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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC 20554

In the Matter of

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

**COMMENTS OF CMOR**

CMOR submits these comments in response to the Notice of Proposed Rulemaking in this proceeding. We address issues specifically related to survey research calls.

**INTRODUCTION AND STATEMENT OF POSITION**

CMOR is a non-profit, national trade association formed in 1992 to promote the interests of survey research to society. We represent the entire survey research industry. Our members consist of survey research companies, their clients (the end-users of the information and analysis compiled by the researchers), as well as other industry associations that share our same intents. Our collective mission is twofold:

- To improve the understanding of the value of research and continuously improve the research process to be fully respectful of respondents, encouraging respondent cooperation in the process.
- To advocate on behalf of the survey research industry

Survey research is the scientific process of gathering, measuring and analyzing public opinion and behavior. On behalf of their clients, which include state and federal government, businesses, social institutions, and the media, researchers design and conduct interviews with a small, but statistically-balanced, sample of the public. Survey researchers then aggregate and analyze the information from these interviews to help their clients' respond to public opinion about social issues, political candidates, and government policy, about products and advertising,

about media and entertainment, and the like. The ultimate objective of professional survey research is that, based on a small but statistically meaningful number of interviews, the entire population will benefit from better products and services, a more publicly-responsive electorate, and a more consumer-responsive environment.

The nature of the survey research process (and the resultant industry codes and guidelines) is based on the concept of confidentiality – legitimate survey research companies never divulge the identity, personal information or individual answers of a survey participants, *unless specifically granted permission* to do so by the participant. Survey research is thus sharply distinguishable from creating sales lead generation.

Survey research is not telemarketing or telephone solicitation. The purpose of survey research is not to sell or even to encourage the sale of goods or services; nor is it to raise consumer awareness of particular brands or goods or services. Survey research calls do not solicit, but rather seek the opinions of a carefully selected sample of the public. **Researchers never ask for money or attempt to sell products or services.** Moreover, sales or solicitation is not acceptable or permitted in legitimate and professionally conducted survey research. Using the guise of a survey to sell any product or service would not only violate research industry codes and guidelines, but could also be deemed deceptive marketing under the FTC's Telemarketing Sales Rule. CMOR actively participated in the formulation of those rules and strongly supports the purposes which underlie them. The TSR helps to preserve the bright line between research and marketing and thereby protect both the value and efficacy of survey research.

CMOR submits these comments to urge that the Commission revise its rules in order to make unmistakably clear that telephone calls for survey research purposes and the technology used to place such call are not subject to the TCPA. As we show in these comments, the legislative history of the TCPA establishes that Congress did not intend that survey research calls

be governed by the TCPA in any respect and conferred upon the Commission the power to resolve definitional ambiguities in the rules in order to effectuate this purpose.

## ARGUMENT

### **A. SURVEY RESEARCH CALLS SHOULD BE TREATED AS CATEGORICALLY EXEMPT FROM THE TCPA.**

The Congressional sponsors of the TCPA repeatedly stated that the purpose of the TCPA is to regulate the use of the telephone (and associated technology) when such use is designed to encourage or sell products or services. The initial sponsor of the Senate bill, Senator Hollings, stated that, “This bill is *purely targeted* at those calls that are the source of the tremendous amount of consumer complaints at the FCC and at the State commissions around the country --- the telemarketing calls placed to the home.”<sup>1</sup> likewise, Senator Pressler stated that, “This legislation is the result of a House and Senate conference on comprehensive telemarketing legislation... [p]eople are increasingly upset over this invasion of their privacy by unrestricted telemarketing ... [t]he primary purpose of this legislation is to develop the necessary ground rules for cost-effective protection of consumers from unwanted telephone solicitations.”\* The FCC has also consistently described the TCPA and its Rules as governing and regulating the use of telephone and associated technology for marketing purposes. In the Notice of Proposed Rulemaking in 1992<sup>3</sup>, the FCC characterized the law as one that “restricts the use of automatic dialing systems and telephone facsimile machines for telemarketing purposes.”<sup>4</sup> In the current NPRM, the FCC similarly recognizes that the TCPA and the Rules restrict “unsolicited

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<sup>1</sup> 137 Cong. Rec. S9874 (daily ed. July 11, 1991)(statement of Sen. Hollings).

<sup>2</sup> 137 Cong. Rec. 518317 (daily ed. Nov. 26, 1991)(statement of Sen. Pressler).

<sup>3</sup> In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Notice of Proposed Rulemaking, 7 FCC Rcd. 2736 (FCC No. 92-176) (released Apr. 17, 1992). (hereinafter “FCC No. 92-176 at \_\_\_\_”).

<sup>4</sup> FCC No. 92-176. At ¶ 1.

advertising using the telephone and facsimile machine.” The FCC further stated “. . . Congress enacted the TCPA in an effort to address a growing number of telephone *marketing calls* and certain *telemarketing practices* thought to be an invasion of consumer privacy”<sup>6</sup> and that “In this NPRM, we seek to review the practices *used to market goods and services over the telephone and facsimile machine* that are the focus of the TCPA and the Commission’s implementing regulations.”<sup>7</sup>

The Commission has also recognized that the provisions of the TCPA dealing with communications technology also only apply when that technology is used in a marketing context. With respect to the TCPA restrictions on autodialers, the FCC stated, “The Commission is authorized to propose exemptions to this prohibition.” Moreover, the Commission stated “it is not the intent of the TCPA to prohibit or restrict such non-telemarketing uses of autodialers.”<sup>9</sup>

Despite the unambiguous legislative purpose to the TCPA, and the Commission’s clear grasp of the limited scope of that statute, the rules do not unambiguously confine themselves to marketing purposes. In part, this is due to certain definitional ambiguities in the statute itself. First, the statute uses the term “any telephone call” in reference to the use of automatic telephone dialing systems *or* “an artificial or pre-recorded voice.” The Commission has, in section 64.12000(c), exempted calls that are not made for a “commercial purpose” or, if made for a “commercial purpose,” do not include the transmission *of* any “unsolicited advertisement.” However, the exemption by its terms only applies to the transmission of pre-recorded messages. There is, thus, doubt whether survey research calls – which are generally not pre-recorded but often do make use of “automatic telephone dialing systems” or predictive dialers – are exempt.

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<sup>5</sup> In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Notice of Proposed Rulemaking and Memorandum and Order, 2002 FCC LEXIS 4578 (FCC No. 02-250) (released Sept. 18, 2002), at ¶ 1. (hereinafter “FCC No. 02-250 at \_\_\_”).

<sup>6</sup> FCC No. 02-250 at 2.

<sup>7</sup> *Id.* at ¶ 11.

<sup>8</sup> FCC No. 92-176 at ¶ 2.

Further, although it is clear that survey research calls do not fall within the definition of a “telephone solicitation,” it is important that the Commission make absolutely clear that any National Do Not Call List is limited only to those calls that directly “encourage” purchases and that market research surveys as well as other types of surveys are exempt.

These results are supported by sound policy considerations:

Survey research plays an important role in our democracy. As an industry member noted “Surveys and polls have become an important part of the U.S. Information system... America is now made up of 300 million people, in different cities, made up of different races and religions, with different occupations and incomes, ages and orientations. They all have opinions about everything and there is a legitimate need for business and political leaders to understand these opinions and take an informed position or make products better for people. Surveys and polls provide that information. We are, in effect, the ombudsman of the American people, making sure that the attitudes and behavior of everyone is measured accurately and reported to top management and politicians.”<sup>10</sup>

Recognizing the value of survey research, Congress has time and time again used survey data in helping make policy decisions and has used it as part of the Findings in numerous bills. For example, in 2001, Congressional House Subcommittee on Commerce, Trade and Consumer Protection solicited the research industry to provide information on consumer privacy for a Congressional hearing entitled, “*Opinion Surveys: What Consumers Have to Say About Information Privacy.*” The FCC has likewise seen the value of survey research by inclusion of a USA Today/CNN/Gallop poll information in the 2002 NPRM.”

In addition, the volume of survey research calls is dramatically fewer than those for sales-related purposes. As the NPRM states “Some estimate that today telemarketers may attempt as many as 104 million calls to consumers and businesses every day, and that telemarketing calls

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<sup>9</sup> *Id.* at ¶ 10.

<sup>10</sup> Hany Heller, *New York Times*, 1999.

<sup>11</sup> FCC No. 02-250 at ¶ 42.

generate over \$600 billion in sales each year.”<sup>12</sup> By comparison, the survey research industry makes highly selective calls to members of the public. Households that may receive several calls a week or even several calls a day from telemarketers would only receive several calls a year for survey research or may never be contacted at all

Similarly, because the nature of survey research calls is very different from marketing calls, issues with respect to predictive dialer technology do not arise in the context of survey research. The norm in the survey research industry is to set the dialers so that they yield a “abandonment rate” of 1% or less. In many cases, the abandonment rate is set at .6% and the dialers are programmed so that if during any calling period the abandonment rate exceeds that standard, the predictive algorithm shuts down. In such cases, the dialer basically becomes a very fast modem dialing device and will only dial one number for every available interviewer. Thus, in the context of survey research, the public policy issues the Commission is considering concerning predictive dialers simply do not apply.

Finally, a number of states have recognized that survey research must be differentiated from marketing in the development of their state telephone solicitation statutes. State laws have consistently exempted calls for survey research purposes.<sup>13</sup> However, a substantial percentage of survey research calling is interstate in character. It is therefore of central importance that the Commission clearly and unambiguously specify in its rules that all calls for survey research purposes are categorically exempt from the TCPA.

The Commission can and should resolve these ambiguities by adding a separate subsection to its rules which provides that the use of the telephone and of telephone technology

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<sup>12</sup> *Id* at par. 7.

<sup>13</sup> Alaska Stat. §45.50.475(g)(3)(B)(iii) excludes “calls limited to soliciting the expression of ideas, opinions or votes;” Louisiana— La. R.S. 45:844:12(4)(e),(f) excludes “calls for the purpose of conducting marketing research, public opinion polling, or similar activities that do not involve telephonic solicitation or selling and calls “constituting political activity.”; Oklahoma – 15 Okl. St. @755A.2 excludes “a person making telephone calls to a residential customer for the sole purpose of polling or soliciting the expression of ideas, opinions or votes, or a

including automatic telephone dialing systems and/or predictive dialers for survey research calls are not governed by the TCPA or the Commission's rules.

**B. Survey Research Calls to Wireless Numbers Do Not Pose Privacy or Economic Concerns.**

If, as we have shown it should, the Commission categorically exempts survey research calls from the operation of the TCPA, the exemption would equally apply to the prohibitions on such calls made to a cellular or other wireless telephone subscriber. If, however, the Commission does not categorically exempt survey research calls from the operation **of** the TCPA, the Commission should at least remove restrictions on calls to wireless phones for survey research purposes.

According to the data set forth in the NPRM, one in five mobile phone users regard their wireless phone as their primary phone. When number portability is fully implemented, the percentage of the population that use wireless telephones as their exclusive or primary line is very likely to increase. Under the current TCPA regulations, the research industry would be required to remove all such numbers from a survey sample to ensure compliance with the rules or would have to cease the use of automatic telephone dialing systems in making such calls.

Cessation of the use of autodialers is simply not practical from an economic standpoint. Categorical exclusion of wireless phones will have the undesirable **and** plainly unintended effect of reducing the reliability of survey data. As the Commission is well aware from its own survey research activities, a key to the use of survey data is the establishment of **a** representative sample of the population. If wireless subscribers are definitionally taken out of the potential sample

universe, this will have a detrimental impact on the reliability of research data. This is not a theoretic problem; it is a subject of concern throughout the industry.<sup>14</sup>

The net effect is that even though a cell phone owner would expect *at most* one to two survey research calls a year, creating a restriction on cell phone calls for survey research would add substantially to the costs of all research and decrease the reliability of all research data, and thereby reduce the value of public opinion as input to key decisions and policies.

In these circumstances, the Commission can and must establish a regime that properly balances the legitimate interests of wireless subscribers with the equally legitimate and compelling needs of the research industry and the governments and social institutions they support. Although the TCPA is absolute in its terms prohibiting such calls, it is plain that Congress did not intend this result. Rather, the primary concern was that wireless subscribers not be required to pay for a large number of unsolicited calls, whether or not of a commercial nature. The inherent nature of survey research, however, assures that exempting survey research calls entirely from the TCPA will not impair the values that underlie the wireless prohibition. The selection of a representative sample itself will limit the number of calls that are placed to consumers who use their wireless telephone as their exclusive or primary telephone instrument. As we have noted, most consumers only receive several survey calls per year in total (*if they receive any at all*) and the number received by cell phone owners would be even less.

The burden on wireless subscribers is thus so slight as to be trivial. Since survey research calls do not offend the fundamental purpose of the wireless phone provisions of the TCPA, the categorical exemption we seek should apply to these kinds of calls as well. Similar considerations may apply to other types of non-commercial calls.

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<sup>14</sup> Valerie Jenkins, "The Impact of Mobile Phones on Sampling," The Frame (Sept. 2001) ([http://www.worldopinion.com/theframe/2001/sept\\_1.html](http://www.worldopinion.com/theframe/2001/sept_1.html)).

At all events, literal adherence to the terms of the TCPA is inconsistent with what Congress intended in its enactment of the wireless provision of that statute. Indeed, read literally, the statute would prohibit all non-commercial calls to wireless phones made using an autodialer except calls made for “emergency purposes.” Plainly, however, Congress did not intend the Commission to mechanically and literally implement this aspect of the TCPA. It specifically empowered the Commission, under subsection (b)(2)(C) of the TCPA, to exempt calls made to cellular and similar wireless telephones in certain circumstances. Congress recognized the only reason for a prohibition on calls to wireless phones is that, under established communications industry practices and policies, the called party pays for those calls. However, calling plans have changed in the last ten years to reduce this economic burden on the cell phone user. In addition, there may be circumstances in which the called party may be willing to receive non-commercial calls – including survey research calls – on his or her wireless primary instrument, whether or not the called party pays.

Accordingly, if survey research calls are not to be categorically exempted from the TCPA, then the Commission should establish a separate and specific exemption for survey

research calls to wireless phones. To do otherwise raises potential constitutional issues as well as harm to the American public

Respectfully submitted,

  
Donna L. Gillin, Esq. *re 10/*  
Director of Government Affairs  
CMOR, Promoting and Advocating  
Survey Research  
5507-10 Nesconset Highway, 147  
Mount Sinai. NY 11766

Ian D. Volner, Esq.  
George E. Constantine, Esq.  
Venable, Baetjer, Howard & Civiletti  
1201 New York Ave., N.W.  
Suite 1000  
Washington, DC 20005

dc\157199