

**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)

REPLY COMMENTS OF AMERIQUEST MORTGAGE COMPANY

Ameriquest Mortgage Company (“Ameriquest”), a retail specialty mortgage lender that provides financial services to individuals who have less than perfect credit, relies heavily on telemarketing outreach for a large percentage of its business. Indeed, a large percentage of Ameriquest’s customers learn about available refinancing opportunities through the company’s telemarketing outreach efforts. Thus, absent telemarketing, many of our customers would not be aware that these types of refinancing options exist.

The telemarketing practices of the retail specialty mortgage industry, and Ameriquest in particular, provide considerable consumer protections that obviate the need for a national do-not-call list for these types of transactions. Most notably, these mortgage transactions are typically completed in a face-to-face closing rather than over the telephone and are heavily regulated by a myriad of state and federal lending regulations.

Consequently, Ameriquest believes that, under the Telephone Consumer Protection Act’s (“TCPA”) requirement that the Federal Communications Commission (“FCC” or “Commission”) consider different treatment of local calls, the Commission should exempt local calls made to establish a face-to-face meeting. Such an action would preserve the ability of consumers who have been denied access to conventional mortgage channels to be apprised of available refinancing and consolidation services.

I. Duty to Consider Local and Face to Face Calls

The Federal Communications Commission, not the Federal Trade Commission (“FTC”), was given the explicit authority to consider whether – and now, more importantly, how – to create a sweeping, nationwide DNC list. Congress provided specific guidelines to the FCC, rather than the FTC, governing the establishment of such a list. Thus, regardless of the FTC’s actions, *this* Commission must act accordingly under the guidelines and responsibilities established by the TCPA. If the FCC were to create a list not in accordance with the TCPA, it would render the list “arbitrary, capricious, or manifestly contrary to the statute.”¹

Although the FTC has conducted a rulemaking that has produced a DNC list, the FTC’s list does not satisfy the TCPA’s requirements of creating a “single national list.” For example, the FTC’s list is not a “single national list” for consumers because it lacks the jurisdiction under the TCPA to extend its requirements to: (1) common carriers, (2) financial institutions, or (3) intrastate calls. Furthermore, the FTC did not evaluate the impact of a DNC list on local calls – indeed, unlike the FCC, it had no responsibility to do so.

In order to create a lawful list, the FCC must carefully structure a DNC list that comports with the requirements of the TCPA and not simply rubber stamp or fill in the gaps for the FTC. Although the FCC can and should consider what the FTC has done in its proceeding, the Commission should not simply accede to the FTC’s position without making certain that it has considered all of the relevant provisions of the TCPA.

II. Authority and Requirement to Address Local Calls

In this proceeding then, the FCC must start with the dictates of 47 U.S.C. § 227(c)(1) and (2) and determine *whether* it should create a list, and if so, its impact on both local and non local

¹ *Chevron, U.S.A., Inc. v. Natural Resources Defense Counsel*, 467 U.S. 837, 844 (1984).

calls. Subsection (c)(1)(C) requires the Commission to “consider whether different methods and procedures may apply for *local telephone solicitations*.” This subsection is part of the threshold analysis of which method (DNC list or other) of limiting telemarketing calls the FCC should adopt. Thus, even if the Commission chooses to create a national DNC list, it must consider how to treat local calls, and then whether to exempt certain local calls from a DNC list. This is particularly important because, unlike telemarketing calls under the Telemarketing Sales Rule (“TSR”), the TCPA applies to both interstate and intrastate calls. If it reached only interstate calls, many local calls would be exempt from the TCPA’s requirements (except for multi-state metropolitan areas such as Washington, New York, Cincinnati, Kansas City, or St. Louis).

Although the term “local telephone solicitation” is not defined in the TCPA, the relevant committee reports, or in the Communications Act, it is discussed in the legislative history of the TCPA. As Ameriquest discussed in its initial comments, the local telephone solicitation provision was clarified in a colloquy between Senators Gore and Pressler. Their exchange strongly suggests that a local call is a call made by a company with a physical presence in an area that results in a face-to-face meeting of some sort. Senator Gore specifically referenced the local branch office of a large national photography studio as an example of a local caller.²

III. Face-to-Face Calls Should Be Exempted

Since all calls that result in a face-to-face meeting are inherently local, Ameriquest believes that, regardless of how or whether the Commission defines local calls, face-to-face local calls should be exempted from a nationwide DNC list.

Such a determination requires a local presence but does not impose a specific distance or import a contrived definition from other sections of the Telecommunications Act. This makes

² 137 Cong. Rec. S16,204 (daily ed. Nov. 7, 1991).

sense because in some geographic areas, a local call would span two or more area codes. Furthermore, because the geographic idea of “local” varies with the area (e.g. local in the western states is different than local in northeastern states) there is no need for the FCC to impose an artificial distance requirement.³ Thus, as Ameriquest explained in its initial comments, face-to-face calls are inherently local because they require a physical presence in a community for the face-to-face meeting.⁴

Ameriquest believes that an exemption will not lead to unscrupulous practices. It is hard to conceive of a marketer that uses one or two (or even more) large call centers establishing branch offices or making in-person visits to customers simply to avoid the DNC list. Many of the marketers who call from far away sell low profit margin items which would make such a complicated effort to subvert the rules prohibitively expensive. Even if they were to do so, it is not at all clear that the recipients of those calls would be willing to travel to obtain the merchandise or have a person come to their homes.

Furthermore, face-to-face calls are inherently less intrusive than calls from afar. As Congressman Cooper explained:

We may not mind a call from a local business in town reminding us of [a] special sale or opportunity. If they are rude or intrusive, they are accountable in the local area by the damage to their reputation among the people who live there.⁵

This is demonstrated by the number of states that exempt such calls and by the less intrusive nature of these calls. Many states have face-to-face exemptions in their DNC lists. Even the most recent state to impose a DNC list, Michigan, included a face-to-face exemption.⁶

³ This is similar to the Commission’s definition of EBR that is flexible enough to apply to all business models.

⁴ If the Commission chooses not to use face-to-face to define local calls, but rather elects a different definition for local calls, Ameriquest would also support such a decision so long as local call is defined clearly and with regard for multi-state metropolitan areas and other “large” local areas.

⁵ 137 Cong. Rec. H11312 (daily ed. Nov. 26, 1992) (statement of Congressman Cooper).

⁶ 2002 Mich. Pub. Acts 612, § 1(m)(iii) (excluding from the definition of telephone solicitation a “voice communication to a residential telephone subscriber in which the caller requests a face-to-face meeting with the

If the FCC list preempts state lists or if it coexists with state lists (i.e. a caller is subject to both the TCPA and state law for intrastate calls) then the FCC should base its regulations on the prevailing state laws. No states filed comments stating that they had received consumer complaints stemming from the face-to-face exemption.⁷ Because the states, having operated lists for a number of years, have decided that it is best not to impose DNC requirements on face-to-face calls, then the FCC should respect those judgments.⁸

Finally, face-to-face calls are less intrusive and fundamentally different than other types of calls. The fact that state laws recognize face-to-face exemptions is evidence that such calls are perceived as less intrusive. Additionally, face-to-face calls are only marginally within the definition of “telephone solicitation.” Congress sought to regulate only telephone solicitations because those are the most intrusive calls. Although a face-to-face call is arguably a telephone solicitation because it “encourages” the purchase of a good or service, it is only a solicitation in a remote way – the actual purchase will be encouraged at the in-person meeting.

The FTC considered whether to exempt face-to-face calls from its DNC list and determined not to do so.⁹ This determination is, however, irrelevant to this Commission’s consideration of the matter because the TSR only reaches interstate calls and many local calls resulting in a face-to-face meeting are intrastate calls (except for the unique metropolitan areas discussed above). The TCPA, on the other hand, reaches all calls; thus it requires the FCC to

residential telephone subscriber to discuss a purchase, sale, or rental of, or investment in, goods or services...”). Seven states have virtually identical exemptions to Michigan and ten others have various forms of a face-to-face exemption.

⁷ In fact, it appears that no parties filed comments opposing face-to-face exemption, whereas several commenters, the Mortgage Bankers Association, the Direct Marketing Association, and the Direct Sellers Association, expressly supported a face-to-face exemption in filings.

⁸ *Cf. United States v. Lopez*, 514 U.S. 549, 581 (1995) (“In this circumstance, the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear.”).

⁹ Telemarketing Sales Rule, 68 Fed. Reg. 4580, 4655-56 (Jan. 29, 2003).

consider whether local calls should be covered by a DNC list.¹⁰ Given the different reaches of the two statutes and the specific commands of the TCPA, the FCC must make an independent determination of whether to exempt local face-to-face calls from its DNC list.

CONCLUSION

In sum, Ameriquest believes that the Commission should carefully consider all of the TCPA's criteria to design a "single national list," and that any such a list should exempt local calls that result in a face-to-face meeting.

Respectfully submitted,

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¹⁰ 47 U.S.C. § 227(c)(1)(C).