BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

In the Matter of
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,
Notice of Proposed Rulemaking
CG Docket No. 02-278; FCC 16-57

Comment of the Staff of the Federal Trade Commission's Bureau of Consumer Protection

June 6, 2016

I. INTRODUCTION

Federal Trade Commission staff[1] thanks the Federal Communications Commission for this opportunity to comment on the proposed amendments to its regulations implementing the Telephone Consumer Protection Act of 1991 ("TCPA"), as set forth in its May 2016 Notice of Proposed Rulemaking ("NPRM"). FTC staff recognizes the FCC's efforts to uphold the vital consumer protection principles of the TCPA through its proposed rulemaking.

The FTC is an independent administrative agency responsible for protecting consumers and promoting competition. The FTC has extensive experience related to debt collection and telemarketing, the areas affected by the proposed amendments, including through many debt collection cases involving violations of the Federal Trade Commission Act ("FTC Act") and the Fair Debt Collection Practices Act ("FDCPA"),[2] and through promulgating and enforcing the Telemarketing Sales Rule ("TSR").[3] For example, since 2010, the FTC has filed 43 cases alleging debt collection violations against more than 250 defendants, and obtained over $350 million in judgments. Based on this experience, we submit the following recommendations and analysis for the FCC to consider as it finalizes its rule.

The FTC's experience shows that debt collection calls and robocalls raise significant consumer protection concerns and are often vehicles for abusive, deceptive, and unfair business practices. FTC staff recommends that the FCC proceed with caution, and only incrementally, with any expansion of permissible robocalling. We also recommend that the FCC attempt to harmonize its rules as much as possible with existing laws governing debt collection and telemarketing. In particular, these laws provide many crucial protections for consumers against unfair, deceptive, and abusive collection and telemarketing practices, prohibiting many specific practices, mandating disclosure of critical information, and granting important rights that consumers can use to protect themselves. Indeed, there is extensive law under the FDCPA and Section 5 of the FTC Act governing when and how debt collectors can call consumers to collect debts. Similarly, there is significant law governing telemarketing practices under the TSR, including the use of robocalls. To the extent possible, the FCC should create standards for the collection of government debt that are consistent with these existing laws.

II. RULEMAKING BACKGROUND

On November 2, 2015, Congress amended the TCPA to permit robocalls[4] made "solely" to collect a debt "owed to or guaranteed by the United States," even without the prior express

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[1] This letter expresses the views of staff of the FTC's Bureau of Consumer Protection. The letter does not necessarily represent the views of the Federal Trade Commission or of any individual Commissioner. The Commission has, however, voted to authorize the submission of these comments.

[2] 15 U.S.C. §§ 1692-1692p.

[3] 16 C.F.R. Part 310.

[4] Under the TCPA and the FCC's associated guidance, the term "robocalls" includes calls made either using an automatic telephone dialing system ("autodialer") or with a prerecorded or artificial voice. *See* 47 U.S.C. § 227(b); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Declaratory Ruling and Order, 30 FCC Rcd 7961, 7694, ¶ 1 n.1 (2015) ("*2015 TCPA Declaratory Ruling and Order*").

consent of the called party.[5] Congress directed the FCC to prescribe implementing regulations for this amendment within nine months of enactment.[6] The FCC published its NPRM pursuant to Congress's mandate on May 6, 2016.[7]

III. FTC EXPERIENCE WITH ROBOCALLS AND DEBT COLLECTION, AND GENERAL COMMENTS

As the FCC rightly notes in its NPRM, robocalls present significant consumer protection challenges. The high number of consumer complaints the FTC receives about these and other similar calls highlight these challenges. In addition, robocalls raise special consumer protection challenges when used for debt collection purposes, such as increasing the chance of unlawful disclosures to third parties.

The FTC's consumer complaint data indicates that consumers are regularly barraged with unwanted calls. The FTC receives more complaints about unwanted calls than all other complaints combined, and a significant majority of these complaints are about calls that deliver a prerecorded message (a subset of what the FCC refers to as "robocalls" in its NPRM).[8] From October 2014 to September 2015, for example, the FTC received almost 3.6 million "Do Not Call" consumer complaints, of which approximately 59% (177,165 per month) were complaints about robocalls.[9] And the volume of these complaints has increased significantly over the past several years, more than doubling since 2010.[10]

Abusive calls also plague consumers in the specific context of debt collection. The FTC compiles "Do Not Call" complaints separately from all other kinds of complaints. Not including "Do Not Call" complaints,[11] the FTC received over 900,000 consumer complaints in 2015 relating to debt collection, more than any other industry or practice. Of these complaints over

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[5] Bipartisan Budget Act of 2015 ("Budget Act"), § 301, Pub. L. No. 114-74, 129 Stat. 584 (2015) (modifying 47 U.S.C. § 227(b)).

[6] Budget Act §§ 301(a)(1)(C), (b).

[7] CG Docket No. 02-278; FCC 16-57, https://apps.fcc.gov/edocs_public/attachmatch/FCC-16-57A1.pdf.

[8] *See* Consumer Sentinel Network Data Book for January – December 2015 at 3 (Feb. 2016), https://www.ftc.gov/system/files/documents/reports/consumer-sentinel-network-data-book-january-december-2015/160229csn-2015databook.pdf *and* National Do Not Call Registry Data Book FY 2015 at 5 (Nov. 2015), https://www.ftc.gov/reports/national-do-not-call-registry-data-book-fiscal-year-2015.

[9] *See* National Do Not Call Registry Data Book FY 2015 at 5.

[10] In the fourth quarter of 2010, the FTC received approximately 69,000 robocall complaints per month. *See* National Do Not Call Registry Data Book FY 2011 at 5 (Nov. 2011), https://www.ftc.gov/os/2011/11/111130dncdatabook.pdf. By the third quarter of 2015 (the most recent period for which we have published data), robocall complaints had hit nearly 190,000 per month. *See* National Do Not Call Registry Data Book FY 2015 at 5 (Nov. 2015).

[11] Debt collection calls are not subject to the "Do Not Call" list restrictions of the TSR because they are not "conducted to induce the purchase of goods or services," a prerequisite for coverage under the TSR. *See* 16 C.F.R. § 310.2(gg); *see also* Statement of Basis and Purpose, TSR, Final Rule, 68 Fed. Reg. 4580, 4664 n.1020 (Jan. 29, 2003). Nonetheless, some complaints about unwanted debt collection calls get categorized, based on submitter designation, as "Do Not Call" complaints. Therefore, complaints about debt collection practices are even larger than reported as related to debt collection.

320,000 reported that the consumer was called repeatedly or continuously, over 306,000 complained about getting calls after sending a "cease communication" request to the collector, and over 1,000 complained about being called before 8 AM or after 9 PM or at inconvenient times. Robocalling increases the number of possible collection contacts, and any expansion in their use likely will magnify consumer harms arising from debt collection calls.

Government imposter frauds – where scammers pretend to be government officials to get you to send them money – are also increasing. In the past, consumer protection agencies have advised consumers that the federal government will not call without first sending a letter. This provided an easy-to-communicate and easy-to-follow bright-line rule that consumers could use to shield themselves from these scams. Because the TCPA amendments now allow robocalls to collect a debt owed to the U.S. Government, it will be more challenging for consumers to distinguish between legitimate debt collection calls and calls placed by scammers impersonating the government. To minimize this consumer confusion, FTC staff recommends the FCC consider measures to help consumers discern when a call may be a scam.

These consumer complaints suggest that the FCC should exercise caution and restraint in this robocall rulemaking. Congress has long recognized that consumers should be free from abusive telephone calls that impinge on consumers' right to privacy,[12] and consumer complaints demonstrate there is strong demand for measures that help curb the number of unwanted calls.

Robocalls also raise a number of distinct consumer protection issues when used for debt collection purposes. Indeed, in enforcing the FDCPA, Section 5 of the FTC Act, and the TSR, the agency has identified a number of concerns raised by autodialers and prerecorded calls that are implicated by the FCC's rulemaking. Although the FTC believes that debt collectors generally should be allowed to use new and emerging technologies to contact consumers, these concerns should be considered as the FCC crafts its final rule.

For example, in its public report on debt collection technologies, the FTC noted that an inevitable side effect of using autodialers to contact consumers is that a dialer will sometimes reach more consumers than can be connected to available collectors.[13] In these situations, a predictive dialer either disconnects the call (resulting in a "hang-up" call) or keeps the consumer connected with no one on the other end of the line in case a collector becomes available (resulting in "dead air").[14] The "hang-ups" or "dead air" that can result from calls made using predictive dialer technology may violate Section 806 of the FDCPA, which broadly prohibits "any conduct the natural consequence of which is to harass, oppress, or abuse any person. . . ." Indeed, Section 806(5) specifically prohibits debt collectors from "causing a telephone to ring . .

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[12] *See* 15 U.S.C. § 6102(a)(3) (directing the Federal Trade Commission to include in the TSR provisions prohibiting telemarketers from "undertak[ing] a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy"); *see also* 15 U.S.C. § 1692(a) (listing "invasions of individual privacy" among the purposes for which Congress enacted the FDCPA).

[13] Fed. Trade Comm'n, *Collecting Consumer Debts: The Challenges of Change* (Feb. 2009), https://www.ftc.gov/reports/collecting-consumer-debts-challenges-change-federal-trade-commission-workshop-report.

[14] TSR, Final Rule, Statement of Basis and Purpose, 73 Fed. Reg. 51164, 51165 (Aug. 29, 2008) (codified at 16 C.F.R. § 310).

. repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number."[15] Violations of this provision are particularly likely where calls are repeated (multiple calls over a short span of time) or continuous (a call immediately after a preceding call is terminated), or where the calls continue despite the consumer's request that the debt collector stop calls entirely pursuant to the cease communication right under the FDCPA.[16] The FTC recently has pursued several law enforcement actions under these circumstances for alleged violations of the FDCPA.[17]

Contacting consumers using prerecorded calls also increases the chance of unlawful disclosures to third parties, because of the risk that someone other than the debtor may answer the call or hear a message. The FDCPA seeks to balance the distinct goals of providing information to consumers and preventing disclosure of a consumer's private debt to third parties. Section 805(b) of the FDCPA prohibits collectors from revealing the existence of a debt to third parties.[18] This limitation recognizes that such disclosure could cause harm to the consumer, including the invasion of individual privacy.[19] But other provisions of the FDCPA, including Sections 806(6) and 807(11), require a debt collector, in every communication with a consumer (which includes voicemails and other messages), to disclose that they are calling to collect a debt as well as other identifying information.[20] Thus, if a collector chooses to use a pre-recorded message, there is a high risk of inadvertently disclosing a debt to a third party who may listen to the message, or of violating Sections 806(6) and/or 807(11) by not disclosing that they are a collector attempting to collect a debt. The FTC previously has examined this issue with regard to answering machines and voicemail systems.[21] As with these other technologies, the use of prerecorded calls presents the possibility of a privacy harm that is at the core of the consumer protection principles of the FDCPA.

Moreover, the "dead air" and "hang up" harms associated with autodialers and other forms of robocalling were among the primary drivers of the FTC's 2008 amendments to the

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[15] 15 U.S.C. § 1692d(5). Whether a debt collector violates this provision of the FDCPA is a fact-specific inquiry.

[16] The FDCPA's cease communication provision is located in Section 805(c). 15 U.S.C. § 1692c(c).

[17] *See, e.g.*, *FTC & CFPB v. Green Tree Servicing LLC*, No. 0:15-cv-02064 (D. Minn. Apr. 21, 2015) (Complaint ¶¶ 63, 124-28), https://www.ftc.gov/enforcement/cases-proceedings/112-3008/green-tree-servicing-llc; *FTC v. K.I.P., LLC*, No. 1:15-cv-02985 (N.D. Ill. Apr. 6, 2015) (Complaint ¶¶ 20-22, 41), https://www.ftc.gov/enforcement/cases-proceedings/152-3048/kip-llc-payday-loan-recovery-group; *FTC v. Expert Global Solutions, Inc.*, No. 3-13 CV 2611-M (N.D. Tex. July 8, 2013) (Complaint ¶¶ 22, 50-53), https://www.ftc.gov/enforcement/cases-proceedings/1023201/expert-global-solutions-inc-nco-group-inc; *FTC v. Goldman Schwartz Inc.*, No. 4:13-cv-00106 (S.D. Tex. Jan. 14, 2013) (Complaint ¶¶ 33, 64), https://www.ftc.gov/enforcement/cases-proceedings/122-3096/goldman-schwartz-inc.

[18] 15 U.S.C. § 1692c(b); *see also* § 1692b(2) (prohibiting collector from stating that a consumer owes a debt if communicating with third parties for certain permitted purposes).

[19] 15 U.S.C. § 1692(a).

[20] 15 U.S.C. §§ 1692d(6), 1692e(11). Court cases examining these dual requirements under the FDCPA are often referred to collectively as "*Foti*" cases, after one of the leading decisions in the area. *Foti v. NCO Fin. Sys., Inc.*, 424 F. Supp. 2d 643, 669 (S.D.N.Y. 2006).

[21] *Collecting Consumer Debts: The Challenges of Change* at 47-50. *See also FTC v. Expert Global Solutions, Inc.*, No. 3-13 CV 2611-M (N.D. Tex. July 8, 2013) (Complaint ¶¶ 24, 44-46).

TSR, which prohibited prerecorded telemarketing calls without a consumer's express written agreement to receive such calls.[22] Although the TSR does not apply to calls to collect debt,[23] it contains a provision similar to FDCPA Section 806(5), prohibiting as abusive a telemarketer "causing any telephone to ring, or engaging any person in telephone conversation, repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number."[24] The TSR further prohibits abandoned calls – i.e., telemarketing calls that do not connect to a sales representative within two seconds of the call recipient's greeting.[25]

In sum, robocall and debt collection complaints are among the largest categories of consumer complaints the FTC receives. These calls strike many consumers as abusive and harassing, particularly when they are frequent, and their use in debt collection threatens consumer privacy and poses significant compliance challenges under the FDCPA. FTC staff urges the FCC to adopt implementing regulations that mitigate as much as reasonably possible the risks of law violations and consumer harms associated with robocalls.

IV. SPECIFIC COMMENTS REGARDING FCC RULEMAKING PROPOSALS

A. Scope of Covered Calls

The NPRM begins by seeking comments on how the FCC should interpret several key phrases from the Budget Act amendments in its implementing regulations. Foremost among them, the FCC asks for suggestions on how to interpret the phrase "solely to collect a debt."[26] FTC staff proposes that the agency interpret this phrase to limit permitted robocalls: (1) to only those relating to debts in "default"; (2) to only those persons who actually owe the debts; (3) to only the collection of the government debt and not any other; and (4) for collection purposes exclusively.

1. Default vs. Delinquency

First, FTC staff suggests "default" as the threshold for covered calls because default, rather than "delinquency," is the touchstone for coverage under the FDCPA. The FDCPA excludes from coverage "any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity . . . (iii) concerns a debt which was

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[22] *See* 73 Fed. Reg. at 51,165.

[23] *See supra* note 11.

[24] 16 C.F.R. § 310.4(b)(1)(i).

[25] 16 C.F.R. § 310.4(b)(1)(iv). "An outbound telephone call is 'abandoned' under this section if a person answers it and the telemarketer does not connect the call to a sales representative within two (2) seconds of the person's completed greeting." *Id.* The TSR creates a "safe harbor" for call abandonment if, among other things, a telemarketer "employs technology that ensures abandonment of no more than three (3) percent of all calls answered by a person," and allows the telephone to ring for at least fifteen seconds or four rings before disconnecting an unanswered call. 16 C.F.R. § 310.4(b)(4)This TSR safe harbor allows the use of predictive dialers provided they are set to limit the percentage of abandoned calls that are placed. *Id.*

[26] NPRM ¶ 8 (quoting Budget Act § 301(a)(1)(A)).

not in default at the time it was obtained by such person."[27] Thus, those collecting debts that were not "in default" when their agency obtained them are not considered "debt collectors" under the act. The legislative history of the FDCPA frames the statute's "in default" language as intended to exclude "mortgage service companies and others who service outstanding debts for others, so long as the debts were not in default when taken for servicing."[28] This servicing/default distinction is a key marker of what constitutes debt collection under the FDCPA. FTC staff proposes that the FCC adopt a corresponding position in its regulations, permitting payment demands via robocalls only when a consumer is already in default.[29] Such an interpretation would harmonize these regulations with the primary consumer protection statute in the area of debt collection, and would appropriately minimize the consumer protection risks of robocalls that seek payment on a debt.

2. Calls to Third Parties

Second, as the FCC proposes, FTC staff recommends that covered calls be limited to calls directed at the person or persons obligated to pay the debt.[30] As noted above, the FDCPA prohibits collectors from revealing the existence of a debt to third parties.[31] Section 804 of the FDCPA allows a collector to contact a third party solely for the purpose of acquiring location information about the debtor. 15 U.S.C. § 1692b. But it imposes strict limits on such calls and prohibits collectors from stating that the consumer owes any debt.

Congress considered avoiding third-party disclosure of debt collection information to be an "extremely important protection" of the FDCPA at its enactment.[32] Congress identified collection calls to third parties as collection practices that are "not legitimate" and "result in serious invasions of privacy, as well as the loss of jobs."[33]

Robocalls—particularly prerecorded messages—already increase the possibility of unlawful third-party disclosures because the call may be answered by someone other than the alleged debtor. The FCC's proposed limit here helps minimize this risk and advances the important privacy protections of the FDCPA. Should the need genuinely arise for a call to a third party in order to locate the debtor, collectors could still initiate such calls manually rather than using an autodialer.

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[27] 15 U.S.C. § 1692a(6)(F).

[28] S. Rep. No. 382, 95th Cong., 1st Sess. 3, at 3, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696.

[29] The FCC also seeks guidance on how to define "default" for purposes of its implementing regulations. "Default" is not a defined term under the FDCPA, and there is no single bright-line test that is applicable in all collection scenarios. Whether a debt is in default is generally controlled by the terms of the contract creating the indebtedness and applicable state or federal law, and in the absence of anything conclusive therein, a creditor's reasonable and consistently-applied written guidelines may be helpful in determining when an account is in default.

[30] NPRM ¶ 13.

[31] 15 U.S.C. § 1692c(b); *see also* § 1692b(2) (prohibiting collector from stating that a consumer owes a debt if communicating with third parties for certain permitted purposes).

[32] S. Rep. No. 382, 95th Cong., 1st Sess. 3, at 4, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1699.

[33] *Id.*

3. Solely for the Collection of Government Debt

Third, FTC staff recommends that the FCC limit the content of covered robocalls to collection of debts owed to or guaranteed by the United States (*i.e.*, debts covered by the Budget Act amendments), and only those such debts the caller is authorized to collect. The NPRM notes that the FCC is considering allowing robocalls "concerning other debts or matters about which the caller may want to speak with the debtor."[34] FTC staff sees no justification for such an extension in the TCPA amendment enacted by Congress. As noted above, that amendment permits collection robocalls "*solely* to collect" a covered debt or "*solely* pursuant to the collection" of a covered debt.[35] Given the significant consumer protection concerns that robocalls present, and given the possibility that permitting a broader range of content could conflict with the FTC's prohibitions on telemarketing-related robocalls,[36] FTC staff urges the FCC to require that the content of covered calls be limited to covered debts.

4. For Collection Purposes Exclusively

Finally, should the FCC choose to allow "debt servicing" robocalls, the FCC should limit the definition of "debt servicing" to exclude calls that solicit any fees or consideration for the goods or services offered and limit the definition to government debts.[37] FTC staff urges the FCC to prevent robocallers from using the collection of government debt as a Trojan Horse to

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[34] NPRM ¶ 12.

[35] Budget Act §§ 301(a)(1)(A), (a)(1)(B) (emphasis added).

[36] *See, e.g.*, 16 C.F.R. § 310.4 (b)(1)(v) (prohibition under the TSR).

[37] Should the FCC permit robocalls that solicit any fees or consideration for the services offered, such calls may also be governed by the "debt relief services" amendments to the TSR (16 C.F.R. Part 310) as well as the Mortgage Assistance Relief Services Rule, recodified as Regulation O ("MARS Rule/Reg. O") (12 C.F.R. Part 1015). Both rules protect consumers from unfair, or deceptive debt-related services offered in exchange for a fee or consideration. More specifically, these rules prohibit debt relief and MARS providers from collecting fees for services until a debt has been settled, altered, or reduced, require certain disclosures, and prohibit specific misrepresentations about material aspects of the services. The TSR defines debt relief service to mean: "any program or service represented, directly or by implication, to renegotiate, settle, or in any way alter the terms of payment or other terms of the debt between a person and one or more unsecured creditors or debt collectors, including, but not limited to, a reduction in the balance, interest rate, or fees owed by a person to an unsecured creditor or debt collector." 16 C.F.R. § 310.2(o). In defining debt relief services, the FTC acknowledged that it was seeking to reach providers who charged a fee and was <u>not</u> attempting to cover creditors and collectors offering concessions to individual debtors; legitimate outreach and loss mitigation activities of creditors and their agents or affiliates; or routine communications between consumers and credit grantors or debt collectors about settling debts, restructuring debt terms, waiving fees, reducing interest rates, or arranging for other account changes. Amended TSR and Statement of Basis and Purpose ("*TSR Amended Rule 2010*"), 75 Fed. Reg. at 48458, 48466 (Aug. 10, 2010). The TSR's definition of debt relief services was limited to unsecured debts because the FTC was issuing the MARS Rule to specifically address problems in the area of mortgage assistance relief services. *TSR Amended Rule 2010*, 75 FR at 48467.

engage in otherwise prohibited sales calls regarding additional products or services[38] or engage in the collection of non-government debts. Any "debt servicing" robocalls calls made in whole or in part to sell services to consumers are prohibited under the TSR, unless express written consent for the robocall was obtained from the recipient prior to the call.[39] This is because calls that include selling services to consumers constitute telemarketing under the TSR,[40] and the TSR prohibits outbound telemarketing robocalls without first obtaining express written consent for the robocall from the recipient.[41] FTC staff therefore urges the FCC not to undermine this pre-existing prohibition.

B. Consumer Information Obtained During Covered Calls

Another threshold question being considered by the FCC is whether its implementing regulations should place any restrictions on the treatment of information obtained from consumers in the course of a covered robocall.[42] FTC staff believes that the FCC should consider restrictions in two areas.

First, the FCC rule should require covered callers to maintain reasonable security over the data they collect during covered calls, much of which may be highly personal and sensitive. The FTC's recent law enforcement experience demonstrates the importance of reasonably securing the vast amount of sensitive personal information obtained and stored in the process of debt collection. For example, in two recent cases,[43] the Commission charged sellers of debt collection portfolios with improper handling of consumer information—often including such

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[38] The FTC has sued several debt collectors who have combined their attempts to collect a debt with sales offers. *See, e.g., FTC v. CompuCredit Corp. and Jefferson Capital Sys., LLC,* Civ. A. No . 1 :08-CV- 1976-BBM-RGV (N.D. Ga. 2008) (defendants allegedly combined debt collection attempts with an offer for a new credit card that would help rebuild credit), https://www.ftc.gov/enforcement/cases-proceedings/062-3212/compucredit-corporation-jefferson-capital-systems-llc; *FTC v. Luebke Baker and Assocs., Inc.*, Civ. A. No. 112-cv-1145 (C.D. Ill. 2012) (debt collector allegedly upsold a debt relief service), https://www.ftc.gov/enforcement/cases-proceedings/082-3206/luebke-baker-associates-inc; *FTC v. Pro Credit Group, LLC,* Civ. A. No. 8:12-cv-00586 (M.D. Fl. 2012) (debt collector allegedly engaged in a scheme to defraud consumers by telemarketing a service that purports to lower the interest rates on consumers' debts), https://www.ftc.gov/enforcement/cases-proceedings/122-3051-x120037/pro-credit-group.

[39] While the TSR and the MARS Rule/Reg. O also regulate specific practices of certain debt service providers, the telemarketing of any service, including a debt service, is subject to all the general prohibitions and requirements of the TSR.

[40] The TSR defines telemarketing to include "a plan, program, or campaign which is conducted to induce the purchase of goods or services . . . by use of one or more telephones and which involves more than one interstate telephone call." 16 C.F.R. § 310.2(gg).

[41] 16 C.F.R. § 310.4 (b)(1)(v).

[42] NPRM ¶ 12.

[43] *FTC v. Bayview Solutions, LLC,* No. 1:14-cv-01830-RC (D.D.C. Apr. 21, 2015) (Stipulated Final Order for Permanent Injunction), https://www.ftc.gov/system/files/documents/cases/150421bayviewstip.pdf; *FTC v. Cornerstone and Company, LLC,* No. 1:14-cv-01479-RC (D.D.C. Apr. 21, 2015) (Stipulated Final Order for Permanent Injunction), https://www.ftc.gov/system/files/documents/cases/150421cornerstonestip.pdf; *see also* Press Release, FTC Alleges Debt Brokers Illegally Exposed Personal Information of Tens of Thousands of Consumers on the Internet (Nov. 12, 2014), http://www.ftc.gov/news-events/press-releases/2014/11/ftc-alleges-debt-brokers-illegally-exposed-personal-information.

sensitive information as bank account and credit card numbers, birth dates, contact information, and employers' names—that could put consumers at significant risk of identity theft or expose them to so-called "phantom" debt collection down the road.[44] Although the FTC has authority to require these and other types of companies to maintain reasonable security, it has advocated for additional tools in this area, such as the authority to obtain civil penalties. Requiring covered callers to maintain reasonable security under the FCC's implementing regulations should further deter unlawful conduct.

Second, the Rule should emphasize that the information obtained during a covered call should be used solely for purposes of collecting debts on behalf of the government and for no other purpose. Among other things, this would prevent covered callers from selling any consumer information obtained during a covered call to any third party. It would also prohibit covered callers from using any consumer information obtained during a covered call to collect on any non-government debt or to offer any other products or services.[45] Such a use restriction is consistent with, for example, the Fair Credit Reporting Act, which allows consumer reports to be used only for enumerated permissible purposes and no other. It is also consistent with both the scope of the amendment to the TCPA—which excepts from the TCPA's consent requirement only those robocalls made *solely* to collect a debt owed to or guaranteed by the United States—and consumer expectations in this area.

C. Other Parameters of Covered Calls

Other critical questions in the FCC's NPRM seek comment on when robocalls should be allowed and under what circumstances they must stop. These questions include whether there should be restrictions on call hours, whether consumers should have a right to opt out of debt collection robocalls, and how to implement any such opt-out right.

FTC staff supports the FCC's proposal to limit robocalls to between the hours of 8:00 a.m. and 9:00 p.m, and to also restrict such calls during other times the collector knows or should know are inconvenient for the consumer.[46] The FDCPA and the TSR similarly limit debt

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[44] "Phantom" debt collection involves demanding payment on debts that consumer don't actually owe, including debts that never existed. Phantom debt collectors frequently are able to convince consumers that they owe these non-existent debts because they have a lot of sensitive personal and financial information about the consumer—often including the consumer's address, date of birth, and social security number. The FTC has brought a number of enforcement actions against companies that pursue consumers for phantom debts, including a recent case against a company that allegedly sold fake debt portfolios. *FTC & State of Illinois v. Stark Law, LLC*, No. 1:16-cv-3463 (N.D. Ill. Mar. 21, 2016) (Complaint ¶¶ 43-52, 59-64), https://www.ftc.gov/enforcement/cases-proceedings/152-3243/stark-law-llc-dba-stark-recovery.

[45] For example, the FTC has filed several actions against debt buyers that supplemented information obtained from the original creditor with information, such as new address and identifying information, obtained through third party sources such as available commercial databases, including credit reporting databases (a process is known as "skip-tracing"), where the supplemented information was incorrect or related to the wrong debtor. *See, e.g., FTC v. Asset Acceptance, LLC*, Civ. A. No. 812-cv-182-T-27EAJ (M.D. Fl. 2012), https://www.ftc.gov/enforcement/cases-proceedings/052-3133/asset-acceptance-llc; *FTC v. Credit Bureau Collection Servs.*, Civ. A. No. 10-CV-169 (S.D. Ohio 2010), https://www.ftc.gov/enforcement/cases-proceedings/062-3226/credit-bureau-collection-services.

[46] NPRM ¶ 19.

collection and telemarketing calls to this same timeframe.[47] Because consumers may have schedules that vary significantly, the FDCPA additionally requires that a collector refrain from communicating at other times if the collector knows or should know that calls during those hours are inconvenient for the consumer.[48] As with FTC staff's suggestion to define covered calls with regard to "default," adopting this proposal would harmonize the TCPA's requirements with the relevant FDCPA and TSR provisions.

FTC staff also supports the FCC's proposal to allow consumers to stop robocalls at any time, and to require that consumers be informed of their proposed right to opt out of these calls. Exercising this right makes sense for some consumers; if a consumer cannot find a viable way to satisfy a debt collection demand, continued calls may simply serve to harass or abuse the consumer. Congress recognized the harm of being unable to stop collection calls in the context of the FDCPA, where it embedded a right for consumers to cease communications from debt collectors.[49] The FCC came to a similar conclusion in its 2015 TCPA Declaratory Ruling and Order, holding that consumers should be able to use "any reasonable method, including orally or in response to a text message" to opt-out of future calls.[50] FTC staff supports the application of this principle here. FTC staff also supports the FCC's proposal requiring a voice- and/or key press-activated opt-out mechanism to be included in the robocalls.[51] This type of requirement is particularly important for robocalls because consumers may not interact with a live agent who can process the consumer's request.

An opt-out right, however, is only effective if it is well-known. As the FTC indicated in its 2009 policy report on debt collection, consumers often do not appear to recognize that the FDCPA gives them the right to demand that collectors cease contacting them.[52] Because of this, the FTC recommended that Congress amend Section 809(a) of the FDCPA to require that debt collectors inform consumers of their cease communication rights.[53] Similarly, FTC staff recommends that the FCC adopt regulations that clearly inform consumers of their right to stop covered robocalls at any time. FTC staff supports expanding the opt-out mechanisms for

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[47] 15 U.S.C. § 1692c(a)(1). 16 C.F.R. § 310.4(c).

[48] 15 U.S.C. § 1692c(a)(1)

[49] FDCPA Section 805(c), 15 U.S.C. § 1692c(c).

[50] *See* NPRM ¶ 21 (citing 2015 TCPA Declaratory Ruling and Order, 30 FCC Rcd at 7996, ¶ 64.

[51] These requirements are consistent with the opt-out mechanisms required for telemarketing robocalls under both the TSR and the TCPA. 16 C.F.R. § 310.4(b)(1)(v)(B)(ii)(A)-(B); 47 C.F.R. § 64.1200(b)(3). Protection of consumer privacy was a primary basis for both of these requirements. *See* TSR, Final Rule, Statement of Basis and Purpose, 73 Fed. Reg. at 51164 (Aug. 29, 2008) ("The [opt-out mechanism] amendment is necessary because the reasonable consumer would consider prerecorded telemarketing messages to be coercive or abusive of such consumer's right to privacy."); Report and Order, CG Docket No. 02-278, filed Feb. 15, 2012 at ¶ 48 (". . . the automated, interactive opt-out mechanism we adopt will empower consumers to revoke consent if they previously agreed to receive autodialed or prerecorded telemarketing calls and stop receipt of unwanted, autodialed or prerecorded telemarketing calls to which they never consented.") .

[52] *Collecting Consumer Debts: The Challenges of Change* 27.

[53] *Id.* Section 809(a) of the FDCPA, 15 U.S.C. § 1692g(a), requires debt collectors to inform consumers of other specific rights -- such as the right to dispute the debt and obtain verification -- within five days after their initial communication with the consumer.

telemarketing robocalls to the covered debt collection calls due to the similar significant impact on consumer privacy.

The NPRM also seeks comments generally on what other actions should be considered to reduce unwanted debt collection robocalls to consumers,[54] as well as on whether and how to encourage debtors to connect with a live agent for these purposes.[55] Additionally, the NPRM states that the FCC has determined that an ability to stop unwanted calls is critical to the TCPA's goal of consumer protection and that right is particularly important here, where consumers need not consent to the covered calls in advance.[56] To further these goals, FTC staff suggests the FCC require covered debt collection callers to transmit Caller ID information that includes a caller number that connects to a live agent representing the debt collector.[57]

In 2003, the FTC amended the TSR to require that telemarketers transmit their telephone numbers to Caller ID services.[58] This requirement has enabled consumers to identify telemarketers, thus giving them a choice as to whether to accept the calls[59] and the ability to file complaints with law enforcement officials against noncompliant telemarketers.[60] Further, requiring the Caller ID number to connect to a live agent has helped consumers request that the calls stop.

Obligating debt collectors to transmit their telephone numbers to consumers' Caller ID services could convey similar benefits to consumers. First, through Section 805(c) of the FDCPA's requirement that debt collectors cease communication with a consumer upon written request,[61] Congress recognized that consumers have the right to decide not to communicate with a debt collector. Mandating that debt collectors transmit their phone number to consumers' Caller ID services assists consumers who decide that they do not want to answer the phone to communicate with the debt collector. Second, Section 806(5) of the FDCPA prohibits debt

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[54] NPRM ¶ 17.

[55] NPRM ¶ 18.

[56] NPRM ¶ 20.

[57] Both the TSR and the TCPA require telemarketers to transmit the caller's telephone number . *See* 16 C.F.R. § 310.4(a)(8) and 47 C.F.R. 64.1601(e). Both provisions also permit telemarketers to substitute a customer service telephone number. A primary basis for both provisions is the protection of consumer privacy. *See* Statement of Basis and Purpose, TSR, Final Rule, 68 Fed. Reg. at 4623 (". . . consumers will receive substantial privacy protection as a result of [transmission of caller identification] provision"); Rules and Regulations Implementing the TCPA, 68 Fed. Reg. 44144, 44166 (July 25, 2003) ("Caller ID allows consumers to screen out unwanted calls and to identify companies that they wish to ask not to call again."). Although the proposed covered debt collection calls are not telemarketing calls, permitting covered callers to use robocalls to reach consumer's cellular telephone lines without consent raises similar consumer privacy concerns. As such, FTC staff recommends implementation of similar caller identification requirements for covered debt collection calls.

[58] 16 C.F.R. § 310.4(a)(8).

[59] *See* Statement of Basis and Purpose, TSR, Final Rule, 68 Fed. Reg. at 4626-27 (codified at 16 C.F.R. Part 310). Another important reason for requiring telemarketers to transmit this information was to enable consumers to lodge an entity-specific "Do Not Call" request with the telemarketer pursuant to 16 C.F.R. § 310.4(b)(1)(iii). *Id.*

[60] *Id.* at 4627.

[61] 15 U.S.C. § 1692c(c).

collectors from "causing a telephone to ring . . . repeatedly or continuously with the intent to annoy, abuse, or harass any person at the called number."[62] Mandating that debt collectors transmit their phone number to consumers' Caller ID services assists consumers in identifying and complaining to law enforcement officials about collectors who engage in such conduct without having to pick up the phone. Finally, such a requirement would also advance the protections found in Section 806(6) of the FDCPA, which prohibits a debt collector from "plac[ing] telephone calls without meaningful disclosure of the caller's identity."[63]

V. CONCLUSION

FTC staff's recommendations are based on its extensive law enforcement experience enforcing the FTC Act, the FDCPA, and the TSR. As noted throughout this comment, there are extensive debt collection protections under the FDCPA that extend to when and how debt collectors can call consumers to collect debts. In addition, the TSR addresses the appropriate use of prerecorded phone calls. FTC staff's recommendations seek to harmonize the FCC's rulemaking with these other bodies of law to the extent possible. We hope that these recommendations prove useful to the FCC's rulemaking efforts and appreciate the FCC's consideration of them.

[62] 15 U.S.C. § 1692d(5).

[63] 15 U.S.C. § 1692d(6).