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April 11, 2000

Robert Biggerstaff
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Mt. Pleasant, SC 29465

Office of the Secretary
Federal Communications Commission
445 Twelfth St. SW
Washington DC 20554

Dear Secretary:

Please find enclosed my Request for Clarification of the Commission's rules implementing the Telephone Consumer Protection Act of 1991.

Please feel free to contact me if you need any further information. I remain,

Sincerely,



Robert Biggerstaff
(843) 740-4525

enclosure

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

CC Docket No. 92-90

REQUEST FOR CLARIFICATION

Robert Biggerstaff ("Requester") hereby requests that the Commission clarify its prior decisions and implementing rules¹ in this proceeding and/or clarify the Commission's interpretation of the Telephone Consumer Protection Act of 1991 ("TCPA") (Pub. L. No. 102-243, 105 Stat. 2394, December 20, 1991), with respect to telephone solicitations.

The TCPA and the Commission's implementing rules at 47 C.F.R. 64.1200 prohibit certain types of pre-recorded message solicitations by telephone, and require that pre-recorded messages delivered by telephone contain certain minimum information identifying the entity making the calls.

Several telemarketers using pre-recorded message players, have been calling consumers' homes and using the following scenario:

¹ 47 C.F.R. Part 64 Subpart 1200.

After the consumer answers the phone, the initial recording states something like "If you would like to know how you can save lots of money, press '1'."

After the consumer presses '1' the recorded message continues with information about the product or service being proffered, and asks the consumer to leave their phone number so the caller can contact the consumer to make further solicitations.

This scenario presents a unique problem to consumers. The calling party would claim that by pressing '1', the consumer has "consented" to the further delivery of a recorded message, so the message after pressing '1' is permitted by the TCPA. But if the consumer does not press '1', there is no way to determine who the caller is, to learn their identity, or to make a complaint or a "do-not-call" request.² By failing to provide proper identification as required by the Commission's rules at 47 C.F.R. 64.1200(d), these violators can remain anonymous and escape the consumer's ire.

In addition, the entity making these calls can claim that the message text **before** asking the consumer to press '1' is not technically an "unsolicited advertisement" as defined at 47 U.S.C. § 227(a)(4), since it does not actually describe the "goods or services" being offered, and thus claim that the first part of the recorded message is not prohibited by the TCPA.

² See Report & Order, 7 FCC Rcd. 8752 ¶ 9 ("calls placed by recorded message players can be more difficult for the consumer to reject or avoid").

This seems to eviscerate the entire intent of the statute. The TCPA is a remedial, not a criminal, statute and should be broadly construed to effectuate the intent of Congress. The exemption that the Commission carved out for pre-recorded message calls that do not contain an "unsolicited advertisement" was intended for voice mail systems and not for sales calls carefully crafted to try to evade the TCPA's restrictions.³

The Commission has addressed a similar situation in the Memorandum Opinion and Order, 10 FCC Rcd 12391 at ¶ 15 (1995):

A call made by a telemarketer solely to determine whether a subscriber wishes to receive a telephone solicitation is, in effect, a solicitation from that telemarketer, and accordingly would violate that subscriber's do-not-call request.

The Commission similarly noted that sending a fax asking for permission to send fax advertisements was a prohibited act. Memorandum Opinion and Order, 10 FCC Rcd 12391 at ¶ 37 (1995).

These decisions do not, however, make clear that a pre-recorded message asking a consumer to press '1' to "find out how they can save lots of money" or to "receive more information" is an "unsolicited advertisement" and governed by the TCPA.

³ See Report & Order, 7 FCC Rcd. 8752 ¶ 47 (1992); 137 Cong.Rec. H11310-12 (1991) (mentioning "telemessaging services" such as "MessagePhone, Inc.").

I note that the TCPA is a remedial statute, and the statutory definitions, like "unsolicited advertisement" should be broadly construed in favor of the consumer:

We are also mindful that the TCPA is a remedial statute and "should be liberally construed and interpreted (when that is possible) in a manner tending to discourage attempted evasions by wrongdoers." Scarborough v. Atlantic Coast Line R. Co., 178 F.2d 253, 258 (4th Cir. 1950). Exemptions from provisions of remedial statutes "are to be construed narrowly to limit exemption eligibility." Hogar v. Suarez-Medina, 36 F3d 177, 182 (1st Cir 1994); accord Olsen v. Lake Country, Inc., 955 F.2d 203, 206 (4th Cir. 1991). See also 3 N. Singer, Sutherland Statutory Construction § 60.01.

Biggerstaff v. Low Country Drug Screening, No. 99-SC-86-5519 (Charleston County, S.C., Nov. 29, 1999). I believe it is reasonable in this circumstance to construe the initial pre-recorded message asking the consumer to "press '1'" if they want to "save lots of money" or "to receive more information" to meet the definition of an "unsolicited advertisement" when this pretext is part of the caller's solicitation program.

The Commission was granted broad authority by Congress to restrict pre-recorded calls that "adversely affect the privacy rights that this section is intended to protect"⁴ and it is clearly within the Commission's authority to consider these calls within the ambit of the statute and Commission's rules.

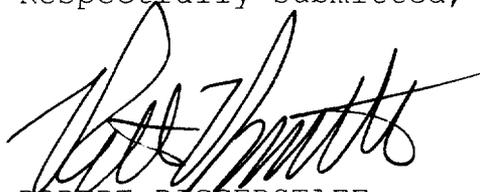
⁴ 47 U.S.C. § 227(B)(2)(B).

Based on the foregoing, Requester requests that the Commission clarify its interpretation of the TCPA and/or the Commission's rules to clarify that:

- 1) calls using a pre-recorded message asking permission to make a solicitation or as a preface to a solicitation to a consumer are in fact an "unsolicited advertisement" under the TCPA and the Commission's rules and;
- 2) failure to provide identification required by 47 C.F.R. 64.1200(d) is in fact a prohibited act under the TCPA and subject to the provisions of the private right of action in that statute at 47 U.S.C. § 227(b)(1).

I would respectfully ask that this request be given expedited review to the extent possible so that the correct interpretation of the TCPA and the Commission's rules can be effectuated and Consumers can be provided the full protections of the statute as soon as possible.

Respectfully submitted,



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