

FCC MAIL SECTION

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of)
)
Rules and Regulations Implementing)
the Telephone Consumer Protection Act)
of 1991)

CC Docket No. 92-90 ✓

ORDER

Adopted: December 18, 1992

Released: December 18, 1992

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. This Order responds to two requests for stay of the effective date of final regulations adopted in this proceeding.¹ First, the Consumer Electronics Group of the Electronic Industries Association and the Telecommunications Industry Association ("Manufacturers' Associations") have filed a Petition for Stay ("Petition") of the effective date of Section 68.318(c)(3) of the rules, 47 C.F.R. § 68.318(c)(3), insofar as it requires that telephone facsimile machines manufactured after December 20, 1992 clearly mark identifying information on each facsimile transmission. See Section 68.318(c)(3) of the Commission's rules, 47 C.F.R. § 68.318(c)(3), as amended. The Petition requests that the Commission stay the effective date with respect to the manufacturing requirement until six months after issuance of a ruling on a Petition for Reconsideration and Clarification ("Petition for Reconsideration") filed by the Manufacturers' Associations in this proceeding. Second, the American Financial Services Association, American Resort Development Association, Direct Marketing Association, Direct Selling Association, National Association of Manufacturers, National Association of Realtors, and National Retail Federation ("Telemarketing Associations") have filed a Joint Motion for Deferral of Effective Date of Certain Requirements ("Joint Motion") set forth in § 64.1200(e)(2) of the rules. For the reasons stated below, we deny both requests.

II. CONTENTIONS

2. Request for Stay of Section 68.318(c)(3). Pursuant to the Telephone Consumer Protection Act of 1991 (TCPA), Pub.L. No. 2102-243, 105 Stat. 2394 (Dec. 20, 1991), the Report and Order implements regulations which restrict the

1 See Report and Order, In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CC Docket No. 92-90, FCC No. 92-443 (October 23, 1992) ("Report and Order").

use of automatic telephone dialing systems ("autodialers"), artificial or prerecorded messages, and telephone facsimile machines. The regulations also restrict the making of telephone solicitations. The Report and Order revises Part 68 of the Commission's rules to require that any person transmitting a message by telephone facsimile machine must clearly mark the message with the date and time of transmission, the sender's identity, and the telephone number of the sender or the sending machine. 47 C.F.R. § 68.318(c)(3); see § 227(d)(1) of the TCPA. Our rules further require that the Commission revise its regulations to require that telephone facsimile machines manufactured after the effective date automatically transmit this identifying information. § 68.318(c)(3); see § 227(d)(2). The TCPA stipulates that its requirements shall take effect one year after the date of enactment (December 20, 1991). See Section 3 of the TCPA. The Manufacturers' Associations request that the Commission stay the effective date of the manufacturing requirement for a period of six months, beginning on the date the Commission issues an order on their Petition for Reconsideration in this proceeding. In support of their request, the Manufacturers' Associations state that their Petition for stay easily satisfies the criteria for grant of a stay, established in Virginia Petroleum Jobbers Association v. F.P.C., 259 F.2d 921, 925 (D.C. Cir. 1958), as modified by Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977) (Virginia Petroleum Jobbers); see also Wisconsin Gas Co. v. F.E.R.C., 758 F.2d 669 (1985). Under the four-pronged test set forth in these decisions, a stay may be granted where (1) the petitioner has shown that it is likely to prevail on the merits; (2) the petitioner will be irreparably injured absent a stay; (3) the issuance of a stay would not substantially harm other interested parties; and (4) a stay would serve the public interest.

3. The Manufacturers' Associations contend that several factors make the instant case compelling. They believe there is a strong likelihood their petition to reconsider the manufacturing deadline will be successful because the least expensive telephone facsimile machines, those marketed primarily to the consumer marketplace, do not have the capability to mark the date and time of transmission. Due to the complexity and expense of redesigning these "low-end" machines, consumers would be forced to purchase higher-priced machines or wait a minimum of six months until redesign is complete. The Manufacturers' Associations maintain that the purpose of the manufacturing requirement would not be jeopardized by the requested stay, because the TCPA would still require persons sending facsimile messages to place identifying information on each transmission, and would ban unsolicited advertisements to facsimile machines. In addition, the Manufacturers' Associations contend that an ambiguity over the application of the rules to "fax boards" (which enable computers to send and receive electronic messages over telephone lines) would allow continued abuses by those most likely to misuse facsimile machines, *i.e.*, businesses determined to violate the TCPA by failing to provide identification. Thus, they argue (both in this proceeding and in their petition for reconsideration), the manufacturing requirement unfairly burdens manufacturers of telephone facsimile machines without addressing the devices most likely used to cause the abuses targeted by the TCPA, *i.e.*, fax boards. Moreover, the Manufacturers' Associations contend that the TCPA was intended to impose only a minimal burden on manufacturers of telephone facsimile machines. Finally, the Manufacturers' Associations assert that the period allowed under this Report and Order for

compliance is much shorter than periods provided for compliance with prior amendments of Part 68. The Manufacturers' Associations state that these factors, combined with the need for clarification of several issues prior to any transitional period for compliance, create a strong likelihood of success on the merits in the reconsideration proceeding, and that therefore stay is warranted.

4. The Manufacturers' Associations maintain that the Petition satisfies the remaining three criteria for grant of a stay. They state that manufacturers of facsimile machines would suffer irreparable injury due to the uncertainty, disruption, and expense that would be caused if the date and time stamping requirements were imposed on December 20, 1992, before the issues raised in the Petition for Reconsideration are addressed. The Manufacturers' Associations maintain that other interested parties will not be substantially harmed by an extension of time for compliance with the manufacturing requirement because, as noted above, the TCPA and our rules require that all facsimile machine users place identifying information on each transmission. 47 U.S.C. § 227(d)(1); 47 C.F.R. § 68.318(c)(3). The Manufacturers' Associations assert that most machines are capable of transmitting the most relevant information, *i.e.*, the sender's name and telephone number, with each facsimile message. They contend that it is clearly in the public interest to impose a stay that would preserve the *status quo ante*, avoid the harm caused to consumers by higher facsimile machine prices, and relieve manufacturers of the burden of immediate compliance with the manufacturing requirement.

5. The Manufacturers' Associations acknowledge that the December 20, 1992 effective date is mandated by the TCPA, but contend that the language of the TCPA nevertheless authorizes the Commission to grant their request for a stay. They point out that in contrast to other self-executing provisions of the TCPA, particularly §§ 227(b)(1)(C) and (d)(1) ("It shall be unlawful for any person..."), the section of the statute which sets forth the manufacturing requirement, § 227(d)(2), requires implementation by Commission regulation ("The Commission shall revise the regulations..."). The Manufacturers' Associations maintain that the language reflects Congress' intent that the Commission's rulemaking process be employed to specify the requirements applicable to the manufacture of facsimile machines. They contend that Congress would have been aware that the Commission's rules may be suspended, revoked, amended, or waived for good cause. Accordingly, they argue, the Commission may exercise its discretion to prevent any undue burden to the industry by delaying implementation, where the delay would not thwart the purpose of the statute. In the alternative, the Manufacturers' Associations urge the Commission to exercise its discretion to suspend enforcement of the rules, as it has done recently with respect to the television vertical blanking interval.²

6. Joint Motion for Deferral of Rules for Making Telephone Solicitations. Section 64.1200(e)(2) of the rules, 47 C.F.R. § 64.1200(e)(2),

² See Suspension of Section 73.682(a)(iv) of the Commission's Rules to Permit Additional Use of Line 19 of the Vertical Blanking Interval, FCC 92-479 (released Nov. 4, 1992).

sets forth specific requirements for persons or entities who make telephone solicitations, including rules regarding the establishment and maintenance of company-specific lists of residential subscribers who have requested not to receive further solicitations. 47 C.F.R. § 64.1200(e)(2).³ The Telemarketing Associations request a 60-day deferral of these requirements, arguing that a grant of a deferral under the circumstances is consistent with past Commission decisions delaying the effective date of its rules. The Telemarketing Associations maintain that the request is reasonable, given that § 64.1200(e)(2) imposes substantive rules which require changes in business practices and contractual relationships. The Telemarketing Associations state that unanticipated policy determinations, such as requirements that some affiliated entities maintain a do-not-call list and that the party on whose behalf a solicitation is made will be liable for violations of the Commission's rules, require changes in business relationships which cannot be properly accomplished in approximately 60 days between the release of the Report and Order and the December 20, 1992 effective date. Moreover, they assert, that the period of time is inadequate for the purpose of training personnel in the new rules. The Telemarketing Associations contend that the delay will not materially alter the expectations of the rules' intended beneficiaries, and that the likelihood of any claims of violations of § 64.1200(e)(2) arising during the requested 60-day interim period is remote.

III. DISCUSSION

7. Section 68.318(c)(3) of the Rules. We reject the Manufacturers' Associations' contention that they will suffer irreparable injury if the rules are not stayed. The Manufacturers' Associations present supporting affidavits by telephone facsimile machine manufacturers which predict significant monetary losses through lost sales, loss of existing stock, and retooling costs unless the Commission stays the December 20, 1992 date.⁴ Even assuming the accuracy of these estimates, the Manufacturers' Associations have not established that such losses would be attributable to the imposition of the December 20, 1992 deadline established by the Commission's rules. The legislative history of the TCPA demonstrates that losses attributable to redesign and retooling were taken into account when the deadline was imposed in the statute.⁵ The Manufacturers' Association has presented no evidence demonstrating their claim that they will

3 This rule section requires that telephone solicitors: (1) maintain a written policy for making telephone solicitations; (2) train personnel in the existence and use of the solicitor's do-not-call list; (3) record and maintain do-not-call requests from residential telephone subscribers; (4) forward do-not-call requests to affiliates where appropriate; and (5) furnish identification to the residential subscriber during a solicitation.

4 See Appendix to Manufacturers' Association Petition for Stay. Affidavits of Sharp Electronic Corporation, Matsushita Electric Corporation of America, and Samsung Electronics of America, Inc. predict millions of dollars in losses in sales, existing stock and redesign costs absent a stay.

5 S. Rep. No. 178, 102d Cong. 1st Sess. 9 (1991).

suffer any additional harm which was not taken into account as a result of this legislatively imposed requirement, of which they have been on notice for a year. See §227(d)(2) of the TCPA. Moreover, it is conceivable that manufacturers could recover some losses as users purchase more expensive machines which allow them to place sender identification on each facsimile transmission automatically, rather than manually, as the TCPA clearly intends of facsimile machines manufactured after December 20, 1992. Machines manufactured before that date could continue to be sold. In light of legislative history on the manufacturing requirement, predictions by the Manufacturers' Associations of irreparable harm attributable to the imposition of the December 20, 1992 deadline are rejected as speculative. See Virginia Petroleum Jobbers; Wisconsin Gas Co. v. F.E.R.C., 758 F.2d 669, 674 (D.C. Cir. 1985).

8. Additional arguments offered by the Manufacturers' Associations on the merits of the stay request are not persuasive. The Manufacturers' Associations have presented no evidence to support their claim that computer messaging by fax boards will be more susceptible to the types of abuse targeted by the Commission's rules than conventional telephone facsimile machines, and that therefore the manufacturing requirement unfairly burdens manufacturers of telephone facsimile machines.⁶ Moreover, although the Commission has in past instances deferred the effective date of new Part 68 rules, the Manufacturers' Associations have not presented persuasive arguments that deferral is warranted where the statute clearly provides a date certain for implementation of its provisions.⁷ We note that the separate manufacturing requirements, including a December 20, 1992 effective date, were specifically mandated by the TCPA, independent of the user identification requirements. Thus, had Congress believed the user identification requirements alone were adequate, it would not have adopted the manufacturing requirements.

9. With respect to the question of whether a stay would substantially harm other interested parties, the Manufacturers' Associations maintain that no other parties will be harmed by issuance of a stay, since the identification requirements imposed on users insure that the purpose of the manufacturing provision will not be defeated. While no parties have opposed the request for stay, it is important to note that facsimile machine users must begin compliance immediately with the identification requirements whether or not the requested stay is granted. Under these circumstances, the grant of a stay would affect the rules' intended beneficiaries by delaying the broad availability of facsimile machines which automatically transmit sender identification, and by extending the period in which consumers are burdened with the task of manually transmitting sender identification for each transmitted fax. In balancing the burdens of compliance on consumers and on

6 We do not address, and reserve for reconsideration on the merits, the contention by the Manufacturers' Association that fax boards are not subject to the Commission's rules.

7 See, e.g., Petitions Seeking Amendment of Part 68, 76 FCC 2d 246, 251-52 (1980); Connection of Telephone Equipment, Systems and Protective Apparatus to the Telephone Network, 50 Fed.Reg. 48,203, 48,208 (1985).

manufacturers, particularly in view of what appears to be the clear intent of Congress, we find that the public interest weighs against a stay. In view of the foregoing, we conclude that the Manufacturers' Associations have not met the requirements established in Virginia Petroleum Jobbers.

10. The Manufacturers' Associations have not persuaded us that special circumstances warrant suspension of enforcement of our rules with respect to the effective date for the manufacturing requirement. See 47 C.F.R. § 1.3; see Northeast Cellular Telephone Company v. FCC, 897 F.2d 1164 (D.C. Cir. 1990). The Manufacturers' Associations have had notice of the effective date of the rules implemented in this proceeding, and its specific application to manufacturers, since enactment of the TCPA more than 10 months ago. See Section 3 and § 227(d)(2) of the TCPA (requiring that machines "... manufactured after one year after the date of enactment of this section..." must clearly mark identifying information). We do not believe that the concerns regarding potential ambiguities in interpretation and burdens of compliance represent a special set of circumstances warranting deviation from the Commission's rules, particularly in light of the clear statutory intent and the fact that the Manufacturers' Association had ample opportunity in the rulemaking proceeding to address precisely such issues. Under the circumstances, we find that a deviation from the rules is not warranted and would not serve the public interest.

11. Rules for Making Telephone Solicitations. Although styled as a Petition for Deferral of Commission action, in practical effect the Telemarketing Associations' pleading seeks a waiver or suspension of the December 20, 1992 effective date of § 64.1200(e)(2) of the Commission's rules for an interim period of 60 days. 47 C.F.R. § 1.3. We are not convinced that special circumstances warrant a deviation from the rules or that such deviation would serve the public interest. We cannot agree with Telemarketing Associations that the expectations of residential subscribers will not be substantially affected by deferral, or with the suggestion that the small likelihood of claims of violations during the 60-day period warrants a delay in implementation of the rules. The record in this proceeding reflects a strong interest among residential subscribers in obtaining relief from the number of telephone solicitations they receive. A delay in the effective date would increase the number of unwanted calls that subscribers would otherwise be subject to if the rules were effective December 20, 1992 as prescribed by the TCPA. The Telemarketing Associations' unsubstantiated assertions have not persuaded us that special circumstances warrant an additional 60 days for compliance with the rules, nor that the public interest would be served by subjecting residential subscribers to further unwanted telephone solicitations during a 60 day interim period. We conclude that the public interest in allowing residential subscribers to avoid telephone solicitations on the effective date, as expected, outweighs the possible benefits of permitting additional time.

IV. CONCLUSION

12. We believe the intent of Congress in passing the TCPA is clear. For the foregoing reasons, we deny the request of the Manufacturers' Associations for a stay of the December 20, 1992 effective date of our rules, and we deny the Telemarketing Associations' request for waiver or suspension of the rules for an interim 60-day period. As noted above, we reject the suggestion by the Manufacturers' Association that we decline to enforce 47 C.F.R. § 68.318(c) (3) for an interim period.

V. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, that the petition and motion before the Bureau ARE DENIED. This action is taken pursuant to authority delegated under Sections 0.91 and 0.291 of the Commission's rules.

14. IT IS FURTHER ORDERED, that this action IS EFFECTIVE ON ADOPTION.

FEDERAL COMMUNICATIONS COMMISSION



Cheryl A. Tritt
Chief
Common Carrier Bureau