

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

Rules and Regulations Implementing the
Telephone Consumer Protection Act of 1991

CG Docket No. 02-278

CC Docket No. 92-90

REPLY COMMENTS OF VERIZON

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Summary

In their comments, Verizon and others reported on the consumer confusion and unnecessary burdens caused by multiple, inconsistent do-not-call (“DNC”) registry regimes. The FTC’s action in adopting yet another regime only makes this situation worse. While the FTC’s system is, in the main, a perfectly reasonable one, the FTC overlays it on top of the more than two dozen individual state DNC systems in a way that will only confuse consumers and drive up industry compliance costs, costs that consumers ultimately will bear. And because the FTC’s jurisdiction is limited, its regulations will not apply to many industries that telemarket heavily, and consumers who sign up for the FTC’s registry will find — most likely to their surprise — that they still receive telemarketing calls. The Commission should put an end to this confusion and adopt a single consistent, uniform national DNC system. In doing this, the Commission should build upon state DNC registries that follow the Commission’s rules and preempt those that do not.

In other respects, the FTC handled well the issues before it. In particular, Verizon supports, as it did in its comments to the Commission, the FTC’s rule prohibiting telemarketers from interfering with calling party identification services. Tens of millions of consumers subscribe

to these services and find them useful in controlling the calls they receive. The Commission should adopt a similar rule so that it will apply to all telemarketing efforts. The Commission should also take additional steps to ensure that advances in technology, such as Internet telephony, do not undermine these services and the consumer benefits they provide.

I. The Commission Should Act Promptly To Establish a Truly National DNC System.

The commentators heavily favor the Commission's establishment of a national DNC registry. Some of the opposition to such a system seems to be prompted by concerns about its complexity and cost.¹ In light of the fact that 25 states already have DNC registries — which impose differing requirements and obligations on telemarketers — it is hard to understand how a single national database would be more complex or costly. The strongest opposition comes from WorldCom,² a firm with a well-documented history of consumer abuses, including so many telemarketing-related violations of the Commission's slamming rules that the Commission required it to establish a special Telemarketing Compliance Program.³ The FTC's action confirms that a national DNC registry would benefit both consumers and responsible telemarketers. The Commission should move quickly to adopt such a system.

¹ E.g., Qwest at 7; BellSouth at 3; SBC at 6.

² WorldCom at 3-36.

³ As part of a settlement of numerous consumer complaints, the Commission also required MCI WorldCom to pay \$3,500,000 to the U.S. Treasury. *MCI WorldCom Communications, Inc.*, 15 FCC Rcd 12181 (2000).

The DNC rule adopted by the FTC includes features that the Commission should include in its own regulations. First, the rule includes a limited safe-harbor from liability for violating DNC requests,⁴ which tracks the Commission’s own rules for company-specific DNC lists.⁵ The FTC also concluded that consumer registrations should remain valid for five years,⁶ in order to maintain the accuracy of the database in light of the rate at which numbers are disconnected and reassigned. While a shorter time period would make the system even more accurate, a five-year period represents an appropriate balance between burden on the consumer and database accuracy.

A. The Commission Should Replace the Patchwork of State Do-Not-Call Rules with a Coherent National System.

Congress gave the Commission jurisdiction to regulate telemarketing — “telephone solicitation” in the terminology of the Telephone Consumer Protection Act — whether the telemarketing call is physically interstate or intrastate.⁷ Consumers, of course, do not care whether the telemarketer calling them is sitting across the street or across the country; and an “interstate” telemarketing call might be made on behalf of a local business, while a business from another state might reach a consumer through a local call. Thus, the normal distinction between interstate and intrastate telecommunications that so important in the Communications Act is irrelevant to the Commission’s analysis under the TCPA.

In particular (and as discussed in more detail below), Congress gave the Commission the authority to establish a national DNC system and told the Commission the features that such a

⁴ Section 310.4(b)(3).

⁵ See FTC Order, *available at* www.ftc.gov/os/2002/12/tsrfrn.pdf, at 178; 47 CFR § 64.1200(e)(2).

⁶ FTC Order at 163.

⁷ That term is defined in section 227(a)(3) as a “telephone call” made for a specified purpose and is not limited to interstate telephone calls. 47 U.S.C. § 227(a)(3).

system should have.⁸ These requirements are clear and straightforward and can be readily implemented. This detail was provided to give clear guidance to the Commission, as the House committee noted, “because state laws will be preempted” by Commission action.⁹ Once the Commission has done this, no state may require the use of a different list.¹⁰

There can be no rational case made for the continuation of separate state DNC systems after the national system is established. As one state regulator advised, “the Texas PUC encourages the FCC to consider that the creation of one national no-call list would not only reduce the costs associated with the development and maintenance of two separate no-call databases providing essentially the same service to the same group of consumers, it would also fulfill consumer expectations that registration on a national no-call list should stop unwanted telephone solicitation calls from any entity subject to federal and state regulatory authority.”¹¹ Similarly, the Colorado PUC urged that there not be different customer deadlines and required actions (such as renewal dates) for the various lists.¹²

The coexistence of both state and federal lists can only confuse customers, and the existence of two federal lists would truly baffle them. A consumer may pay the fee to be listed on a state-sponsored list only to learn that she could have gotten the same protection for free with a federal list. Or she chooses the FTC list — because it sounds like a more encompassing national

⁸ 47 U.S.C. § 227(c)(3).

⁹ H.R. Rep. 102-317, 102nd Cong., 1st Sess., at 21 (1991).

¹⁰ “If, pursuant to subsection (c)(3), the Commission requires the establishment of a single national database of telephone numbers of subscribers who object to receiving telephone solicitations, a State or local authority may not, in its regulation of telephone solicitations, require the use of any database, list, or listing system that does not include the part of such single national database that relates to such State.” 47 U.S.C. § 227(e)(2).

¹¹ Texas PUC at 4.

¹² Colorado PUC at 4.

endeavor— only to find that she is still receiving telemarketing calls from firms in industries beyond the FTC’s jurisdiction. And it is these confused and disappointed consumers who will ultimately pay the cost of establishing and maintaining these multiple lists.

The FTC seems hopeful that the states will “harmonize” their independent systems to the FTC’s own and that the “transition period” will be “relatively short” (whatever that means).¹³ But that is all it is — hope. And the FTC has pointed to no evidence at all that this will ever occur, let alone occur in a “relatively short” time. During this “relatively short transition period,” of course, consumers will be signing up — and in some cases paying as much as \$15 for — DNC protection that does not best meet their needs, will be receiving unwanted telemarketing calls that they could have avoided by signing up for a different list and will be paying for their own disappointment and confusion through higher prices for goods and services.

In fact, all the evidence would suggest that this “harmonization” will never occur. Currently, there is no coordination among the various state agencies on the development of DNC regulations. As a result, there is no consistency as to (1) how often lists are published (quarterly or monthly), (2) the dates that the lists become available or effective, (3) the fees telemarketers pay to purchase lists or that consumers pay to be placed on them, (4) whether there is an established business relationship exemption and (5) how consumers are provided with notice about the existence of the program. There are different rules as to the timing of customer DNC requests, when DNC lists must be produced and when they become effective. If there has been no harmony among state DNC regimes up to now, there is no reason to believe that the adoption of another non-binding regime by a federal regulator will miraculously produce harmony now.

¹³ FTC Order at 158.

Adoption of a national DNC list by the Commission could rationalize this situation and produce obvious benefits — a single set of rules that would apply to all consumers and all telemarketers. It could provide consumers with a one-step method for preventing telemarketing calls. This approach could be less burdensome than repeating requests on a case-by-case basis, particularly in light of the number of entities that conduct telemarketing today. It could also simplify matters for telemarketers.

1. The establishment of a national list replaces separate state lists for telephone solicitations covered by the national list.

The comments supporting state regulations do not come to grips with the statutory requirement that state DNC regimes that are inconsistent with a DNC regime established by the Commission must conform to the Commission’s rules or be preempted.

First, Congress gave the Commission the authority to:

“require the establishment and operation of a single national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations, and to make that compiled list and parts thereof available for purchase.”¹⁴

With the phrase “*single* national database,” Congress plainly intended that if the Commission established a national DNC database system that it be the only DNC database system. If the FCC requires such “a single national database,” of course, individual state databases would be unnecessary and, worse, inconsistent.

Second, the statute prescribes in detail the characteristics of this “single national database” system. This detail was provided to give clear guidance to the Commission, as the House committee noted, “because state laws will be preempted” by Commission action.¹⁵

¹⁴ 47 U.S.C. § 227(c)(3).

¹⁵ H.R. Rep. 102-317, 102nd Cong., 1st Sess., at 21 (1991).

Third, the statute also provides:

“If, pursuant to subsection (c)(3), the Commission requires the establishment of a single national database of telephone numbers of subscribers who object to receiving telephone solicitations, a State or local authority may not, in its regulation of telephone solicitations, require the use of any database, list, or listing system that does not include the part of such single national database that relates to such State.”¹⁶

If the Commission requires “a single national database,” then a state may not require the use of any database other than the portion of the national system that relates to that state. The statute is clear and gives the Commission no choice here — if it establishes “a single national database,” then states “may not” require the use of separate databases of their own or change the characteristics or specifications of the national system. Phrased differently, once the national database is established, a state must either conform its DNC regime to the federal rule or cease operating it.

Separate state lists could still exist where the federal requirement did not apply. For example, while the Commission’s DNC rules would not apply to certain types of telemarketing, such as telephone calls by tax-exempt nonprofit organizations which are excluded from the definition of “telephone solicitations” in the TCPA or to calls which the Commission has excluded by rule, a state might be able to apply its DNC requirements to such calls. In that case, section 227(e)(2) would permit the state to require such organizations to use a DNC list that includes the national list plus the numbers of other subscribers who have signed up for the state list.

2. The Commission should build on the existing state lists in implementing its own system.

More than two dozen states have DNC registries and an infrastructure to support them. Consumers in those states have been made aware of these registries and know how to take

¹⁶ 47 U.S.C. § 227(e)(2),

advantage of the protection they afford. The Commission need not — and should not — discard all this. Rather, it should build upon what already exists in establishing a single national system.

The Commission should adopt rules that establish the single, national database that complies with the requirements of section 227(c)(3) by a date certain. Each state with an existing DNC registry would be given the opportunity to elect whether it wanted its DNC list and systems to be part of the national registry. Any state that so elected would have to bring its system into conformance with the national requirements and could continue in operation. Any state that did not could transfer its list to the national system and would cease operating its DNC registry when the national system became operational.

B. DNC Systems Must Recognize and Accommodate Established Business Relationships.

Congress created the established business relationship exemption when it enacted the TCPA in order “to not unduly interfere with ongoing business relationships.”¹⁷ For this reason, the TCPA permits an enterprise having an established business relationship with a consumer “to solicit the subscriber even if the subscriber otherwise objected to unsolicited calls.”

The rule adopted by the Commission in 1992 to define this relationship¹⁸ mirrors the balance created in the statute and reflects the Commission’s “conclusion that a business

¹⁷ H.R. Rep. 102-317, 102nd Cong., 1st Sess., at 13 (1991).

¹⁸ “[A] prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.” 47 C.F.R. § 64.1200(f)(4).

relationship should be defined broadly rather than narrowly,”¹⁹ and there is really no reason to change it now.

A number of commentors urge the Commission to change this rule. One commentor suggests that it should be limited to situations where the customer has actually set up an account with the company for the purpose of making a recurring purchase,²⁰ while another wants it narrowed to allow telemarketers to contact former customers only regarding the type of transaction that customer has made before, but not new kinds of transactions unassociated with the prior transactions.²¹ Other commentors suggest fine-tuning the rule, for example to require that consumer have completed a purchase from the company within 24 consecutive months prior to the call.²²

Similar proposals were made in the FTC proceeding,²³ and the FTC considered in depth whether there should be an established business relationship exception and, if so, exactly what its limits should be. The result is a rule that is narrower than the Commission’s existing regulation, but still one that “reflects a balance . . . between barring all calls to those subscribers who objected to unsolicited calls, and a desire to not unduly interfere with ongoing business relationships.”²⁴ While the Commission’s existing definition is perfectly satisfactory, the FTC’s approach is also a reasonable one.

¹⁹ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd 8752 ¶ 35 (1992).

²⁰ National Consumers League at 5.

²¹ Ohio PUC at 15.

²² Texas Office of Public Utility Counsel at 5-6; NASUCA at 18.

²³ FTC Order at 32-39.

²⁴ H.R. Rep. 102-317, 102nd Cong., 1st Sess., at 13 (1991).

The FTC correctly recognized that businesses and “many consumers favor an exemption for companies with whom they have an established relationship.”²⁵ That exemption should not be open-ended — “a company should be able to claim the exemption only if there has been a relatively recent transaction between the customer and the seller....”²⁶ Several state statutes and a number of commentors in that proceeding suggested time periods from 24 to 36 months.²⁷ The FTC concluded, however, that “18 months is an appropriate time frame because it strikes a balance between industry’s needs and consumers’ privacy rights and reasonable expectations about who may call them and when.”²⁸

The FTC also took a reasonable and practical approach to the affiliate issue identified in the Notice. As is the case in this docket,²⁹ some commentors before the FTC argued that an established business relationship should not be extended to a company’s affiliate. The FTC concluded, however, “In determining whether affiliates or subsidiaries should be encompassed within an ‘established business relationship,’ the Commission looks to consumer expectations: If consumers received a call from a company that is an affiliate or subsidiary of a company with whom they have a relationship, would consumers likely be surprised by that call and find it inconsistent with having placed their telephone number on the national ‘do-not-call’ registry?”³⁰ The FTC went on to say that the exception would not apply if “the nature and type of goods or services offered by the division are substantially different from those offered by other divisions of

²⁵ FTC Order at 34.

²⁶ FTC Order at 36.

²⁷ FTC Order at 35-36.

²⁸ FTC Order at 36.

²⁹ National Consumers League at 5.

³⁰ FTC Order at 39.

the corporation or the corporate organization as a whole.”³¹ While a more objective test than “consumer expectations” and “substantially different” goods and services would provide greater clarity, it may be impossible to write a regulation that does that. The FTC’s approach clearly focuses on the correct issues and should be adopted by the Commission.

II. Technology Can Help Protect Consumer Privacy, and It Should Not Be Thwarted by New Serving Arrangements.

The record before both the Commission and the FTC demonstrates that technology, especially services and equipment that rely on calling-party-number, or Caller ID, information can help consumers protect themselves from unwanted telemarketing calls. The Commission should ensure that neither telemarketers nor unrelated technological advances undermines this protection.

A. The Commission Should Ensure That Telemarketers Do Not Interfere with These Network Capabilities.

The FTC adopted a strong rule prohibiting telemarketers within its jurisdiction from interfering with the transmission or delivery of calling-party identification information. The FTC concluded that “consumers will receive substantial privacy protection as a result of” a requirement not to block Caller ID information and that “consumers and telemarketers will both benefit from the increased accountability in telemarketing that will result from this provision.”³²

The record in this proceeding supports this result. The National Consumers League reports that consumers are frustrated when Caller ID fails to reveal who is calling and urges that any intentional blocking by telemarketers should be prohibited.³³ State regulators³⁴ and consumer

³¹ FTC Order at 39.

³² FTC Order at 119.

³³ National Consumers League at 3.

³⁴ Ohio PUC at 19; Tennessee Regulatory Authority and Tennessee Attorney General at 13.

advocates³⁵ similarly urge that telemarketers should not be allowed to block transmission of Caller ID numbers to the customer.³⁶ The Commission should extend the benefits of the FTC's rule by applying it to all telemarketers.

The FTC found that "transmission of Caller ID information is not a technical impossibility" and that "telemarketers are able to transmit this information at no extra cost, or minimal cost."³⁷ Nothing in this record undercuts that conclusion.

Moreover, the Commission should require that all telemarketers making telephone solicitations ensure with their telecommunications service providers that a valid, dialable CPN is delivered to the terminating local exchange carrier. Alternatively, these firms should be required to transmit a toll-free number that a consumer could call to be added to the DNC list of the soliciting firm.

B. The Commission Should Ensure That Technological Changes Do Not Diminish These Protections.

Internet telephony may offer efficiencies and other benefits as compared to circuit-switched services. These benefits will be hollow if Internet telephony services are deployed in a way that does not include CPN capabilities. Under existing rules, "common carriers" generally must pass the CPN they receive.³⁸ It is unclear whether Internet telephony will be characterized as "common carriers" or whether the Commission will need to change its regulations to make them apply to these services. More important, there are Internet telephony applications in which CPN is not necessarily generated at all (because the calls do not pass through an originating end

³⁵ Texas Office of Public Utility Counsel at 3; NASUCA at 3.

³⁶ FTC Order at 119.

³⁷ FTC Order at 119.

³⁸ 47 C.F.R. § 64.1601(a).

office switch). It would be an unfortunate result if the new network technology decreased the privacy protections of the old in ways that consumers were unable to control.

Conclusion

The Commission should establish a national DNC registry that replaces state registries and prohibit telemarketers and new technologies from interfering with the delivery of CPN information.

Respectfully submitted,



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