

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

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

COMMENTS OF STONEBRIDGE LIFE INSURANCE COMPANY

Stonebridge Life Insurance Company (“Stonebridge”), by counsel and pursuant to the Further Notice of Proposed Rulemaking in the captioned proceeding, 1/ hereby comments on FCC efforts to “maximize consistency” with the Federal Trade Commission’s (“FTC”) recent revisions to its Telemarketing Sales Rule (“TSR”). 2/

Stonebridge respectfully submits that, in order to truly “maximize consistency” with the FTC’s rules as Congress mandated in the Do-Not-Call Implementation Act, the FCC must recognize, as did the FTC, that federal telemarketing regulations must give way to state law where it directly controls the telemarketing of insurance. As Stonebridge explains below, any prospect of FCC regulation of telemarketing by insurance providers epitomizes the pitfalls inherent in attempting to shoehorn rules adopted under the TCPA to fit FTC action taken under the Telemarketing Act, which is a part of the Federal Trade Commission Act and subject to its associated limitations and jurisdictional exemptions.

1/ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd 6071 (2003).

2/ *See id.* ¶ 6 (citing Do-Not-Call Implementation Act, Pub. L. 108-10, 117 Stat. 557 (2003) (requiring FCC reconciliation with FTC amendments to 16 C.F.R. § 310.4 and calling for FCC to “maximize consistency” therewith)).

BACKGROUND

The FTC's authority to adopt telemarketing rules, with which the Do-Not-Call Implementation Act now requires the FCC to "maximize consistency," is subject to explicitly stated limitations under the Telemarketing Act. The Telemarketing Act is part of the FTC Act, and is subject to various jurisdictional limits that prevent the FTC from regulating entities such as banks, savings associations, federal credit unions, regulated common carriers, and non-profit entities.^{3/} The law also includes an exemption provided for the "business of insurance" as required by the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15. Section 1012 of the McCarran-Ferguson Act states that "[n]o act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any state for the purpose of regulating the business of insurance." *Id.* § 1012. It has long been settled that insurance advertising, of which telemarketing is a function, constitutes the "business of insurance" under McCarran-Ferguson.^{4/}

The McCarran-Ferguson mandate that removes the "business of insurance" from FTC jurisdiction generally, and from the TSR by extension, differs from other exemptions in that it is a "functional" exemption while the others are entity-based. An "entity-based" exemption was analyzed in *Minnesota ex rel. Hatch v. Fleet Mortgage Corp.*, which held the TSR applied to a bank subsidiary engaged solely in mortgage loan servicing because the Gramm-Leach-Bliley

^{3/} See, e.g., *Telemarketing Sales Rule*, 68 Fed. Reg. 4580, 4581 & n.19 (2003). See also 15 U.S.C. § 6105(a) ("this chapter shall be enforced ... under the Federal Trade Commission Act ... [such that] no activity ... outside the jurisdiction of that Act shall be affected") (referencing 15 U.S.C. § 41 *et seq.* ("FTC Act")).

^{4/} See *FTC v. National Cas. Co.*, 357 U.S. 560 (1958); *Colonial Life & Accident Ins. Co. v. American Family Life Assurance Co.*, 846 F.Supp. 454 (D.S.C.1994). See also *Sabo v. Metropolitan Life Ins. Co.*, 137 F.3d 185, 191 (3d Cir. 1998) ("whatever the precise contours of the insurance business phrase may be, there is nothing more basically 'insurance' than the sale of an insurance contract and the insurer's unique approach in trading, advertising, or valuing [it]").

Act exempts banks from FTC jurisdiction, but not entities “controlled by a bank that is not itself a bank.” 181 F.Supp.2d 995, 997-1000 (D. Minn. 2001). By contrast, McCarran-Ferguson examines the conduct of an entity to determine whether it is engaged in the “business of insurance” rather than whether the entity is an insurance company, or any other particular kind of business. The FTC has itself cited this distinction between functional and entity-based exemptions. *See FTC v. Saja*, 1997 WL 703399 *1 (D. Ariz. 1997) (“Plaintiff argues ... that the exemption for not-for-profit corporations, like other FTC Act exemptions for banks, common carriers, etc., is directed at the status of the entity not the conduct to be regulated”).

The FTC’s treatment of the McCarran-Ferguson “business of insurance” exemption was less clear when it adopted the TSR and when it recently amended the rules. The FTC acknowledged that the TSR “does not apply to the business of insurance to the extent that such business is regulated by State law,” ^{5/} but in declining to exempt from the TSR parties that act on behalf of exempt organizations, it did not discuss the unique business of insurance exemption. ^{6/} The FTC took virtually the same approach recently when it amended the TSR. *See Telemarketing Sales Rule*, 68 Fed. Reg. 4580, 4586-87 (2002) (“*Amended TSR Order*”). The FTC explained that “the exemption enjoyed by [some] entities does not extend to any third-party telemarketers who may make or receive calls on behalf of those exempt entities,” such that “when an exempt ... institution ... conducts its telemarketing campaign using a third-party

^{5/} *Telemarketing Sales Rule; 16 C.F.R. Part 310*, 60 Fed. Reg. 43842, 43843 (1995) (citing 15 U.S.C. 1012(b)).

^{6/} *Id.* The FTC offered only the example of banks and airlines, which are not subject to the rules, “because they are exempt under section 5 of the FTC Act,” while “a nonbank company that contracts with a bank to provide services on behalf of the bank, and a non-airline company that contracts with an airline to provide services on behalf of the airline, are not exempt from the FTC Act” or the rules implementing it. *Id.*

telemarketer not exempt from the Rule, then that campaign is subject to the provisions of the TSR.” *Id.* at 4587.

This discussion did not clarify whether the amended TSR applies to insurance telemarketing by third-party call centers, and Stonebridge filed suit seeking, *inter alia*, a declaratory ruling that such telemarketing constitutes the “business of insurance” exempt from FTC jurisdiction under the McCarran-Ferguson Act. *See Stonebridge Life Ins. Co. v. FTC*, No. 03-739 (D.D.C. filed March 21, 2003). Responding to this complaint, the FTC clarified its position, stating that “the status of the entity that engages in practices prohibited by the Rules is not dispositive of the McCarran-Ferguson Act restriction,” ^{7/} and that “with respect to activities ... protected by the McCarran-Ferguson Act, they are protected *whether they are engaged in by insurance companies or those telemarketing on behalf of insurance companies.*” ^{8/} Stonebridge has recently filed, pursuant to 16 C.F.R. § 1.1 *et seq.*, a request for an advisory opinion by the FTC to confirm its position as explained in the litigation. ^{9/}

Stonebridge notes that the FCC’s notice of proposed rulemaking in this docket contains a similar blurring of the “business of insurance” exemption. *See Implementation of the Telephone Consumer Protection Act of 1991*, 17 FCC Rcd 17459, ¶ 10 (2002). In the notice, the Commission describes the exemptions from FTC jurisdiction as “including banks, credit unions, savings and loans, common carriers, nonprofit organizations, and insurance *companies.*” *Id.*

^{7/} Defendant Federal Trade Commission’s Opposition to Plaintiff’s Motion for a Temporary Restraining Order, at 9, filed March 26, 2003, in *Stonebridge Life Ins. Co. v. FTC*, No. 03-739 (D.D.C. filed March 21, 2003) (copy attached).

^{8/} *Stonebridge Life Ins. Co. v. FTC*, No. 03-739, Tr. at 17 (D.D.C. Mar. 28, 2003) (emphasis added) (copy attached).

^{9/} A copy of Stonebridge’s request for an advisory opinion is attached.

(emphasis added). This misstates the McCarran-Ferguson exemption for the “business of insurance” as an entity-based exemption rather than the functional exemption that the Act provides, and that the FTC now seems to agree, since Stonebridge sought to enjoin the Amended TSR, exempts telemarketing whether carried out by or on behalf of an insurance company.

DISCUSSION

The business of insurance is exempt from regulations under the FTC Act because it is extensively regulated by the states already, and the same reasoning applies to the telemarketing of insurance products and services. The exemption is necessary so companies like Stonebridge do not have to face potentially competing obligations imposed by federal and state regulators. In seeking a temporary restraining order against enforcement of the amended TSR to telemarketing by third-party call centers on behalf of insurance providers, Stonebridge demonstrated that state insurance departments routinely review its telemarketing scripts, and it provided several examples of consent orders or settlements that would create direct conflicts if the new TSR obligations were to apply. This is precisely what the McCarran-Ferguson Act is designed to avoid by exempting the business of insurance from the FTC’s jurisdiction.

If the FCC decides to adopt new telemarketing rules that apply to sales calls made as part of the business of insurance, the regulations will conflict with McCarran-Ferguson. At least one court already has held that McCarran-Ferguson precludes application of the TCPA to the marketing of insurance products and services. *The Chair King, Inc. v. Houston Cellular Corp.*, 1995 WL 1760037 (S.D. Tex. 1995), *vacated on other grounds* 131 F.3d 507 (5th Cir. 1997). The FCC thus faces the same jurisdictional bar as the FTC, and it faces the same practical problems as well.

In order for the FCC to maintain consistency with the FTC rules, the FCC should recognize that, just as with the FTC, the McCarran-Ferguson Act bars application of FCC telemarketing rules to the business of insurance. *See* 15 U.S.C. § 1012(b). Unlike the FTC, however, the FCC should deal with the issue more squarely by clearly stating the FCC's telemarketing rules do not apply to telemarketing calls made by or on behalf of insurance providers to sell insurance products or services. This approach is the most consistent with not only the amended TSR, but with the McCarran-Ferguson Act as well.

For non-insurance products, except as described herein, Stonebridge does not object to the FTC's recent amendments to its TSR. The purpose of this request for comments was to examine how the FCC could improve the TCPA rules to maximize consistency with Section 310.4(b) of the amended TSR, and enhance consumer privacy protections while avoiding the imposition of unnecessary burdens on the telemarketing industry, consumers and regulators. However, the amended TSR requires sellers or telemarketers using predictive dialers, an "inevitable side effect" of which is abandoned calls, *Amended TSR Order*, 68 Fed. Reg. at 4641, to employ technology that ensures abandonment of no more than 3% of all calls answered by a person, measured per day per calling campaign. 16 C.F.R. § 310.4(b)(4)(i). This imposes an unnecessary burden on telemarketers, which should be alleviated by eliminating the reference to a per-day measure. 10/

10/ Stonebridge also disagrees with the requirement in the amended TSR that requires telemarketers to obtain the last four digits of the account number to be charged, as this is contrary to the Gramm-Leach-Bliley prohibition on account number sharing and will only serve to unduly confuse consumers. However, this requirement is imposed under Section 310.4(a) of the amended TSR, not Section 310.4(b) (with which the Implementation Act directs the FCC to maximize consistency), so this provision is outside the scope of FCC attention in this proceeding.

CONCLUSION

For the foregoing reasons, Stonebridge Life Insurance Company respectfully submits that the Commission should adopt rules and/or a statement specifically recognizing that the McCarran-Ferguson Act bars the application of FCC telemarketing rules to the business of insurance.

Respectfully submitted,

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