DOCKET FILE COPY ORIGINAL

RECEIVED

FEB - 4 2003

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

January 31,2003

Ms. Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

RE: Telephone Consumer Protection Act Amendments -- Comment. CG Docket No. 02-278; CC Docket No. 92-90

Dear Ms. Dortch:

AARP appreciates the opportunity to comment on the Federal Communications Commission's (FCC) Notice of Proposed Rulemaking to amend rules adopted pursuant to the Telephone Consumer Protection Act of 1991 (TCPA). The Commission is to be commended for initiating this effort to address a number of concerns consumers have regarding telemarketing calls. In our comments today, AARP will focus on the Commission's requests for input on the use of autodialers, prerecorded messages and facsimile machines; the establishment of a national Do Not Call registry; and efforts to incorporate wireless service under the TCPA. We will also address, where relevant, the Federal Trade Commission's (FTC) recently announced changes to the Telemarketing Sales Rule.

AARP's interest in the Telephone Consumer Protection Act and concerns about telemarketing abuses are longstanding. With more than 35 million members aged 50 and above, AARP is the largest membership organization representing the interests of older Americans. We are greatly concerned about the rampant telemarketing fraud perpetrated against older people. Because many people do not realize that they are victims, and many others are unwilling to report these frauds to law enforcement agencies, there is no way to quantify with any certainty either the number of victims or the dollars lost. However, Congress has estimated that $40 billion is lost to fraudulent telemarketers annually. **See** Telemarketing and Consumer Fraud and Abuse Prevention Act of 1994, 15 U.S.C. § 6101 et seq. (1996). Many of these victims are older people, specifically targeted by these scam artists. Consequently, AARP supports federal and state laws, regulations, and public policies designed to outlaw fraudulent and deceptive telemarketing practices and to provide adequate remedies for victims.

Several years ago, in recognition of the fact that older people are favorite targets of fraudulent telemarketers, AARP made federal and state legislative and regulatory initiatives and public education on this issue a top priority. For example, we have been active participants in the rulemaking processes at both the FCC and the FTC.

No. of Copies rec'd 0+5
List ABCDE

AARP also undertook a major initiative aimed at educating consumers about how to identify and avoid fraudulent pitches, and steps they should take to enforce their rights when they have been defrauded. We released several publications and public service announcements to advance this goal. We also worked with state and federal law enforcement and regulatory agencies, as well as consumer and industry groups, to develop consumer education messages and to support investigation and prosecution of fraudulent telemarketers.

We believe that giving consumers the ability to make choices regarding the calls they receive in their home or business would help reduce fraud and prevent unscrupulous individuals from taking advantage of older consumers. The adoption of many of the proposals in this rulemaking would be another critical step in this process.

Automated Calling Systems

AARP urges the Commission to adopt rules that bring automated calling systems' abandonment rates as close to zero as possible, and that prohibit all telemarketers – even those not using an automated calling system – from blocking consumers' Caller ID. These rules should apply to telemarketers regardless of whether they have an established business relationship with the consumer being called. Such rules will help prevent the subversion of systems designed to alert consumers who is calling them, and will help prevent the annoyance and even fear sometimes generated by abandoned calls.

In the ***Notice,*** the Commission recognizes the problems experienced by consumers, particularly older Americans. AARP members have indicated that multiple "hang-ups" make them fearful that their homes are being cased for break-ins. The FTC, too, has noted an increase in consumer complaints, and the industry's acknowledgement of consumer objections, about the use of predictive dialers. The Commission seeks comment on any legitimate business or commercial speech interest that these calls may promote.

In revising its rules concerning the use of automated dialing technologies, the Commission seeks to balance the legitimate business interests of companies to market their products with the rights of consumers not to be annoyed by abandoned calls from telemarketers. Automated calling systems allow telemarketing operations of even modest size to reach literally thousands of consumers in one day. While Telemarketers' use of automated calling systems benefits telemarketers, allowing them to make more calls and contact more people, it does so to the detriment of consumers, who often do not want to talk to them.

The FTC has addressed the predictive dialer problem by requiring telemarketers to make certain disclosures to the person receiving the call. In addition, the FTC rule would require that a person receive a recorded message upon answering the phone. Accordingly, a telemarketer that uses a predictive dialer would commit an abusive act or practice if the telemarketer did not make the required disclosures on any call in which a consumer answers the phone. We urge the FCC to amend the TCPA implementing rules to reflect the changes announced by the FTC in this area.

Prohibition of Caller ID Blocking

AARP is on record in support of legislation and/or regulations that prohibit the practice of blocking Caller ID systems. We have testified to this effect before Congress and have submitted similar comments to the FTC on this matter. We believe that the FCC should amend the Caller ID rules to prohibit telemarketers from blocking consumers' Caller ID. Such a prohibition would especially aid consumers who receive telemarketing calls placed with a predictive dialer. As the FTC noted, "when the predictive dialer disconnects the call, the consumer often has no effective way to determine from whom the call originated and thus to whom he or she should direct a 'do-not-call' request.. ." If telemarketers were prohibited from blocking Caller ID, consumers with Caller ID would have a greater ability to monitor telemarketers who are violating Do Not Call restrictions.

The FTC took this very approach in its December Order in requiring telemarketers to display a working return telephone number and we ask this Commission to adopt that approach.

National Do Not Call Registry

The Commission seeks comment on a variety of issues concerning a proposed national Do Not Call registry, including whether the Commission should extend any FTC requirements to those entities not under the FTC's jurisdiction and the role the Commission should play in the administration and enforcement of a national database. There are clearly areas in which the FCC can exercise its jurisdiction regarding telemarketing under the TCPA, and in which the FTC cannot. These include telemarketing activity by common carriers, banks and insurance companies. In light of the FTC's year-end action, to ensure consistency across government regulations it's critical that the FCC address these issues appropriately.

The Commission should adopt rules that would cover entities to which the jurisdiction of the FTC does not extend. AARP believes strongly, however, that the FCC should not undertake creation of a separate national list as such an effort would be duplicative, costly, confusing to consumers and ineffective. All telemarketers covered by the FCC's jurisdiction should be required to purchase the national registry maintained by the FTC.

The Commission should preserve the right of the states to enforce their own laws and state Do Not Call programs and to work cooperatively with federal authorities for the benefit of consumers. It is important that even if the proposal adopted by the Commission does not actually preempt state law, the **effect** of the rules does not create a de facto preemption of state law. De facto preemption might occur should the proposed federal program undermine the state's ability to enforce its own do not call programs. The FTC has been adept in addressing this concern and we recommend that the FCC take the same approach.

The combination of the FTC's registry with the amended FCC rules should ensure that placement of a consumer's telephone number on the list will establish a blanket prohibition on telemarketers calling the consumer, unless the consumer makes an affirmative act to authorize calls from the specific entity on whose behalf the telemarketer is calling. Authorization by

negative option can be confusing to consumers and would be ineffective in reducing unwanted telemarketing calls. This practice should not be allowed.

The Do Not Call Registry Should Not Preempt the States

The Commission seeks comments on the interplay between its proposed rules and states' "Do Not Call" requirements. Specifically, the Commission asks whether its rules should preempt state requirements. The Commission also seeks comment on whether the federal and state databases should be able to share Do Not Call request information.

AARP believes the Commission's regulations should not preempt state "Do Not Call" requirements that provide consumers with greater protection against telemarketers. It would be illogical and unfortunate for the Commission's proposed rule to ***reduce*** the protections afforded consumers in those states whose do-not-call laws are more beneficial to consumers.

In addition, it is clear from the TCPA that Congress intended for states to be able to provide their consumers with greater protections against telemarketers. Section 227(e) (1)(D) explicitly prohibits preemption of any state law that "imposes more restrictive intrastate requirements or regulations on … the making of telephone solicitations." Thus, the Commission may not preempt state laws that are more restrictive on telemarketers.

States with their own Do Not Call laws have enforced these laws against telemarketers across the country, irrespective of whether the call was "intrastate" or "interstate" in nature. Since telemarketers are aware that they must comply with state law, most of them have purchased existing state Do Not Call lists and have removed the telephone numbers of consumers on those lists from their own solicitation lists. Many states have taken action against telemarketers that violate state laws by calling consumers who are listed on the state's Do Not Call list. No action taken against a telemarketer has been challenged by the argument that a state cannot protect its residents in this manner. Therefore, the Commission should require that telemarketers comply with state law so that effective state Do Not Call laws will continue to operate. Such a requirement would allow for the state and federal programs to work most efficiently as numbers on state lists are transferred automatically to the federal database during the transition to one national list.

"Established Business Relationship" Definition

The Commission's current rules exempt from the restrictions on the use of prerecorded messages calls to "any person with whom the caller has an established business relationship at the time the call is made.. .." The Commission defines "established business relationship" as 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.

The Commission seeks comment on whether it should revise this definition and the interplay between an established business relationship and a consumer's request not to receive calls from the person or entity with whom the relationship has been established.

In our view, the current definition is much too broad, increasing the likelihood that consumers may get unwanted telemarketing calls. For example, a consumer could answer a company's survey concerning the types of products and services offered by the company or one of its clients. Based on this "inquiry," the company or one of its affiliates could call the consumer numerous times in order to market one or more of the products. In addition, requests to be placed on the company's Do Not Call list might not stop calls from affiliates "unless the consumer reasonably would expect [the affiliates] to be included given the identification of the caller and the product being advertised."

Not every contact with an entity should establish a business relationship between the entity and the consumer. **A** consumer who merely inquires or provides an opinion about a company's products and services should not be subjected to subsequent telemarketing calls from the company. In order to be considered "established," the relationship should also be ongoing, i.e., where the consumer has completed a transaction (making a purchase or a payment) with a company within the **12** consecutive months prior to the call. In addition, if a consumer requests placement on a company's Do Not Call list, that request should be extended to all of the company's affiliates with whom the consumer does not have an ongoing relationship. Such a measure is necessary to counter the ability companies now have to share consumer information with their affiliates. A consumer who does not do business with a company's affiliate cannot give "express invitation or permission" to the affiliate to call the consumer for telemarketing purposes. The Commission should not extend the exemption by rule.

Exemptions

Do Not Call legislation is only meaningful if it is comprehensive. Exemptions are essentially holes in the law -- carve-outs from the express request of consumers not to be subject to unwanted, unsolicited calls. Arguments by the telemarketing industry that consumers who appreciate telemarketing calls will be injured are without logic. Inclusion on a Do Not Call list is a purely voluntary act by the consumer; those people who still wish to receive calls need not place their names on a Do Not Call registry. **AARP** recognizes that there may be an expectation by consumers that they will be in contact with businesses with which they have a current, ongoing, voluntary relationship; calls from such businesses are not necessarily unwanted or unsolicited. Calls made from a business with which consumers have had a prior relationship are a different matter altogether. In situations where the consumer has chosen not to continue a business relationship, it cannot be presumed they wish to be solicited by that business again. In fact, it is a source of consumer frustration to be repeatedly asked to buy something from a business when the previous responses have been "no."

In summary, **AARP** believes any exemption for an existing business relationship must be limited to those situations where the relationship is current, ongoing, voluntary, involves an exchange of consideration, and has not been terminated by either party. Such relationships demonstrate that

consumers have chosen to be customers of that company. Past inquiries or applications alone are not an indication that the consumer has chosen to do business with that company, and certainly do not mean the consumer wishes to be called, despite being on a Do Not Call list. Consumers will have no incentive to seek information from businesses in an attempt to comparison shop if, by doing so, they subject themselves to unwanted and often intrusive telemarketing calls. The spirit of a Do Not Call law will not be met by creating exemptions that facilitate telemarketing.

Wireless

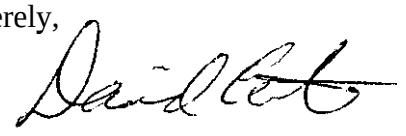
The Commission also seeks comment on how wireless telephone communications should be treated under the TCPA. AARP believes that wireless telephone numbers should be considered "residential telephone numbers" for the purposes of the Commission's rules on telephone solicitations. **As** the use of wireless phones for both local and long distance calling is becoming more and more prevalent, it is only natural to assign the same rules and requirements to telemarketers accessing consumers through their wireless phones as exist for wireline communications. The FTC has made a decision to provide the opportunity for consumers to place their wireless numbers on the national Do Not Call registry. We urge the FCC to tailor its rules to treat wireless numbers the same as wireline numbers as they pertain to jurisdiction within the TCPA.

Conclusion

The Federal Communications Commission is to be commended for the issuance of this Notice of Proposed Rulemaking and for its effort to amend the Telephone Consumer Protection Act. In the eleven years since the implementation of the TCPA, AARP and other organizations have worked hard to ensure its effectiveness. Adoption of the Commission's recommendations will go a long way toward providing consumers with the protection they deserve from unwanted telephone calls.

We look forward to working with Commission staff and others in the ensuing months to address many of the concerns outlined today. We urge the Commission to adopt the revised rule while incorporating the changes we have advocated. If you have any questions, please feel free to contact me or call Jeff Kramer of the Federal Affairs staff at 202/434-3800. Thank you.

Sincerely,



David Certner
Director
Federal Affairs