DOCKET FILE COPY ORIGINAL

ORIGINAL

RECEIVED

JAN 31 2003

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

REPLY COMMENTS OF DIRECTV. INC.

DIRECTV, Inc. ("DIRECTV") hereby submits the following reply comments in the above-captioned proceeding.[1] The regulatory landscape has changed considerably since the *Notice* was published and the initial comments were 'riled. As the Commission has recognized,[2] any action in this proceeding must now take into account amendments to the Federal Trade Commission's Telemarketing Sales Rule ("TSR") newly-promulgated under the Telemarketing and Consumer Fraud and Abuse Prevention Act.' While the TSR addresses many of the issues raised by the Commission in the *Notice*, Commission action is still necessary to clarify and ensure the uniform applicability of telemarketing rules.

1 *See* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, *Notice of Proposed Rulemaking and Memorandum Opinion and Order*, CG Dkt No. 02-278, CC Dkt No. 92-90 (rel. Sept. 18, 2002) ("Notice").

2 *See Public Notice*, Consumer and Governmental Affairs Bureau Announces An Extension of Time to File Reply Comments, CG Dkt No. 02-278, DA 02-3554 (rel. Dec 20, 2002) (extending reply comment date in light of FTC action).

3 *See* http://www.ftc.gov/os/2002/12/tsrfinalrule.pdf (text of amended TSR); 15 U.S.C. §§ 6101-6108 (Act).

I. THE COMMISSION SHOULD ACT TO ENSURE THE CREATION OF A UNIFORM DO-NOT-CALL REGISTRY

The central feature of the TSR is its cstablishnient of a "do-not-call" ("DNC") registry. Telemarketers are prohibited from making outbound calls to numbers on the DNC registry without the written consent of the called party, or without an established business relationship.[4] DIRECTV generally supports the TSR, and believes that the amended rule will both aid consumers as well as provide much-needed uniformity and certainty to businesses,

The FTC's action. however. does not obviate the need for further action by the Commission. While the DNC prohibition would by its terms extend to any individual or business entity,' conimentcrs have pointed out that the FTC's jurisdiction and rules may not reach certain parties regulated by the FCC." It would be odd, and indeed unfair, if certain companies could operate free from telemarketing restrictions while certain of their competitors were subject to those restrictions. DIRECTV therefore agrees that the Commission should extend the substance of the TSR to those entities within the FCC's jurisdiction that would otherwise be exempt.'

Moreover, the Cornmission should act to ensure national uniformity in rules governing the conduct of telemarketing and facsimile solicitations. The TSR appears not to preempt additional state laws and regulations, including state do-not-call lists.' DRECTV believes that this additive approach represents the worst of all worlds from a regulatory perspective.

---

4 § 310.4(b)(1)(B).

5 *See* §§ 310.2(v), 310.2(bb).

6 *See, e.g.*, Comments of National Cable & Telecommunicat ns Ass'n ("NC Comments") at 6; WorldCom Comments at 30-36.

7 *See. e.g.*, NCTA Comments at 6-7.

8 *See, e.g.*, 15 C.F.R. § 310.7(b).

Businesses like DIRECTV would remain subject to a host of varied and potentially conflicting state requirements, and the federal rule would simply attach another regulatory burden – another list to buy into and monitor, another set of rules to abide by, but ironically, no assurance that this patchwork of databases is truly benefiting the consumer.

DIRECTV strongly urges that existing state databases instead be incorporated wholesale into a single, national DNC registry of the type expressly contemplated by the TCPA.[9] This proposal would address the concern of the state attorneys general that elimination of the various state programs could lead to consumer "confusion."[10] And indeed, state consumer protection agencies could continue to promote, unchanged, the availability of DNC registration, while substituting the federal phone number or Internet address for the state registration information. There is simply no reason to maintain redundant state and federal do-not-call lists.

Nor is there any merit to the attorneys generals' argument that state do-not-call lists "cannot" be preempted.[11] While the TCPA may not directly preempt certain types of consistent state regulation, there is no question that the FCC has authority to preempt state law through its rules. The Supreme Court has made plain that, "[p]re-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may preempt state regulation."[12] The FCC can – and should – preempt state regulation of interstate telephone and facsimile solicitations to the extent necessary to ensure the creation of a uniform national DNC registry.

---

9 47 U.S.C. § 227(c)(3); ***see*** Notice at ¶ 49.

10 Comments and Recommendations of the Attorneys General at 15-16.

11 *See id.* at 9-12.

12 *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 368-69 (1986)

II. THE COMMISSION SHOULD ADOPT THE FTC'S DEFINITION OF ESTABLISHED BUSINESS RELATIONSHIP

The established business relationship exception reflects the "balance" struck by Congress in the TCPA "between barring all calls to those subscribers who objected to unsolicited calls, and a desire to not unduly interfere with ongoing business relationships."[13] The record in this proceeding demonstrates that the exception remains as necessary today as when it was adopted in 1992.[14] As numerous commenters have shown, a flat prohibition on unsolicited telephone calls and facsimiles would inappropriately and unduly interfere with significant numbers of important and legitimate commercial transactions.[15] A consumer generally does not resent – and indeed usually welcomes – receiving an unsolicited phone call from his dentist reminding him to come in for his six-month check-up, or from her financial planner advising her that now would be a good time to buy (or sell) a security, or from a service provider (such as DIRECTV) to inquire about the customer's satisfaction with the service or interest in receiving a free trial of a new offering.

Likewise, numerous commenters support DIRECTV's position that the definition of "established business relationship'"[16] should *not* be narrowed to include a substantive inquiry into the nature of the business relationship.[17] This exercise would necessarily involve drawing complicated and ultimately indeterminate lines. Would the stock broker also be allowed to call

---

13 H.R. Rep. No. 317, 102nd Cong., 1st Sess. 13 (1991).

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

15 *See, e.g.*, Comments of the National Retail Federation at 12-19; Cingular Comments at 10; Comments of Conicast Cable Communications Inc. ("Corncast Comments") at 3-8; Comments of the Direct Marketing Ass'n at 18-21.

16 *See* Notice ¶ 20.

17 *See. e.g.*, Comments of Verizon at 13 ("Verizon Comments"); Comments of the Magazine Publishers of America at 11-13.

his clients about bonds? What about life insurance? Could DIRECTV call its own subscribers to promote the DIRECTV digital video recorder service? Or a DIRECTV satellite-delivered broadhand offering'? The Commission should not attempt to draw substantive distinctions that would allow an entity to call about certain goods or services, but not others.''

DIRECTV supports the established business relationship exception incorporated in the TSR. The FTC finds an established business relationship to exist for eighteen months following a consumer's purchase or lease of the seller's goods or services, or for three months following a consumer's inquiry about such goods or services.[19] This avoids the line-drawing problems inherent in any substantive inquiry into the line of business. And it is reasonably restrictive and protective of consumers' privacy interests – indeed the record evidence supports a less restrictive period, of two years or more.''' Yet in the interest of uniformity:' the Commission should adopt the FTC's definition as to those telephone and facsimile solicitors that fall within its own jurisdiction.

III. THE COMMISSION SHOULD RECOGNIZE AND RELIEVE THE BURDEN OF AGGRESSIVE AND MISPLACED TCPA LAWSUITS

Several commenters in addition to DIRECTV related their own horror stories of overzealous private enforcement actions under the TCPA.[22] LCC International described how the on-board modem in one of the repeaters it operates for XM Radio mistakenly auto-dialed a

---

18 **See,** *e.g.*, Verizon Comments at 13-15.

19 See 15 CFR § 310(n).

20 ***See,*** *e.g.*, Magazine Publishers Comments at 13. **See** *also* comments of the Electronic Retailing Association at 11; Verizon Comments at 12 (discussing seasonal or otherwise infrequent nature of certain business relationships); National Retail Federation Comments at 14-17.

21 *See, e.g.*, Comcast Comments at 8-11 (emphasizing need for uniformity).

22 See *e.g.*, Comments of the National Association of Broadcasters at 3-4 (describing class actions brought against Cox Radio, Inc. and Susquehanna Radio Corp).

wrong number numerous times over several days. Rather than notify LCC or XM of the problem. the called party hired a plaintiffs' lawyer and filed suit, demanding a multimillion dollar damage award."

Similarly, Nextel Communications found itself embroiled in a class action lawsuit based on the unsolicited faxes transmitted by "an independent contractor of an independcnt business."[24] Ncxtcl apparently had no knowledge of the advertisement, nor was the alleged culprit in any way within Nextel's control. But because a salesperson somewhere happened to send unsolicited facsimiles advertising Nextel's service, the plaintiffs' lawyers identified a "deep pocket" and filed a lawsuit.[25]

As DIRECTV related in its initial comments, it has fallen victim to similar class action threats." Other examples abound. DIRECTV recently received a demand letter from a lawyer whose client had received one call from an independcnt retailer – demanding $20,000 immediately, and threatening that if no payment was received, suit would be filed with a $250,000 demand for punitive damages. A cottage industry of professional TCPA complainers and lawyers has arisen, who routinely demand thousands of dollars for a single call, as they "stack" up penalties: $500 for making the call, another $500 for failing to provide a copy of the company's do-not-call policy, and so forth, plus fees and punitive damages. Like LCC, Nextel and numerous others, DIRECTV has become a target of aggressive lawyers who seek to twist the private remedies provisions ***of*** the TCPA far beyond their original intent, and to find liable defendants whose conduct is not culpable.

---

23 Comments of LCC international Inc. at 2 - 4.

24 Comments of Nextel Communications Inc. at 24-25

25 *Id.*

26 ***See*** Comments of DIRECTV, Inc. at 3-4.

The Commission is uniquely positioned to clarify the mis-used private remedy provisions of the TCPA and thus to put an end to such abuse. As Nextel points out, "[c]ourts no doubt will look to the outcome of this Commission docket to guide their decisions" in the "multitude of other similar pending cases across the country."[27] Specifically, the Commission should: (1) clarify its "on behalf of' opinion[28] to make plain that a company cannot be held liable under the TCPA for actions taken by independent third parties without that company's direction or request;" and (2) clarify that the existing enforcement provisions of the TCPA – including individual rights of action and the Commission's own enforcement regime[30] – render unnecessary the certification of class action lawsuits. By making these clarifications, the Commission will help rationalize and regularize TCPA enforcement, and will prevent the TCPA from being used by plaintiffs' lawyers to force settlements from companies facing potential multimillion dollar judgments

IV. CONCLUSION

The Commission should take this opportunity to serve the public interest by balancing the need for consumer privacy with the need to facilitate beneficial commercial activity by regulating with a minimum of intrusiveness and a maximum of uniformity and predictability. The Commission should therefore adopt rules substantively identical to the TSR and its

---

27 *Id.* at 25.

28 "The entity or entities on whose behalf facsimiles are transmitted are ultimately liable for compliance with the rule banning facsimile advertisements." Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, ***Memorandum Opinion and Order,*** 10 FCC Rcd 12391 ¶ 35 (1995).

29 ***See** also. e.g.*, Comments of AT&T Wireless Services, Inc. at **35-36**

30 ***See.** e.g.*, 21st Century Fax(es) Ltd. Apparent Liability for Forfeiture, *Forfeiture* ***Order,*** 17 FCC Rcd **1384** (2002) (imposing $1,100,000.00 fine for facsimile advertising), ***See** also, e.g.*, ***News Release,*** Telemarketing Enforcement Actions Announced (rel. Jan 9 2003) (issuing **13** citations and describing "nearly $7 million in forfeitures proposed or issued since December 1999").

"established business relationship" exception, and should clarify its rules to discourage aggressive and unjustified lawsuits.

Respectfully submitted,

DIRECTV, Inc.

By: _____

Gary M. Epstein
James H. Barker
William S. Carnell
LATHAM & WATKINS, LLP
555 Eleventh St., NW
Suite 1000
Washington, DC 20004-2505
(202) 637-2200

January 31, 2003