

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

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

**COMMENTS OF THE
AMERICAN TELESERVICES ASSOCIATION**

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The American Teleservices Association (“ATA”) hereby submits comments in response to the Further Notice of Proposed Rulemaking in the captioned proceeding. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd 6071 (2003) (“FNPRM”). The FNPRM asks what the Commission can do to “maximize consistency” with the Federal Trade Commission’s (“FTC”) recent amendments to the Telemarketing Sales Rule (“TSR”) as required by Congress in the Do-Not-Call Implementation Act.

INTRODUCTION AND EXECUTIVE SUMMARY

Much has happened since the Commission issued its *Notice of Proposed Rulemaking* in this proceeding last September. In December the FTC unveiled its amended Telemarketing Sales Rule (“Amended TSR”), which included a national “do-not-call” registry. *Telemarketing Sales Rule*, 68 Fed. Reg. 4580 (January 29, 2003). In early 2003, Congress considered, and ultimately passed, legislation authorizing the FTC to raise an estimated \$18 million dollars to compile, operate and maintain the registry. See Do-Not-Call Implementation Act, Pub. L. No. 108-10, 117 Stat. 557 (2003) (“Implementation Act”). The Implementation Act also directed the FCC to complete its

rulemaking under the Telephone Consumer Protection Act (“TCPA”) within 180 days (*i.e.*, by September 7, 2003), and to “consult and coordinate” with the FTC to “maximize consistency” between the two agencies’ “do-not-call” regulations. *Id.* § 3.

Under these circumstances, it might be tempting for the Commission to assume there is political momentum that will make its adoption of corresponding “do-not-call” list all but inevitable. Tempting, perhaps, but wrong. Contrary to such a superficial take on recent events, Congress made clear that it did not intend to dictate the outcome of the FCC proceeding, and it reaffirmed the TCPA’s requirement that the FCC engage in a constitutional balancing that protects the First Amendment rights of telemarketers while promoting residential tranquility. Indeed, the course Congress took is constitutionally required. Courts have invalidated previous efforts to use appropriations and authorization legislation to short-circuit FCC rulemaking proceedings that involve First Amendment questions, as this one does.

I. THE “DO-NOT-CALL” IMPLEMENTATION ACT REAFFIRMS THE COMMISSION’S OBLIGATION TO CAREFULLY BALANCE CONSTITUTIONAL INTERESTS IN IMPLEMENTING THE TCPA

The Commission can obtain the most useful guidance for how to proceed in this docket simply by consulting the text and legislative history of the TCPA and the Implementation Act. The law requires the FCC to strike a careful balance that respects consumer preferences without unduly restricting telemarketing. The TCPA directs the FCC to weigh individual privacy rights, public safety interests, and commercial freedoms of speech and trade, and to adopt regulations that protect subscribers’ privacy rights without intruding unnecessarily and inappropriately on First Amendment rights. As part of this balancing process, Congress directed the FCC to consider the impact of certain

categories of exempt calls. In adopting the Implementation Act, Congress took care to preserve the obligation to protect the First Amendment rights of telemarketers.

A. The Plain Language and Legislative History of the Implementation Act Require the Commission to Engage in Careful Balancing

The TCPA sets forth a number of criteria the Commission must satisfy in adopting any rules to implement the Act. Specifically, the FCC is required to:

- compare and evaluate alternative methods and procedures (including the use of electronic databases, telephone network technologies, special directory markings, industry-based or company-specific “do not call” systems, and any other alternatives, individually or in combination) for their effectiveness in protecting such privacy rights, and in terms of their cost and other advantages and disadvantages;
- evaluate the categories of public and private entities that would have the capacity to establish and administer such methods and procedures;
- consider whether different methods and procedures may apply for local telephone solicitations, such as local telephone solicitations of small businesses or holders of second class mail permits;
- consider whether there is a need for additional Commission authority to further restrict telephone solicitations, including those calls exempted under [the TCPA], and, if such finding is made and supported by the record, propose specific restrictions to Congress; and to
- develop proposed regulations to implement the methods and procedures that the Commission determines are most effective and efficient to accomplish the purposes of Section 227.

47 U.S.C. §§ 227(c)(1)(A)-(E). These criteria formalize the statutory and constitutional requirements that regulations must be appropriately balanced. See S. Rpt. 102-177 at 6 (“The Committee expects the Commission will issue regulations that protect

subscribers' privacy rights without intruding unnecessarily and inappropriately on the First Amendment rights of the speaker.”).

Although the Implementation Act established a specific date by which the Commission must conclude this rulemaking proceeding, ^{1/} it was careful not to require a particular result or to alter the statutory criteria for reaching a decision. The legislative history made clear it is “not the intent” of the Implementation Act to “dictate the outcome of the FCC’s pending rulemaking.” See Do-Not-Call Implementation Act, H. Rep. 108-8, 108th Cong., 1st Sess. at 9 (Feb. 11, 2003). The House Energy and Commerce Committee recognized that “the TCPA requires the FCC to consider a variety of factors” and approaching the “do-not-call” issue, and emphasized “[i]t is not the Committee’s intent to foreclose consideration of those factors be enacting this legislation.” *Id.* Accordingly, the Commission remains obligated to make specific findings and carefully balance “individuals’ privacy rights, public safety interests, and commercial freedoms of speech and trade ... in such a way that protects privacy of individuals and permits legitimate telemarketing activities.” *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 17 FCC Rcd 17459, ¶ 1 (2002) (quoting Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(9), 105 Stat. 2394 (1991)).

This intention is confirmed by the changes in proposed language during the legislative process. As originally drafted, Section 2 of the bill that became the Implementation Act read as follows:

Not later than 180 days after the enactment of this Act, the Federal Communications Commission shall issue a final rule

^{1/} The date the Act specifies falls on September 7, 2003, a Sunday. Consequently, the Commission must terminate the proceeding by September 8, 2003.

amending its regulations under the Telephone Consumer Protection Act (47 U.S.C. et seq.), that shall be substantially similar to the rule promulgated by the Federal Trade Commission (16 C.F.R. 310.4(b)).

See Legislative Draft (Jan. 23, 2003), attached (emphasis added). This directive was changed in H.R. 395 to require instead that “the Federal Communications Commission shall consult and coordinate with the Federal Trade Commission to maximize consistency with the rule promulgated by the Federal Trade Commission.” Implementation Act § 3 (emphasis added). The Committee further clarified the meaning of the substitute language as an attempt “to prevent situations in which legitimate users of telephone marketing are subject to conflicting regulatory requirements.” H. Rep. 108-8 at 9.

The law that ultimately emerged is a long way from a mandate for the FCC to simply follow the FTC’s lead in the “do-not-call” area. The Committee Report even stressed that “because the FCC is bound by the TCPA, it is impossible for the FCC to adopt rules identical to the FTC’s TSR.” *Id.* at 4. The Committee described its “primary concern” as being “the possibility for conflicting regulations” and observed that how “these different regulatory regimes [of the FTC, the states and the FCC] can complement each other and work as one national program is still unclear.” *Id.* at 3. As explained below, the Commission would most effectively serve this statutory mandate to avoid inconsistency not by trying to emulate the FTC, but by retaining and updating its existing “do-not-call” requirements and by clarifying the rules’ jurisdictional scope.

B. Interpreting The Implementation Act as a Mandate to Duplicate the FTC’s “Do-Not-Call” Registry Would be Unconstitutional

Not only is it clear that Congress did not intend to require the Commission simply to fall in line behind the FTC, it is also manifest that it would have violated the First Amendment had it tried to do so. The Commission has had direct experience with this in the past when Congress attempted to compel the FCC to reach a particular conclusion in a rulemaking proceeding with First Amendment implications. In *Action for Children’s Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991), the D.C. Circuit invalidated a congressionally-mandated ban on “indecent” broadcasts where Congress had tried to use appropriations language to direct the outcome of an ongoing rulemaking proceeding. See *id.* at 1507 (citing Pub. L. No. 100-459, § 608, 102 Stat. 22828 (1988)).

As the court described it, “[b]efore the Commission could carry out [its] mandate, Congress intervened” to direct the outcome of the FCC proceeding. *Id.* The court vacated the Commission’s decision, holding that “[t]he fact that Congress itself mandated the total ban on broadcast indecency does not alter our view that ... such a prohibition cannot withstand constitutional scrutiny.” *Id.* at 1509. It concluded that “neither the Commission’s action ... nor the congressional mandate the prompted it can pass constitutional muster.” *Id.* While the Court recognized the “Commission’s constraints in responding” to Congress’ mandate, and that it would be “unseemly for a regulatory agency to throw down the gauntlet ... to Congress,” it held that “Congress’ action ... cannot preclude the Commission” from carrying out constitutional obligations. *Id.* at 1509-10. The court further held that:

While we do not ignore Congress' apparent belief that a total ban on broadcast indecency is constitutional, it is ultimately the judiciary's task, particularly in the First Amendment context, to decide whether Congress has violated the Constitution.

Id. at 1509 (citing *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115 (1989)) (internal quotation omitted). The same analysis applies here, even if the TCPA did not already direct the FCC to conduct a careful balance of the constitutional interests involved.

It would be no more permissible for the Commission to interpret the Implementation Act as an informal signal directing it to adopt a national "do-not-call" registry on the theory that it would be politically expedient to do so. The D.C. Circuit has seen such actions in the past, and has shown no patience with explanations from the FCC's General Counsel that "we are not talking law school enforcement, legal textbook arguments; we're talking political reality here." *Meredith Corp. v. FCC*, 809 F.2d 863, 873 (D.C. Cir. 1987). Such reasoning is "the very paradigm of arbitrary and capricious administrative action," particularly when it ignores significant constitutional issues. As the D.C. Circuit noted in *Meredith*, "no precedent ... permits a federal agency to ignore a constitutional challenge to the application of its own policy merely because the resolution would be politically awkward." 809 F.2d at 874.

Accordingly, the Commission must carefully consider the record in this proceeding under the TCPA's statutory criteria and take action consistent with the inherent constitutional constraints. Moreover, it must restrict itself to adopting only those rules that comport with the First Amendment, even if doing so precludes the Commission from adopting "do-not-call" rules that parallel those in the Amended TSR.

II. THE COMMISSION CAN BEST “MAXIMIZE CONSISTENCY” BY RETAINING AND UPDATING ITS EXISTING “DO-NOT-CALL” REQUIREMENTS

The best way for the Commission to discharge its duty to maximize consistency with the Amended TSR under the Implementation Act, conduct the balancing required by the TCPA, and keep within the confines of the First Amendment is to eschew adopting a national “do-not-call” registry and maintain its current “do-not-call” regime. The Implementation Act not only avoided dictating the outcome of the this proceeding, it did nothing to strengthen the case for a national “do-not-call” registry. As ATA has already demonstrated, there is no record of non-compliance with the FCC’s existing company-specific “do-not-call” rules, those rules are effective, and greater enforcement and consumer education efforts will cure any perceived defects with them. Nothing in the Implementation Act or its legislative history adds to or undermines these facts already in the record. In addition, the FTC made virtually no findings sufficient under the First Amendment to justify the national “do-not-call” registry. Accordingly, reaffirming and strengthening the existing rules per ATA’s recommendations, and clarifying exclusive FCC jurisdiction over predictive dialers, would most effectively carry out the Implementation Act and other statutory obligations.

A. The Commission May Adopt ATA’s Recommendations and Still Maintain Consistency With Virtually All the FTC’s Rules

In its initial comments ATA made a number of suggestions to reaffirm and strengthen the FCC’s existing rules under the TCPA. They include:

- **The Commission should retain existing rules requiring telemarketers to maintain company-specific “do-not-call” lists.** The existing rules strike the appropriate balance required by the TCPA between privacy interests and basic rights of telemarketers. Company-specific "do-not-call" lists preserve

the industry's ability to persuade its audience while respecting consumer rights to cut off further contact. The Commission could improve flexibility of company-specific lists by enabling individuals to sign up online or by calling a toll-free number.

- **The Commission should reduce the "do-not-call" request retention period to two years.** This change in the rule is necessary given the frequency with which telephone numbers change or are reassigned, and the lack of record support for the original ten-year requirement.
- **The Commission should retain its current definition of "established business relationship" under the TCPA and FCC rules.** The existing definition accurately reflects the preference of telephone subscribers for dealing with companies in which have demonstrated an interest.
- **The Commission should retain the existing time of day restrictions that prohibit telemarketing calls to residences before 8 a.m. and after 9 p.m. local time.** The existing limits reflect industry practice in effect before the TCPA rules were adopted. Reducing the hours during which companies can attempt to market goods or services telephonically, particularly during the evening hours, would unduly restrict telemarketing.
- **The Commission should clarify that its rules under the TCPA – and not state laws – govern teleservices that originate in one state and terminate in another.** The Communications Act grants the FCC exclusive authority over interstate and foreign communications, and that states authority is limited to purely intrastate calls.
- **The Commission should take steps to place teleservices calls to wireline and wireless phones on more equal footing.**
- **The Commission should apply its informal complaint rules to telemarketing companies.** Bringing teleservices within the informal complaint rules would aid consumers by streamlining and coordinating the complaint process for all issues. It would also help telemarketers in their compliance efforts by providing notice about consumer concerns.

An FCC decision to simply adopt no new rules and to adopt only those slight modifications suggested above is entirely consistent with FTC regulations. The current FCC rules are entirely consistent with the FTC's new regime. The TCPA rules generally impose restrictions on the use of autodialers and prerecorded messages, company-specific "do-not-call" requirements, and a time-of-day restriction. See

generally 47 C.F.R. § 64.1200. The FTC has indicated it is content to leave the regulation of prerecorded messages to the FCC, *see Telemarketing Sales Rule*, 68 Fed. Reg. 4580, 4587 (2003) (“*Amended TSR Order*”), so there can be no inconsistency with the FTC’s rules in that regard. The FTC also retained its company-specific “do-not-call” and time-of-day restrictions, which were based on the FCC’s current rules, which in turn the FTC relied upon in adopting the original TSR. *Telemarketing Sales Rule*, 60 Fed. Reg. 43842, 43855 (1995). Accordingly, reaffirming the Commission’s existing rules in these areas would leave the FCC and FTC rules in perfect harmony and would not create potential inconsistencies.

With respect to ATA’s recommendation regarding adoption of a revised two-year retention period for company-specific “do-not-call” lists, no retention period is specified in the FTC’s rules, so changing the FCC retention period from the current ten years to two years would make the FCC rule no less consistent with the FTC rule than it has been for the last eight years since the FTC adopted the TSR. Similarly, the agencies’ respective “established business relationship” exemptions differ in that the FCC does not specify a terminal point for such relationships while the FTC does, *compare* 47 C.F.R. § 64.1200(f)(4) *with* 16 C.F.R. § 310.2(n), so the FCC and FTC exemptions would not conflict *per se* even if the FCC takes no action. In addition, subjecting teleservices calls to wireline and wireless phones to similar treatment would comport with the FTC’s approach. *See Amended TSR Order*, 68 Fed. Reg. at 4632.

Finally, nothing in the FTC’s adoption of revisions to the TSR would be inconsistent with the FCC clarifying that its rules under the TCPA – and not state laws – govern teleservices that originate in one state and terminate in another. In fact, the FTC

took pains to distinguish between the interstate telemarketing calls, over which federal agencies may assert jurisdiction, and intrastate calls. *E.g., id.* at 4587. It also specifically noted the need to “harmonize” federal regulation of telemarketing with state regimes, *id.* at 4665, and Congress reinforced this need in the Implementation Act. ^{2/} Congress specifically noted that “[h]ow these different regulatory regimes can compliment each other and work as one national program is still unclear.” *Id.* An FCC statement that at least specifies that federal, not state, rules apply to telemarketing calls originating in one state and terminating in another would do much to resolve this particular area of confusion that even the Implementation Act found difficult to address.

B. The Commission Must Assert Exclusive Jurisdiction Over Predictive Dialers Regardless of the Implementation Act

There is only one area in which ATA’s recommendations for the FCC necessarily conflict with the Amended TSR: the regulation of predictive dialers. However, as ATA has pointed out, exclusive FCC jurisdiction over predictive dialers is required by law regardless of the Implementation Act or the FTC’s claim of authority. ATA has demonstrated that predictive dialers are not “automatic telephone dialing systems” under the TCPA, but that they are “customer premises equipment” (“CPE”) because they reside at the location of a seller of goods or services or its teleservices provider and exist solely to originate, route, and terminate telecommunications traffic. See 47 U.S.C. 153(14). See *also* ATA Comments at 117; ATA Reply at 57. Consequently, predictive dialers fall within the exclusive jurisdiction the FCC has

^{2/} See Implementation Act § 4(b) (requiring annual report on “progress of coordinating ... with similar registries established and maintained by the various States”); H. Rep. 108-8 (“FTC’s rule ... is only one piece of a multi-jurisdictional puzzle” involving “twenty-seven states [that] maintain some form of a do-not-call program”).

maintained over CPE for at least three decades,^{3/} and the FTC has improperly asserted authority to regulate predictive dialers.

The FTC's assertion of authority to regulate predictive dialers is among the issues ATA has raised in its challenge to the Amended TSR in federal district court. See *Mainstream Marketing, Inc. v. FTC*, No. 03-N-0184 (D. Colo. filed Jan. 29, 2003). In its recent motion for summary judgment, ATA explained that the primacy of FCC authority of telecommunication equipment such as predictive dialers is well settled. ATA noted, for example, *Macom Prods. Corp. v. AT&T*, which involved "an automatic telephone dialing device known as the 'Name Caller' [that] enable[d] its user to dial automatically ... preselected telephone numbers," and referral to the FCC under primary jurisdiction. 359 F.Supp. 973, 975, 977 (C.D. Cal. 1973). In referring the case to this Commission, the court specifically noted "the FCC possesses the expertise in the field of wire communications to decide the technical issues raised." *Id.* at 977. The same is clearly true of predictive dialers, which likewise allow users to dial preselected telephone numbers (albeit with a much expanded range and in much more complex patterns than were possible thirty years ago).^{4/}

^{3/} See *Essential Communications Sys., Inc. v. AT&T*, 610 F.2d 1114, 1116 (3d Cir. 1979) (citing *Telerent Leasing Corp.*, 45 F.C.C.2d 204 (1974) *aff'd sub nom. North Carolina Util. Comm'n. v. FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976), *recon. denied*, 552 F.2d 1036 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977)). See also 47 U.S.C. § 152(b) (excluding, *inter alia*, Section 227 from general reservation of state jurisdiction over intrastate communications), and *id.* 227(e)(1) (excluding, *inter alia*, "technical standards," consecrated to FCC jurisdiction, from preservation of "more restrictive" state telemarketing law).

^{4/} The FTC's inexperience regulating telecommunications equipment helps explain why it adopted regulations that presented the teleservices industry so much difficulty that the agency felt constrained to first stay part, and then later all, its predictive dialer rules. See *Telemarketing Sales Rule*, 68 Fed. Reg. 16414 (April 4, 2003); Letter from

Consequently, ATA's recommendation that the FCC should clarify that it holds – and will exercise – exclusive authority over CPE is well-supported, and ATA expects that point to be borne out during judicial review of the Amended TSR. Given that the FTC has improperly exercised jurisdiction over predictive dialer regulation, ATA submits the Commission should not deem itself constrained by the Implementation Act to mirror the Amended TSR, or otherwise forfeit the primacy of FCC oversight, with respect to predictive dialers. As with the other areas discussed above, the FCC should simply refrain from adopting new rules, or if it feels it must adopt regulations, it should do so in a manner that gives due consideration to the type of equipment regulated and the industry consensus on the type and level of regulation that is feasible.

Donald S. Clark, Secretary, FTC, to Robert Corn-Revere, Counsel, ATA, March 14, 2003 (available at www.ftc.gov/os/2003/03/030314ataletter.htm); Letter from Donald S. Clark, Secretary, FTC, to Douglas H. Green, Counsel, DMA, March 14, 2003 (available at www.ftc.gov/os/2003/03/030314dmaletter.htm).

CONCLUSION

For the foregoing reasons, ATA respectfully submits that the Commission should conclude the current rulemaking under the criteria prescribed by the TCPA. It may “maximize consistency” with the FTC’s Amended TSR by retaining its existing company-specific “do-not-call” approach.

Respectfully submitted,

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