

**BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554**

In the matter of Todd Bank’s Petition to clarify the
meaning of “any residential telephone line” in 47 U.S.C.
§ 227(B)(1)(b) and 47 C.F.R. 64.1200(a)(3)

Rules and Regulations Implementing the Telephone
Consumer Protection Act of 1991

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COMMENTS OF VINCENT LUCAS

Summary: As intended by Congress, “residential telephone line” means a line that goes to a residence. There is no evidence that Congress intended for business activity to be of any relevance to whether a line is “residential”. A ruling adverse to Bank’s petition could strip the TCPA privacy rights away from tens of millions of American households who occasionally supplement their income through activities that could be considered home-based businesses.

I. Home-based businesses are very common

30 million Americans work from a home office at least once a week.¹ Forbes Magazine estimates that there are 14 million home-based businesses in the U.S.² By contrast, there are only 124.6 million households in America.³ Therefore, roughly 1 in 9 households are home-

¹ <http://www.forbes.com/sites/kenrapoza/2013/02/18/one-in-five-americans-work-from-home-numbers-seen-rising-over-60>

² <http://www.forbes.com/sites/jasonnazar/2013/09/09/16-surprising-statistics-about-small-businesses> . “There are almost 28 million small businesses in the US. ... 52% of all small businesses are home-based.”

³ 2015 U.S. Census data available at <http://www.census.gov/hhes/families/files/cps2015/tabH1-all.csv>

based businesses. Approximately 543,000 new businesses get started each month.⁴ Two of three businesses begin as home-based businesses.⁵

A quick internet search reveals countless ways that a household can supplement their income with activities that can be characterized as a home-based business⁶: babysitting, grass mowing, tutoring, maid service, handyman work, freelance writing, creating an iPhone app for sale, selling things on eBay, and so forth. Some of these businesses may register as limited liability companies. Many will want to offer a telephone number to potential customers.

II. Congress intended for “residential telephone line” to mean a landline that goes to a residence

In interpreting 47 U.S.C. § 227(b)(1)(B), this Commission must use the meaning for “residential telephone line” intended by Congress. Did Congress intend for one out of nine households to have no rights under the TCPA because they have a home-based business?

“Residential telephone line” is not defined in the statute, nor is there anything else in the wording of the statute that indicates that “residential” means something different than what it means in ordinary English. In the absence of a definition or language in the statute indicating otherwise, the term “residential telephone line” means what one would expect it to mean from

⁴ Forbes, *supra* n. 2

⁵ <https://www.entrepreneur.com/encyclopedia/home-based-business>

⁶ Entrepreneur Magazine, Need a Business Idea? Here are 55”, <https://www.entrepreneur.com/article/201588>; K. Taylor, 32 Legitimate Ways to Make Money at Home, March 16, 2015, <http://www.thepennyhoarder.com/ways-to-make-money-at-home/>; C. Huddleston, 10 Ways Stay-at-Home Moms and Dads Can Make Extra Money, Kiplinger, April 21, 2015, <http://www.kiplinger.com/article/saving/T065-C011-S001-10-ways-stay-at-home-moms-and-dads-can-make-extra.html>

plain English: A residential telephone line is a landline that goes to a residence or that has been designated as a residential by the telephone service provider.

Many other areas of the law recognize that one's residence is where one has the most right to privacy. The U.S. Supreme Court has repeatedly endorsed the "ancient adage that a man's house is his castle."⁷ The Bill of Rights explicitly mentions the "house" when describing certain privacy rights.⁸ *Stanley v. Georgia*, 394 U.S. 557 (1969) held a ban on obscenity unconstitutional when applied to the privacy of one's home. First Amendment jurisprudence recognizes that the government may protect citizens in their own homes from being subjected to speech that they do not want to hear, on the ground that when speech is thrust into a home against the desires of the homeowner, the homeowner is a "captive audience". *E.g. Frisby v. Schultz*, 487 U.S. 474 (1988) (upholding statute banning picketing in front of any residence).

The TCPA was designed to protect people from unreasonable intrusion into the privacy of one's residence (home). The expectation of privacy in one's home for persons with home-based businesses is much closer to the expectations of other persons in their homes than the expectation of privacy at an ordinary work place. At an ordinary workplace, there is generally little expectation of privacy. The business has the right to monitor what you are doing at the workplace. Your boss generally has the right to come into your work area whenever the boss wants, or to install cameras to see what you are doing. By contrast, persons operating home-based businesses generally have complete discretion over how much of the privacy of their home to give up. They can decide not to see any clients at all in their homes, or see clients only at

⁷ *Miller v. United States*, 357 U.S. 301, 307 (1958); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 66 (1973).

⁸ U.S. Const. Article III and IV.

certain times of their choosing, or see only certain clients at their homes, and can designate where in their home to see clients. They retain control over the privacy of their home.

For the home-based business owner, their residence isn't just a workplace. It is where they raise their families and where they rest after they are done working. Their residence is home.

Home-based businesses existed in 1991 too, when the TCPA was enacted. It would be absurd to think that Congress was not aware that many homes operate home-based businesses, or overlooked that when enacting the TCPA. Yet, in § 227(b)(1)(B), Congress chose the words “any residential telephone line”. (Emphasis added). “Any” certainly includes residences that operate home-based businesses. If Congress meant “any non-business telephone line”, they would have said that.

Nothing in the language of the statute indicates that Congress intended for that one must forfeit their rights under the TCPA in order to run a home-based business or cripple their business by never advertising a telephone number.

The statement that the “TCPA does not protect business telephone lines” is not accurate. What 227(b)(1)(B) does not protect is non-residential telephone lines. The test has nothing to do with whether the line is ever used for business purposes.

This Commission posed the question of “whether a telephone line in a home that is used for business purposes can be considered a ‘residential’ line.”⁹ The answer is contained in the text of the statute. A telephone line that is both residential and business is a residential line, and therefore protected by § 227(b)(1)(B) which applies to any residential telephone line.

⁹ Request for Comments, DA 16-341, at 1.

III. Should the Commission grant an exemption under the circumstances described in the Bank Petition?

Nevertheless, this Commission has the power to create exemptions to § 227(b)(1)(B). Any relaxation of 227(b)(1)(B) to permit calls to residences that contain home-based businesses must be viewed as an exemption. Section 227(b)(1)(B) plainly covers calls to residences containing home-based businesses in the absence of an exemption.

A. An exemption is not authorized by the statute

Any exemption must be consistent with the requirements of § 227(b)(2)(B). The exemption must not adversely affect the privacy rights that 227(b) was designed to protect.

In order to create an exemption for business to home-based business (B2HBB) solicitations, the Commission would need to interpret “and” to mean “or” in 227(b)(2)(B)(ii).

The Commission may exempt

(ii) such classes or categories of calls made for commercial purposes as the Commission determines—

(I) will not adversely affect the privacy rights that this section is intended to protect; and

(II) do not include the transmission of any unsolicited advertisement

(Emphasis added). B2HBB solicitations are clearly commercial in nature and do include the transmission of an unsolicited advertisement. Congress meant for “and” to mean “and” in § 227(b)(2)(B)(ii) so that an exemption is authorized only if it meets both clauses (I) and (II) of § 227(b)(2)(B)(ii). Otherwise, exemptions could be created for any message that does not contain

an unsolicited advertisement even if such exemption adversely affects the privacy rights that § 227(b) is designed to protect.

This Commission has the authority under § 227(b)(2)(A) to enact regulations to expand the prohibitions against artificial and prerecorded messages to all business phone lines. Even in the context of an ordinary workplace, most people consider unsolicited artificial and prerecorded advertisements to their work phone to be an unwelcome nuisance. The Commission should consider expanding the prohibition against artificial and prerecorded message to all business telephones, rather than create exemptions that take away from the right to be protected from such calls in one's home.

B. General principles regarding exemptions

In the event that the Commission is nevertheless inclined to create an exemption for B2HBB solicitations, certain principles should be followed. The exemption should be narrow and written in clear language so that it is evident when the exemption applies. One should not be forced to either give up their TCPA rights or give up their business. Residential subscribers should retain control over whether to receive artificial or prerecorded calls. They should have some way to advertise a number to new customers and yet not give up the right to be shielded from robocalls in their homes. As noted, a fundamental characteristic of home-based businesses is that the operator retains control over how much of the privacy of his/her home to give up.

C. Situations in which an exemption should never apply

A B2HBB exemption should never apply in the following situations.

1. The telephone number is registered on the National Do-Not-Call Registry or a company-specific DNC request has been made. In that case, the telephone line owner has clearly expressed the desire not to receive telephone advertisements. The caller should be liable unless the caller can prove that the telephone line is a landline that does not go to a residence. This follows from the principle that the home-based business owner should retain control over the how much of the privacy of their home they give up.

2. The caller is soliciting goods or services that are clearly personal, family, or household in nature. In this case, the defense that the caller thought he/she was calling a business is a sham. If IEG called in order to offer Bank energy service at a residential rate, instead of a business rate, any inquiry into whether Bank uses his number for business is irrelevant.

3. The caller did not know when the call was made that the telephone line is used for business purposes. Otherwise, the defense that the caller thought he/she was calling a business is also a sham. In court, prior to obtaining any discovery, the caller should be able to point to specific evidence regarding why they thought that the telephone line was a business line.

D. Should the Commission create an exemption under 227(b)(2) when a residential telephone number is publicly listed somewhere as a business phone?

Contrary to what the telemarketing lobby will claim, it would not be the end of the world if the Commission does not recognize such an exemption. Congress clearly did not think it would be the end of the world, since Congress specifically directed the Commission to consider

whether to expand 227(b)(1)(B) to businesses. If a B2B telemarketer is uncertain about whether a telephone line goes to a residence, the marketer has many other means to communicate with the potential customer besides artificial or prerecorded telephone messages (e.g. direct mail).

Also, rights under § 227(b)(1)(B) should not be forfeited by merely printing business stationary or business cards with a home phone. In this case, the HBB owner may intend to give out the home phone number to only a select group of clients, and not the general public. (For example, a babysitter who offers his/her services to only friends of the family.)

HBB owners that publicly advertise their phone numbers do so because they wish to obtain customers for their business, not because they wish to receive cold call prerecorded advertisements. Such business listings are not intended as permission or consent to receive prerecorded advertisements. Independence Energy Group did not call Bank in order to hire him as an attorney but in order to sell him something.

I oppose the creation of a business listing exemption. However, in the event that a business listing exemption is created, it should not apply unless all of the following conditions are met:

1. The business listing is current (the most recent edition of the listing and in any event no more than one year old). For example, on the internet, a number may still be associated with a business years after the business has ceased operations.

2. The telephone line owner deliberately put his phone number in the listing. The number must be there because the owner took action with the deliberate and specific intent to have his number appear in that specific listing. An exemption should not be recognized if the phone number was put in the business listing without the consent of the telephone line owner. For

example, Dun and Bradstreet (D&B) puts phone numbers in their business listings without the consent of the telephone line owner. This can happen even if the owner never held out his number as a business number. This occurred in *Adamo v. AT&T*, Ohio 8th Dist., Case No. 79002 (Nov. 8, 2001) (reprinted in the Appendix). The Better Business Bureau listing for D&B contains numerous complaints of D&B publishing a home phone number without the consent of the owner.¹⁰ (See Appendix). They have even listed someone's home phone number as a cemetery.¹¹

3. The business listing is intended for distribution to the public.

4. None of the circumstances listed in the section "Situations in which an exemption should never apply" are applicable.

E. Legitimate B2B calls are not chilled

IEG's filing in opposition at 11-12 claims that legitimate B2B calls would be chilled and claims that there would be various practical difficulties in determining whether a number is residential.

As an initial matter, the Bank petition covers only artificial or prerecorded voice calls. § 227(b)(1)(B). Also the Commission could use its authority under § 227(b)(2)(A) to expand the prohibition against robocalls to businesses.

¹⁰ <http://www.bbb.org/new-jersey/business-reviews/information-bureaus/dun-bradstreet-inc-in-short-hills-nj-12001577/complaints#breakdown>

¹¹ <http://dun-and-bradstreet.pissedconsumer.com/posted-my-home-address-and-phone-number-as-a-cemetery-20140605494070.html>

IEG seems to argue that telemarketers should be able to have a computer program crawl business listing published all over the internet, and treat any number that it finds in a business listing as a non-residential number. Things aren't so simple. The telemarketer must make sure that the number has not been transferred to a new owner, and has not been ported to a mobile number. In addition, the telemarketer must make sure that the business listing is reliable and current and that the number appears in the listing because the business owner wants it there, instead of being published without the consent of the business owner (like the D&B listings).

§ 227(b)(1)(B) also requires that the telemarketer must make sure that the landline does not go to a residence. In most cases, a business listing will contain a physical address in addition to a telephone number. Using Google Maps, one can see a satellite photo of the address and surrounding neighborhood. Using Google street view, street level views are often available also. In most cases, it is evident from the appearance of the building and buildings nearby whether the building is a residence. If that fails, the telemarketer can look up whether the address is zoned as residential or commercial. If there remains uncertainty, the telemarketer can use a live salesperson instead of an artificial or prerecorded voice – after checking whether the phone number is listed on the national Do-Not-Call registry or the DNC list maintained by the company. This is a little more work than just blindly blasting any number in any business listing with prerecorded messages. However, Congress clearly placed a high priority on protecting the privacy of one's home, and as a result, telemarketers have been required to take extra steps to respect that privacy.

Conclusion

Congress meant exactly what it said. “Residential telephone line” means a telephone line that goes to a residence.

Respectfully submitted,

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