

**Before the
Federal Communications Commission**

In the Matter of)
Rules and Regulations Implementing) **CG Docket No. 02-278**
The Telephone Consumer Protection Act of 1991)

**Comments of the
National Consumers League
December 6, 2002**

Introduction

The National Consumers League (NCL) is a private, nonprofit consumer organization that was founded in 1899 to represent the economic and social interests of consumers and workers in the marketplace and the workplace. To accomplish those goals, NCL uses a three-pronged strategy of research, education, and advocacy.

NCL has particular interest and expertise in the problems of telemarketing fraud and abuse. In 1992, NCL established the National Fraud Information Center (NFIC), the first national toll-free hotline for consumers to get advice about telemarketing and report telemarketing fraud. In 1996, NCL created a companion program, the Internet Fraud Watch (IFW), which offers advice about online solicitations and accepts reports about Internet fraud. Consumers can use the hotline and the NFIC/IFW Web site¹ to learn how to avoid telemarketing and Internet fraud. They can also report suspected telemarketing and Internet scams by telephone or online. That information is transmitted electronically to the appropriate local, state, and federal law enforcement agencies, including the Federal Communications Commission (FCC).

Through telephone, mail, and direct contact with consumers, NCL is well aware of the increasing public concern about telemarketing and personal privacy. Last year NCL created a special section on its main Web site about privacy² and in February of 2002 it launched a new educational campaign, "Stop Calling Me," to coincide with National Consumer Protection Week. The goal is to help consumers understand how to avoid unwanted solicitations and assert their privacy rights. The "Stop Calling Me" information is the most popular part of the privacy section on the NCL Web site.

NCL applauds the FCC for initiating this review of the rules³ that were promulgated ten years ago pursuant to the Telephone Consumer Protection Act (TCPA) of 1991. As technology and telemarketing practices change over time, it is important to examine the impact on consumers. NCL believes that the FCC rules must be updated and strengthened to provide effective protection for consumers from telemarketing fraud and abuse.

¹ (800) 876-7060, <http://www.fraud.org/>

² <http://nclnet.org/privacy/stopcalling.htm>

³ TCPA Order, 57 FR 8333, October 23, 1992

Summary of Comments

In these comments NCL will outline why it believes that:

- The company-specific do-not-call approach is inadequate to give many consumers the privacy protection they want;
- Telemarketers should be prohibited from blocking Caller ID and required to transmit information to help consumers identify the responsible party;
- Predictive dialers unduly intrude on consumers' privacy and violate FCC rules;
- Telemarketers should be required to promptly provide the information that consumers need to handle their calls effectively;
- Telemarketers should not be able to circumvent the rules concerning the use of artificial or prerecorded messages;
- The definition of an "established business relationship" should be narrowed for exempting certain telemarketing calls and commercial faxes;
- It should be easier to prevent unsolicited commercial faxes and take action against senders who violate the rules;
- Publicly listing a fax number is not a broad invitation to send commercial faxes;
- Fax broadcasters who supply lists should be liable for violations of the rule;
- Wireless phones should remain off-limits for unsolicited telemarketing calls;
- Consumers should be able to pursue private rights of action more easily;
- The FCC should work in partnership with the Federal Trade Commission and in cooperation with the states on a national do-not-call system.

The company-specific do-not-call approach is inadequate to give many consumers the privacy protection they want.

NCL believes that the current company-specific do-not-call approach is inadequate to give many consumers the privacy protection they want and inappropriately places the burden of avoiding unwanted sales calls on them instead of the marketers who call them unbidden. Many people feel that they are besieged by telemarketing. In a 1999 “Consumers and the 21st Century” survey conducted for NCL by Louis Harris & Associates, 49 percent of respondents rated telemarketing calls as the everyday experience that bothered them the most.

If consumers were satisfied with the company-specific do-not-call approach, there would not be so much demand for other alternatives: many states have created do-not-call lists and millions of consumers have signed up for them;⁴ many consumers pay extra charges for Caller ID, unlisted numbers, and unpublished numbers; and more than 4 million people have signed up for the Direct Marketing Association’s Telephone Preference Service.⁵

In the company-specific do-not-call approach, the consumer must remember to ask the telemarketer not to call again – simply saying that one is busy or not interested is unlikely to prevent future calls – and keep a log of such requests. Furthermore, the request is made *after* the consumer has already been disturbed by an unwanted call. While some people may be content to accept telemarketing calls on a case-by-case basis, others want to take a more comprehensive and convenient approach to protecting their privacy, as the popularity of state and industry do-not-call lists attests.

Telemarketers should be prohibited from blocking Caller ID and required to transmit information to help consumers identify the responsible party.

One strategy that consumers use to protect their telephone privacy is Caller ID. This is an optional service for which there is usually an extra monthly charge. Therefore, consumers are understandably quite frustrated when Caller ID fails to reveal the information they need to recognize who is trying to reach them and decide whether they want to take the call or not. Failure to relay Caller ID also makes it very difficult for consumers to take action for violations of their rights; for example, when they ask not to be called again and are hung up on, or receive repeated calls after having asked to be put on companies’ do-not-call lists.

NCL can conceive of no valid reason why commercial entities should be allowed to intentionally block or fail to provide Caller ID. Based on comments made to the Federal Trade Commission (FTC) as part of the review of its Telemarketing Sales Rule,⁶ NCL believes that it is technically and economically feasible to transmit Caller ID information. The FCC should

⁴See comments from the National Association of Attorneys General to the FTC at <http://www.ftc.gov/os/comments/dncpapercomments/04/naag.pdf>, pg. 4.

⁵See comments from Direct Marketing Association and U.S. Chamber of Commerce to the FTC at <http://www.ftc.gov/os/comments/dncpapercomments/04/dma.pdf>, pg. 12.

⁶ See comments from DialAmerica to the FTC at <http://www.ftc.gov/os/comments/dncpapercomments/04/dialamerica.pdf>, pg. 24.

examine the records of those proceedings and consult with the FTC to determine what information should be required to be conveyed.

Predictive dialers unduly intrude on consumers' privacy and violate FCC rules.

When NCL staff members speak about telemarketing at public events, the subject that generates the most questions and anger from the audience is the use of predictive dialers. While this technology may result in greater efficiency and cost-savings for telemarketers, these gains come at the expense of consumers who are frightened and aggravated by the “dead air” and hang-ups that they frequently experience when they pick up their telephones. This is clearly an undue intrusion on consumers' privacy. It is the equivalent of sending 3 door-to-door salespeople to a neighborhood with twenty homes, using a remote technology to knock on all the doors at once, and leaving seventeen homeowners standing at their doors wondering who was there.

NCL also believes that the use of predictive dialers violates FCC rules requiring telephone solicitors to identify themselves. Since there is apparently no way to completely prevent the problems and infractions caused by predictive dialers, NCL is convinced that the only solution is to ban their use. Providing a recorded message in lieu of a live salesperson would violate FCC rules that limit the use of prerecorded messages. Providing Caller ID information is also an unacceptable solution to the problem, since consumers would still be running to answer their phones, only to find no one to speak to at the other end of the line and no way to make a do-not-call request without calling the company back.

There are other ways that telemarketers can gain greater efficiencies and cost-savings. For instance, with state do-not-call lists (and a national do-not-call registry, if one is created) marketers can eliminate unreceptive consumers from their calling lists, thus reducing the number of unproductive calls they make and allowing them to target their solicitations more effectively.

Telemarketers should be required to promptly provide the information that consumers need to handle their calls effectively.

The current FCC rules do not require telemarketers to provide the information that consumers need to handle their calls effectively. Whether the call is live or a recorded message, the telemarketer should be required to disclose at the onset: the name of the individual caller; the name of the company on behalf of whom the call is being made; that the purpose of the call is to sell a product or service; and a method of contact that enables the consumer to easily obtain additional information that may be needed.

Some telemarketers do not reveal that they are selling something until well into the conversation. In fact, when asked if this is a sales call, they often respond by saying “No, it's a courtesy call.” There is nothing courteous about wasting consumers' time and misleading them about the callers' true intentions. To be useful, the identity of the marketer and the purpose of the call should be provided at the very beginning of the conversation.

The FCC rules should also explicitly state that consumers must be given a method of contact that enables them to easily obtain additional information that may be needed. For

instance, if a phone number is provided, it should be toll-free, and it should connect to a live customer service representative who can answer the consumer's questions and provide the physical address of the company and other information that may be necessary to take action for violations of the rules.

Telemarketers should not be able to circumvent the rules concerning the use of artificial or prerecorded messages.

Some telemarketers attempt to circumvent the rules concerning the use of artificial or prerecorded messages by contending that "telephone solicitation" does not include offers of free goods or services or general information about their goods or services. NCL believes that these types of messages from commercial entities are clearly designed with the ultimate goal of soliciting consumers to buy products or services. The FCC rules should explicitly state that artificial or prerecorded messages of this nature are considered "telephone solicitations" and can only be sent to consumers who have given prior express consent to receive them.

The definition of an "established business relationship" should be narrowed for exempting certain telemarketing calls and commercial faxes.

The FCC definition is much too broad to provide consumers with meaningful protection from unwanted telemarketing solicitations. It robs them of the ability to comparison shop without implicitly agreeing to put themselves on companies' telemarketing lists, since even making an inquiry creates an "established business relationship." Under the current FCC rules, consumers can also create such relationships by the mere fact that they bought something, without any disclosure that they will be added to a telemarketing list and without any control over whether their information is provided to other telemarketers. Furthermore, because consumers are not necessarily expecting to receive telemarketing solicitations as a result of inquiries or isolated purchases, there is nothing to trigger them to say at that point, "Put me on your do-not-call list."

This issue looms even larger as the idea of creating a national do-not-call system is considered. Under the current definition of "established business relationship," consumers who sign up to participate in such a system would have to remember the name of every company with whom they have ever had any contact in order to determine which can call legally them and which cannot. This is unreasonable and unworkable.

The FCC should narrow the definition of "established business relationship" to situations in which the consumer has actually set up an account with a company for the purpose of making recurring or repeated purchases. Furthermore, if the company plans to make telemarketing calls to the consumer, the FCC should require it to disclose that fact and provide the opportunity to opt-out.

NCL also believes that the definition of "established business relationship" should not automatically extend to a company's affiliates. In this era of frequent mergers and acquisitions, consumers are not likely to know who the affiliates are, nor can it be assumed that they will be interested in the products or services affiliates offer. The establishment of a business relationship

presents an ideal opportunity for the company to inform the consumer about its affiliates and ask whether that person wants to receive telemarketing solicitations from them or not.

Similarly, commercial faxes should not be exempted from the prohibition against unsolicited faxes simply by virtue of the fact that there has been some previous contact between the company on whose behalf the fax is sent and the recipient. Small businesses and organizations and people who work out of their homes are especially harmed by unsolicited faxes, which use up their paper and toner and tie up their machines. Only companies with which the recipient has established an account should be allowed to send fax solicitations, and as with telemarketing solicitations, the recipient should be given an easy means of opting-out.

It should be easier to prevent unsolicited commercial faxes and take action against senders who violate the rules.

Judging by the number of unsolicited commercial faxes that NCL receives, the current rule prohibiting them is not very effective. One problem is that the rule does not explicitly require that the telephone number that is provided on the fax is one that the recipient can use to get answers to questions or make complaints about the fax. It also does not require the address of the company on behalf of which the fax is being sent. That information would be helpful for those who wish to take legal action for violations of the rule.

Publicly listing a fax number is not a broad invitation to send commercial faxes.

Fax numbers may appear on a company's letterhead, on an organization's brochure, in a person's email, and many other places from which that information might be collected, but that does not constitute a broad invitation to send unsolicited commercial faxes to recipients with which the sender does not have an established business relationship. That would be the same as arguing that it is permissible to call a consumer with a prerecorded message simply because her number is listed in the telephone directory. Unsolicited faxes are prohibited because they are burdensome, especially for small businesses and organizations and people who work out of their homes. The FCC should make clear that commercial faxes may not be sent in the absence of an established business relationship, narrowly defined along the lines that NCL has suggested.

Fax broadcasters who supply lists should be liable for violations of the rule.

When a fax broadcaster supplies the list that is used to send solicitations on behalf of another commercial entity, it must share liability with that entity for any violations of the rule against unsolicited commercial faxes. In the absence of such liability, fax broadcasters have no incentive to ensure compliance with the rule.

Wireless phones should remain off-limits for unsolicited telemarketing calls.

As the FCC has noted, the growing use of wireless phones makes it imperative to review the rules under the TCPA, especially in light of developments such as the ability to port telephone numbers from landline to wireless phones and the increasing popularity of text messaging. While many consumers buy large "buckets" of minutes, some people, especially

those of limited means or who have credit problems, buy smaller “buckets,” prepaid wireless service, or service with preset spending limits. There is often a separate charge for text messaging. Thus, telemarketing solicitations to wireless customers could have a significant financial impact.

Another reason to preserve the sanctity of wireless phones is public safety. It is generally acknowledged that using a wireless phone while driving can be distracting and dangerous. Allowing unsolicited telemarketing calls and messages to wireless phones would only exacerbate the problem.

Finally, wireless phones provide a personal refuge for people, where they can communicate with friends, family, and colleagues without the annoyance of commercial solicitations. Wireless numbers are not generally published or accessible to strangers. If people begin to receive unsolicited telemarketing calls and messages on their wireless phones, there will be an inevitable backlash and demand for a wireless do-not-call system.

The FCC should hold firm against any erosion of the protections that wireless consumers currently have from unsolicited marketing. If consumers choose to port their landline numbers to their wireless devices, service providers could be required to inform them about how to participate in the do-not-call systems that are available to them. Another solution would be to use technology that would enable telemarketers to distinguish between wireless and landline phones.

Consumers should be able to pursue private rights of action more easily.

In enacting the TCPA, Congress wisely provided for private rights of action so that consumers could enforce their rights directly and hold errant telemarketers accountable, legally and financially, for violating their privacy. NCL believes that consumers should be encouraged to take such action. There may be some rationale for obliging consumers to wait to file suit until they have received more than one call from a telemarketer after having asked not to be called again or after having signed up for a state or national do-not-call list, since it may take a while for do-not-call request to be processed. However, it is unclear whether “two bites of the apple” applies to violations of other telemarketing restrictions under the rules, and NCL sees no reason why it should. Telemarketers should have systems in place to ensure that they make calls during the proper times of day, do not make impermissible calls with autodialers and prerecorded messages, do not send unsolicited faxes, etc. The FCC should clarify that consumers can enforce their rights without having to wait until they have been repeatedly violated.

The FCC should work in partnership with the Federal Trade Commission and in cooperation with the states on a national do-not-call system.

A partnership between the FCC, with its broad jurisdiction, and the FTC, with its considerable experience in enforcement, would be the ideal basis for creating a federally operated do-not-call system. The FTC is obviously far ahead of the FCC in terms of exploring what would be involved in setting up and administering such a system. The FCC should consult with the FTC about the best way to move forward in a concerted fashion.

Meanwhile, many states are even farther ahead, having expended considerable resources to create their own do-not-call systems. It will take some time to set up a federal system and see how it works. If an integrated national do-not-call system is the ultimate goal, the FCC and the FTC should cooperate with the states to address the many issues that will have to be resolved. The FCC should be very careful not to take any action that would weaken consumers' rights or recourse under state laws.

Conclusion

The FCC should consider convening public workshops, as the FTC has done, to obtain more information about the complex issues that it is considering. NCL looks forward to working with the FCC to strengthen consumer protection from telemarketing fraud and abuse.

Respectfully submitted,

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