

RE: FCC 02-250 Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 - CG Docket No. 02-278 CC Docket No. 92-90

Pursuant to the NPRM of the Rules Implementing the Telephone Consumer Protection Act of 1991 adopted on September 12, 2002 I have some comments and suggestions. After spending over a dozen years in the outbound telemarketing industry including the position of Operations Director at a Top 50 Service Bureau and more recently 5 years as COO of a voice message broadcasting company. I have direct experience before and after the TCPA. The TCPA is good legislation; however, it could be better. The problem is not necessarily in adjusting the language of the law as much as it is in enabling the enforcement.

I believe that the TCPA has been a great success for the FCC. The problem is telemarketing has a really bad PR. Take a look at what the FCC has done with amazing success so far in regulating telemarketing. If the discussion centers on controlling "defects" or complaints, consider at what point is quality maximized? I would like to shed some light on just how effective the TCPA has been. I believe that the FCC should be a candidate for the Malcolm Baldrige Award. When you consider what the implementation of the TCPA has really meant to the telemarketing industry.

What is Unacceptable Quality?

If you are not familiar, NEBS Compliance hardware is considered acceptable for the very reliable Public Switched Telephone Network (PSTN) we have. It's a Standard of near Excellence - the reliability of 99.999% (a.k.a. '5-nines'), which in hardware terms is 1 failure in 100,000 hours of service. This is once every 11 years.

I would like to look at Telemarketing Compliance. As cited on page 8 of the NPRM, the actual complaints being 11,000 in the period of 24 months - this is 459 monthly complaints, an average of 23 complaints per day. As cited on page 6 of the NPRM, about 104 million calls per day just from the live operators alone (140 million / 23 complaints). This is less than 1 complaint in 4.5 million calls!

We'll translate that into telemarketing hours (with 40 calls per telemarketing hour), that's less than one complaint every 112,000 hours. The FCC should be acknowledged as achieving a complaint ratio less than the failure of NEBS Compliant hardware. In a very human business to achieve a reliability exceeding industrial computers that are designed to last for 11 years without failure is very impressive.

Think for a moment about the 104 million calls per day, minimum cost of 4 cents in Long-Distance Toll over 4 million dollars a day in Long-Distance Traffic. Which I would guess provides well over \$200k per day in Federal Excise taxes and only 23 complaints. In excise taxes alone that's over \$8,600 to handle one complaint! I think that these are some items that the FCC should take great pride in!

TCPA Extortion

The FCC should be aware of an unintended consequence of the TCPA ... a cottage industry actually using the TCPA to extort money. I believe that you should be punished if you break the law; however, a company did a voice broadcast to businesses which was perfectly legal in every aspect of the

TCPA.

Two Consumer Advocates that DID NOT GET CALLED were paid using the TCPA. They heard about the calls from other parties and filed a lawsuit, sent a press release, etc. They did not get a message. Their phone number was never dialed, but they filed lawsuits. That's right the company never even dialed the telephone numbers of these two people that sued. The Company and could prove this with the telephone bill - but decided it was more cost effective to pay them off than hire lawyers and go to trial to prove the point. So, it cost this Company a couple thousand dollars because the TCPA has enabled these extortionists to steal with out any proof at all.

I'm certain that the FCC would not encourage the act of extortion against any legitimate Telemarketer. However, with this case that is what the consequences were. I don't expect anyone to shed a tear for telemarketing, but I certainly want to be clear that these things happen everyday and those are the complaints that the FCC doesn't hear about very often.

This is a sad result; however, it can be corrected with the TCPA, but not by further restrictions that only complicates the matter. What the TCPA really needs is simplicity for the enforcement. The honest operators of Teleservices companies want those who are dishonest punished more than anyone. It's our industry that they are tarnishing.

TCPA Inequities

Why is it if I personally call someone from my telephone book and I can tell him or her about my special offer on siding, a mortgage rate, anything I want to sell. However, if I try to do the same with a pre-recorded message I have made an unsolicited solicitation? The belief that pre-recorded calls are more intrusive is incorrect - most pre-recorded calls are performed during the day to target your answering devices while people are not home. How is a pre-recorded message on your answering device more intrusive than a live person talking to you when you are home?

TCPA Flight

At the VoiceCast, we were asked by a prospective client to move operations offshore, this way we're not restricted by the Federal Law. We immediately dismissed this; however, we are seeing a great deal of Telemarketing being done offshore. Labor Savings is an issue but the TSR, TCPA and State Do-Not-Call List avoidance is another consideration. International Telemarketing is increasing and they are calling back into the United States. This is worse than Ross Perot's fear of NAFTA - the jobs leaving ... that's done but they are now calling us without our laws.

Speech will unravel the TCPA

If the TCPA is not reined in, parts of the law and it's enforcement will be neutered by the Federal Courts. In March of this year, a precedence in Federal Court that the "unsolicited Solicitation" portion of the TCPA is "not in the governments substantial interest" to regulate. I do agree with this. If what is being done is not a decency issue and it is not endangering the Public Health or Safety, where does the line end?

Stopping telemarketing is a positive issue with most of the electorate; however, that is not what made this county great. Regulating Speech is a

very difficult duty will create a virtual bloodbath of litigation. There are words you cannot say over broadcast media this is standard of decency. Even if there were a FCC Division of Telephone Script Approval, it would be flawed. Here is why. I used this simple sentence in Telemarketer Training, and no matter how you slice it - the exact same words in these sentences can provide a totally different meaning, just by emphasizing a different word.

Frank didn't tell me you were brain dead. - John did.
Frank didn't tell me you were brain dead. - I figured it out.
Frank didn't tell me you were brain dead. - It's on his web site.
Frank didn't tell me you were brain dead. - He told everyone.
Frank didn't tell me you were brain dead. - Said your family was.
Frank didn't tell me you were brain dead. - The verb was "are".
Frank didn't tell me you were brain dead. - He said you pain-dead, you know, numb.
Frank didn't tell me you were brain dead. - He said you were a brain donor!

Outside of decency and safety, the FCC desperately needs to avoid speech issues all this will create is legal challenges to the first amendment. The first amendment guarantees a right to speak, it does not guarantee a right to be heard. If consumers complain, they can sign-up for a State Do Not Call List and Opt out altogether or if their State does not have one there is the DMA's Telephone preference service. My concern is that the "tightening" of the TCPA, adding more rules to adhere to may not be the best avenue to improve the TCPA and protect consumers. I think that the TCPA should be much simpler to deal with.

National Do Not Call List

Could you imagine a toll-free number to stop your junk mail? To opt-out of radio commercials? To eliminate ads in magazines and newspapers requiring only news be printed? It just happens that telemarketing is the latest major direct marketing medium. It has passed Direct Mail in recent years to be the largest. I remember my grandmother complaining about junk mail in the 1970's but now it's understood as a fact of life. If it bothers you too much, you can enroll in the State Do-Not-Call Lists or the DMA Mail Preference Service. If telemarketing did not produce results businesses would not use it!

ECONOMIC IMPACT: If you do not charge the consumer for this service, you advertise it with PSA's and provide a toll-free number, you will destroy telemarketing as an industry. Think about how many new jobless claims this would almost instantly create! There are enough challenges today for Businesses, let alone Telemarketing firms without having the power of the FCC to exterminate the industry. Well over a million people would lose their job. Telemarketing is not evil. If telemarketing was not successful, companies would use other mediums - it's not like there's a waiting list for Newspaper, Radio or Television Ads! With 104 Million Calls placed, that means there are Millions of people buying over the telephone every day. The economic impact would be a disaster.

National Do Not Call (NDNC)

As the FCC staff knows all too well, it's not necessarily the law as much as it's the implementation and enforcement of the law that poses the challenge. The State of Indiana had a net loss to the taxpayer in their implementation of a Do Not Call List. I would support a National Do Not Call List in

exchange for easing of the complication of TCPA compliance. Specifically, rejecting the encumbrances upon speech and replacing them with opt-out as long as the implementation is not aggressively marketed or offered at no cost to the consumer.

Currently, I can tell you based upon the telephone number (to about 99.8% accuracy) whether that number is a hard wire line or if it's wireless. This may change on November 2003. The TCPA is about balancing consumer protections while keeping telecommunications strong and vibrant in this country. There are opt-out mechanisms currently available. The State DNC Lists and the DMA TPS already protect the consumer from unwanted calls on their wireless device.

Remember, if the consumer gets a call and takes no action where's the problem? How has that consumer been violated? This hysteria is out of control. The State Do Not Call Lists provide resolution for this and legitimate telemarketers and legitimate voice broadcasters use these lists! If you state does not have a list the DMA offers it's Telephone Preference Service, which again legitimate voice broadcasters, and telemarketers use. At some point a consumer has to stand up and take some action - like spending the 37 cents to send an opt-out request to the proper entity. It will become so cost prohibitive to do any outbound calls within the borders of this country from ridiculous regulation that American jobs will be traded to offshore firms ... and then it's only a question of when they decide that they other laws are pointless.

War Dialing

The concept of dialing for the purpose of fishing for fax machines, a.k.a. "war dialing" is a very bad practice. The problem is that those bad actors like Fax.Com need to be stopped for this behavior. The best way to address this is in the dialing process restriction of sequential or random; however, that's not enough to stop them I'm sure. The problem is you could over-reach with this very easy if you address calling fax machines - anyone can dial and reach a fax machine, although that may not be their intent. Writing the law based upon "intent" makes it very sticky and problematic to enforce. One issue with "war dialing" is the similarity to a random or sequential dialing process. The numbers they are dialing are not in a pre-selected list. This is where I believe the true point of leverage. The list must be pre-selected and ultimately the list provider must have names associated with the telephone numbers as proof that it was not randomly or sequentially generated. There are many telephone numbers that are not listed. Those numbers are rollover lines at businesses, additional lines at a hospital, etc. The lists that contain these telephone numbers do not come from professional list compilers. Placing the burden on the "War dialer" to produce the names that are associated with the telephone numbers or their source. This may be the best way to curtail this activity.

I would certainly welcome any questions you may have about these comments; I can be reached at 877-251-0746, via my cell phone 402-708-1095 or e-mail doughib@cox.net

Best Regards,

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