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

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| In the Matter of | ) | |
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| Rules and Regulations Implementing the | ) | CG Docket No. 02-278 |
| Telephone Consumer Protection Act of 1991 | ) | |
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# COMMENTS OF NEXTEL COMMUNICATIONS, INC.


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## TABLE OF CONTENTS

SUMMARY ..... ii

DISCUSSION. ..... 2

I. The Commission Should Adopt the FTC's Framework for A National Do-Not-Call Registry ..... 2

A. The Commission Should Retain and Apply Its Current EBR Rule to the National Do-Not-Call Regime. ..... 3

B. The Commission Should Provide a Safe Harbor for Businesses that Make a Good-Faith Compliance Effort ..... 5

II. The Commission Should Preempt State Do-Not-Call Laws ..... 6

III. The Commission Should Codify the Basic Principle that, Like the FTC's TSR, the TCPA Rules Do Not Apply to Solicitations of Businesses, Except where Specified by Statute ..... 9

IV. Any Commission Regulation of Call Abandonment Rates Should Be No More Restrictive than the Maximum Three Percent Abandonment Rate Established by the FTC. ..... 11

CONCLUSION ..... 18

## SUMMARY

Congress adopted the Do-Not-Call Implementation Act to ensure uniformity and efficiency in the regulation of telemarketing activities. The Telemarketing Sales Rule ("TSR") recently amended by the Federal Trade Commission ("FTC") established a comprehensive framework to regulate the telemarketing activities of entities under its jurisdiction. In implementing the Telephone Consumer Protection Act ("TCPA"), the Federal Communications Commission ("FCC" or "Commission") can protect consumer privacy and promote regulatory efficiency by adopting many aspects of the TSR framework. This is particularly true for the national do-not-call registry that the FTC has taken significant steps toward establishing.

Most features of the TSR follow the same principles as the TCPA rules. For example, both sets of rules recognize that a customer's established business relationship ("EBR") with a company signifies that customer's consent to receiving calls from that company, notwithstanding his/her registration on the national do-not-call list. Other features, such as the TSR's safe harbor provisions for businesses that diligently work to comply with the telemarketing rules, provide welcome models for the FCC. These safe harbor provisions can address the recent problems involving the spawning of a telemarketing class action industry focused on reaching "deep pocket" companies rather than restraining bad actors or protecting consumers. Additionally, the FTC model demonstrates the benefits of providing clarification through codification of well-established principles, such as the tenet that the FTC and FCC telemarketing rules are intended by Congress to protect consumers' privacy and do not apply to telemarketing directed at businesses (except in areas expressly specified by statute).

Yet there remains some areas where the FCC's special industry expertise and statutory mandate support adherence to a different role and approach than the FTC. For example, the FTC

has limited the duration of the EBR to only eighteen months following a prior purchase and three months following any other contact establishing a business relationship. As discussed by Nextel and other parties in response to the FCC's initial notice of rulemaking in this proceeding, these overly restrictive time limits would frustrate the legitimate telemarketing activities of telecommunications carriers, which compete in markets with high customer turnover and typically use annual or multi-year service agreements. Consequently, the FCC should adhere to its existing flexible EBR rule for common carriers and other industries that Congress has entrusted to the FCC's jurisdiction rather than the FTC's jurisdiction.

Congress, in the TCPA, also focused on the FCC as the proper authority to establish a national do-not-call registry, and it specified that the states must follow the FCC framework if the FCC implements such a registry. Congress, the FTC and FCC have been unanimous in emphasizing the importance of implementing a one-stop approach to replace a layered patchwork of federal and state do-not-call requirements that would impose unnecessary costs, inefficiencies and confusion on consumers and businesses. When the FTC decided in January 2003 to implement a national registry, it stated that it was reserving action on preempting state requirements because it hoped that the states would respond to its decision with "a relatively short transition period leading to one harmonized 'do-not-call' registry system and a single set of compliance obligations." Unfortunately, since that time, the states have continued to move forward with separate do-not-call legislation. With the benefit of this experience and the specific mandate of the TCPA, the FCC should preempt state do-not-call rules in order to ensure that consumers and businesses are not subject to disparate federal and state requirements. In this way, the FCC can satisfy Congress' directive to provide uniformity in telemarketing regulation, in order to minimize inconsistency and maximize efficiency for consumers and businesses alike.

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To: The Commission

**COMMENTS OF NEXTEL COMMUNICATIONS, INC**

Nextel Communications Inc. ("Nextel"), by its attorneys, and pursuant to Section 1.415(c) of the Federal Communications Commission's ("FCC" or "Commission") rules, hereby submits these Comments in response to the Further Notice of Proposed Rulemaking in the above-captioned proceeding.[1] Nextel supports the Commission's adoption of most aspects of the regulatory model provided by the Federal Trade Commission's ("FTC") recently amended Telemarketing Sales Rule ("TSR"), particularly its plans to implement a national do-not-call registry and safe harbor provisions.[2] At the same time, the FCC's special industry expertise and statutory mandate under the Telephone Consumer Protection Act ("TCPA")[3] require adherence to a different role and approach than the FTC on certain issues. Specifically, in recognition of the competitive needs of the telecommunications industry under the FCC's jurisdiction, the

[1] Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, *Further Notice of Proposed Rulemaking*, CG Docket No. 02-278, FCC 03-62 (rel. Mar. 25, 2002) (the "*FNPRM*").

[2] 16 C.F.R. § 310.4(b).

[3] Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991), *codified at* 47 U.S.C. § 227. The TCPA amended Title II of the Communications Act of 1934, 47 U.S.C. § 201 *et seq.*

Commission should adhere to its current established business relationship ("EBR") rule, rather than jettisoning it in favor of the FTC rule. Likewise, while the FTC has reserved action on preemption of state do-not-call registries, both the lessons learned from the FTC experience, and the TCPA's identification of the FCC as the proper entity to establish a national do-not-call regime which the states must follow, underscore the FCC's authority and need to preempt state requirements. By taking these actions, the FCC will advance Congress' intent in implementing the Do-Not-Call Implementation Act ("Do-Not-Call Act") by ensuring uniformity and efficiency in the regulation of telemarketing activities.[4]

## DISCUSSION

### I. The Commission Should Adopt the FTC's Framework for A National Do-Not-Call Registry

The FTC has developed a comprehensive framework for the establishment of a fully automated national do-not-call registry, and Congress has granted its imprimatur to that framework by enacting legislation to authorize funding of the registry and by urging FCC coordination with the FTC under the Do-Not-Call Act. Because this framework achieves the same goals espoused by the FCC for a national registry, the FCC's adoption of the FTC model would serve the public interest. Such coordination is particularly appropriate given the high cost of establishing and maintaining a national registry and the regulatory efficiencies achieved from joint implementation by the FCC and FTC. Two aspects of the FTC do-not-call rules are particularly important for the FCC to embrace: (a) application of the EBR rule to the do-not-call registry and (b) adoption of a safe harbor for companies that implement a good faith compliance plan.

[4] Do-Not-Call Implementation Act, Pub. L. No. 108-110, 117 Stat. 557 (2003).

### A. The Commission Should Retain and Apply Its Current EBR Rule to the National Do-Not-Call Regime

The TSR provides that customers' registration on the national do-not-call list shall not terminate a company's ability to call those registered customers with whom they have an established business relationship.[5] The FCC's adoption of this rule is particularly appropriate (indeed, mandated) because, in enacting that statute, Congress specifically "adopted an exception to the general rule – that objecting subscribers should not be called – which enables businesses to continue established business relationships with customers . . .."[6] This congressional and FTC determination is consistent with the reality that a consumer's decision to contact or do business with a company reflects his/her decision to open a line of communication with that company, in contrast to other companies with which the consumer has not chosen to do business. Consequently, the individual relationship between a company and its customer must prevail over the customer's registration on a national do-not-call list that is not company-specific, but merely reflects the registrants' general preference not to receive solicitations from companies with which they have no existing relationship.

While adoption of the FTC's general do-not-call framework is advisable, as discussed in Nextel's Initial Comments and Initial Reply Comments, the FCC should not jettison its well-established EBR definition in favor of the FTC's time-restrictive definition.[7] The FTC adopted

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[5] 16 C.F.R. § 310.2(n).

[6] House Report, H.R. REP. NO. 102-317, at 13 (1991); 47 U.S.C. § 227(a)(3); *see also* Nextel's comments in response to the FCC's initial notice of proposed rulemaking in this proceeding, Comments of Nextel Communications, Inc., at 11-15 (filed Dec. 9, 2002) ("Nextel Initial Comments"), responding to Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, *Notice of Proposed Rulemaking*, 17 FCC Rcd 17459 (2002) (the "*NPRM*").

[7] Reply Comments of Nextel Communications, Inc., at 11-13 (filed Jan. 31, 2003) ("Nextel Initial Reply Comments"), responding to the *NPRM*; Nextel Initial Comments at 11-15.

an EBR that applies for just eighteen months from a prior purchase and three months from any other contact establishing a business relationship. The FTC explained that it imposed these restrictions because (i) the industries under the FTC's jurisdiction did not present any transactions for which "a shorter time period would not serve their [marketing] purposes,"[8] and (ii) the time restrictions applied by the FTC "would be at least as restrictive as the majority of states that have such an exemption, thus achieving greater consistency for both industry and consumers."[9]

We discuss in Section II below the FCC's mandate to achieve consistency in the telemarketing rules, specifically the do-not-call registry and framework, through preemption of disparate state requirements. The FTC's reasoning demonstrates the danger of a patchwork of state regulations: businesses are forced to make their marketing operations nationwide comply with the regulations of the state that adopts the most restrictive set of requirements. Although this outcome usually flows from practical business necessity as interstate businesses can only achieve economies of scale through centralized marketing and customer service operations, the costs to businesses (ultimately passed on to consumers) are no less when it occurs under regulatory fiat. There is no statutory or policy basis for the FCC to adopt the FTC's EBR time restrictions in order to make the Commission's EBR rule equally or more restrictive than the most restrictive state rule.

Furthermore, in addition to directing the FCC to adopt a broad and flexible EBR rule, Congress has mandated that the Commission promote vigorous competition in the

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[8] *See, e.g.*, TSR Statement of Basis and Purpose, *Final Amended Rule*, 68 Fed. Reg. 4580, 4592 (2003).

[9] *Id*. at 4593.

telecommunications sector of the economy.[10] Both of these statutory goals would be undermined if the FCC were to attach arbitrary limits on the period during which carriers may compete for customers who have purchased or inquired about their services in the past. As discussed by Nextel and other parties in comments responding to the *NPRM*, such time restrictions on the EBR would thwart competition in the telecommunications services market by insulating customers from competing offers at precisely the time when such information would be most valuable to consumers – at the end of a long-term service commitment.

For telecommunications services under the FCC's jurisdiction, the substantial harm to competition and the enforcement and administrative burdens that are imposed by arbitrary limitations on the duration of the EBR are not justified by any public benefit. The FCC's company-specific do-not-call requirements already protect consumers by enabling them to terminate an established business relationship at any time. While the FCC's adoption of the FTC's general framework for a national do-not-call registry would promote the public interest and regulatory and administrative efficiency, the same cannot be said for the FTC's recent amendment of its EBR definition. The FCC should adhere to its own well-established EBR definition, which places control over the duration of established business relationships where it belongs – with consumers.

### B. The Commission Should Provide a Safe Harbor for Businesses that Make a Good-Faith Compliance Effort

The FCC also should provide certainty and encourage compliance by providing a safe harbor for companies that make a good faith effort to comply with its telemarketing regulations. The FTC provides that a seller or telemarketer will not be held liable for violating either the

[10] *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

company-specific or national do-not-call registry requirements if it can demonstrate that, as part of its routine business practice, it has established and implemented a do-not-call program that satisfies the FTC's compliance and training criteria.[11] As the FTC recognized in proposing the safe harbor, "strict liability is inappropriate where a company has made a good faith effort to comply with the Rule's requirements and has implemented reasonable procedures to do so."[12]

The safe harbor is especially needed in light of the recent, mushrooming growth of strike suits aimed at obtaining massive damages awards against perceived deep-pocket businesses, notwithstanding these businesses' diligent efforts to comply with the telemarketing rules. As the FCC knows, excessive and unreasonable litigation risks – even the risk of relatively frivolous litigation – do nothing but drain businesses' resources and inhibit competition, innovation, and customer service.[13] The FCC's mandate to promote the growth of the telecommunications industry makes it imperative, particularly in today's challenging economy, for the Commission to adopt a safe harbor to reduce these risks and provide certainty for the industry, at the same time that it encourages compliance with the rules.

The FCC's adoption of the foregoing measures not only will provide consistency with the FTC's rules, but will advance the FCC's mission to protect consumers' privacy while preserving businesses' ability to operate in a competitive, efficient and stable environment.

## II. The Commission Should Preempt State Do-Not-Call Laws

The FCC is uniquely qualified and entrusted to advance another public policy goal espoused by Congress and the FTC – the replacement of a layered patchwork of federal and state

[11] 16 C.F.R. § 310.4(b)(3).

[12] Telemarketing Sales Rule, *Notice of Proposed Rulemaking*, 67 Fed. Reg. 4492, 4520 (Jan. 30, 2002).

[13] Nextel Initial Reply Comments at iii, 13.

regulations with a single, national do-not-call regime. The FCC's fulfillment of its role under the TCPA to preempt disparate state do-not-call rules is vital to prevent the imposition of unnecessary costs and confusion on consumers and businesses.

Congress enacted the Do Not Call Act with the ultimate goal of providing "a one-stop solution to reduce telemarketing abuses."[14] The House Report observed with concern that,

> The FTC's rule, however, is only one piece of a multi-jurisdictional puzzle. Of primary concern to the Committee is the possibility for conflicting regulations. In addition to the FTC's national do-not-call registry, twenty-seven states maintain some form of a do-not-call program, and the FCC requires businesses to maintain company-specific do-not-call lists.[15]

The House Report emphasized that the TCPA explicitly grants the FCC the authority to establish a truly uniform, national do-not-call regime.[16]

The FTC itself "envisions allowing consumers throughout the United States to register preference not to receive telemarketing calls in a single transaction with one governmental agency."[17] When the FTC decided in January 2003 to implement a national registry, it stated that it was reserving action on the issue of preemption because it hoped that the states would respond within "a relatively short transition period leading to one harmonized 'do-not-call' registry system and a single set of compliance obligations."[18] In hindsight, the FTC's optimism proved unfounded.

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[14] H.R. REP. NO. 108-8, at 3 (2003).

[15] *Id.*

[16] *Id*. at 3-4.

[17] TSR Statement of Basis and Purpose, 68 Fed. Reg. at 4641.

[18] *Id.*

In the wake of the FTC's decision, states such as Nevada, New Jersey, Oregon and Washington have continued to move forward with separate do-not-call legislation that do not even acknowledge the possibility of coordination or harmonization with the national do-not-call registry.[19] Other recently enacted or amended state statutes, such as those of North Dakota and Illinois, list incorporation of the national do-not-call registry as only one potential approach to the establishment of their state do-not-call registries, subject to a variety of conditions.[20] Even when incorporation of the national registry with the state registry is mentioned under these and other state legislation, states continue to maintain and add to a panoply of do-not-call compliance obligations that perpetuate the problem of inconsistent regulation.[21] As the *NPRM* observed, among other things, state do-not-call regulations "vary widely in the methods used for collecting data, the fees charged, and the type of entities required to comply with their restrictions."[22]

In short, the one-stop solution envisioned by Congress for consumers and businesses cannot be achieved without preemption of state do-not-call requirements. In enacting the TCPA, Congress required that any federal do-not-call regime adopted by the FCC would supersede state do-not-call lists and related compliance requirements.[23] As explained by the TCPA's Senate

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[19] *See* A.B. 232, 2003 Gen. Assem., 72nd Sess. (Nev.) (Introduced 1/8/03; In Senate committee 3/19/03); A. 727, 210th Leg., Assem. No. 727 (N.J.) (Introduced 1/8/02; 2nd reading in Assembly Feb. 27, 2003); S.B. 375, 72nd Leg. Assem., 2003 Reg. Sess. (Or.) (Introduced 2/10/03; Public hearing held 2/24/03); S.B. 262, 72nd Leg. Assem., 2003 Reg. Sess. (Or.) (Introduced 1/23/03; Public hearing held 2/24/03); S.B. 5033, 58th Leg., 2003 Reg. Sess. (Wash.) (Introduced 1/13/03; In Senate committee 2/26/03).

[20] *See* 815 Ill. Comp. Stat. 402/1-99 (2002); S.B. 2255, 58th Leg. Assem., Reg. Sess. (N.D. 2003 (to be codified at N.D. CENT. CODE § 51-26).

[21] *See, e.g.*, *Federal No-Call Law Doesn't Stop State No-Call Bills*, Comm. Daily (March 24, 2003) at 5.

[22] *NPRM*, 17 FCC Rcd 17459 at ¶ 9.

[23] *See* Nextel Initial Reply Comments at 4-6; H.R. Rep. No. 102-317, at 20 ("the House Committee [] believes that because state laws will be preempted, the Federal statute must be

*continued…*

sponsor, Senator Hollings, Congress' determination that the FCC's do-not-call regime would govern interstate telemarketing exclusively is consistent with the general preemptive effect of the Communications Act of 1934 over state regulation of interstate communications.[24] Furthermore, pursuant to Section 227(e)(2) of the TCPA, the FCC's national do-not-call regime must be incorporated into any state do-not-call laws applicable to intrastate telephone solicitations. The House explained that, under this statutory provision, "if the FCC requires establishment of the [national do-not-call regime], State or local authorities' regulation of telephone solicitations *must be based on the requirements imposed by the FCC*."[25]

The FCC is uniquely qualified to eliminate the unnecessary confusion and costs suffered by both consumers and businesses in dealing with a patchwork of different state and federal do-not-call rules. Preemption of state do-not-call requirements is essential to satisfy both the letter and spirit of the Commission's mandate under the TCPA and the Do-Not-Call Act.

## III. The Commission Should Codify the Basic Principle that, Like the FTC's TSR, the TCPA Rules Do Not Apply to Solicitations of Businesses, Except where Specified by Statute

The FCC also can advance its goal to provide clarity in the telemarketing rules by following the FTC's lead in codifying the established principle that these rules are aimed at the protection of consumers and do not apply to telemarketing directed at businesses, except where specified by statute. Section 310.6(g) of the FTC's regulations expressly states that the TSR

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*…continued*

sufficiently comprehensive and detailed [to] ensure States' interests are advanced and protected"); 137 CONG. REC. S18781 (Nov. 27, 1991) ("Pursuant to the general preemptive effect of the Communications Act of 1934, [s]tate regulation of interstate communications, including interstate communications initiated for telemarketing purposes, is preempted").

[24] 47 U.S.C. § 152(a).

[25] H.R. REP. NO. 102-317, at 25 (emphasis added).

does not apply to calls to businesses, except those involving the sale of non-durable office or cleaning supplies.[26] The adoption of a similar regulatory provision by the FCC would codify a principle well-recognized by Congress and the Commission under the TCPA, while providing greater certainty for businesses and direction for the courts.

The FCC regulates telemarketing activities pursuant to statutory authority granted by the Telephone *Consumer* Protection Act. As the House Report accompanying the Do-Not-Call Act stated, "[i]n order to assist *consumers* in dealing with telemarketing, Congress provided authority to the FTC and the Federal Communications Commission (FCC) to limit these intrusions into their *homes*."[27] Thus, for example, Section 227(c)(1) of the TCPA directed the FCC to "initiate a rulemaking proceeding concerning the need to protect *residential telephone subscribers'* privacy rights to avoid receiving telephone solicitations to which they object."[28] Where Congress intended to authorize the FCC's regulation of telemarketing directed at businesses, it specified such exceptions – e.g., Section 227(b)(2)(A), which directs the FCC to "consider prescribing regulations to allow businesses to avoid receiving calls made using an artificial or prerecorded voice to which they have not given their prior express consent."[29]

The *FNPRM* acknowledges the TCPA's consumer focus and states that the FCC's "goal is to enhance consumer privacy protections while avoiding imposing unnecessary burdens on the telemarketing industry, consumers, and regulators."[30] In considering the establishment of a national do-not-call registry, the FCC emphasized that "[t]he TCPA, however, only grants

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[26] 16 C.F.R. § 310.6(g).

[27] H.R. REP. NO. 108-8, at 2 (2003) (emphasis added).

[28] 47 U.S.C. § 227(c)(1) (emphasis added).

[29] 47 U.S.C. § 227(b)(2)(A).

[30] *FNPRM*, CG Docket No. 02-278 at ¶ 3.

authority to the Commission to establish a national database for residential subscribers."[31] The FCC expressed concern that this limit on its jurisdiction could result in a potential inconsistency with the FTC's framework under a then pending proposal to include businesses in the FTC national do-not-call list.[32] The FTC, of course, has reiterated that (with the exception of telemarketing of non-durable office or cleaning supplies) the TSR exempts telemarketing calls to businesses from its requirements, including its do-not-call requirements.[33]

Like the FTC, the FCC should codify the basic principle that the TCPA rules are aimed at protecting consumers and do not apply to telemarketing directed at businesses, except in those areas expressly specified by statute. The codification of this principle will achieve consistency with the FTC's regulatory framework and provide much needed clarity in the face of an explosion of strike suits brought against perceived deep-pocket companies.

## IV. Any Commission Regulation of Call Abandonment Rates Should Be No More Restrictive than the Maximum Three Percent Abandonment Rate Established by the FTC.

The FTC has adopted a three percent call abandonment rate and safe harbor provisions to govern telemarketers' use of predictive dialers.[34] The *NPRM* similarly sought comment on whether the FCC should adopt rules to further restrict the use of predictive dialers to dial consumers' telephone numbers, including comment on whether requiring a maximum setting on

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[31] NPRM, 17 FCC Rcd 17459 at ¶ 57.

[32] *Id.*

[33] TSR Statement of Basis and Purpose, 68 Fed. Reg. at 4632.

[34] 16 C.F.R. §§ 310.4(b)(1)(iv), 310.4(b)(4). An outbound call is considered "abandoned" under the FTC's rules if a consumer picks up the phone and the telemarketer does not connect the call to a sales representative within two (2) seconds of the consumer's completed greeting. Abandoned calls usually arise from the use of predictive dialers, which generally are programmed to contact more consumers than can be connected immediately to available sales representatives.

the number of abandoned calls, or requiring telemarketers who use predictive dialers to also transmit Caller ID information, are feasible options for telemarketers.[35]

As a threshold matter, the TCPA does not confer authority on the FCC to regulate either predictive dialers generally or abandoned call rates in particular. Nothing in the TCPA or its legislative history addresses the use of predictive dialing technology or the problem with abandoned calls, and it is axiomatic that agencies generally have no "authority to fill gaps in a statute that exist because of the absence of statutory authority."[36]

The TCPA does authorize the FCC to regulate certain uses of "automatic telephone dialing systems." Specifically, the TCPA prohibits the use of autodialers to dial emergency phone lines, health care facilities, pager numbers and wireless numbers, and prohibits the use of such systems in such a way as to simultaneously engage two or more lines of a multi-line business.[37] However, as the FCC acknowledged in its *NPRM*, it is questionable whether predictive dialers even fall within the statutory definition of an "automatic telephone dialing system."[38] Moreover, even if predictive dialers were covered by this definition, nothing in Congress' very specific and limited mandate to regulate automatic telephone dialing systems confer authority on the FCC to restrict maximum call abandonment rates.[39] The issue of

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[35] *NPRM*, 17 FCC Rcd 17459 at ¶ 26.

[36] *Fag Italia S.P.A. v. U.S.*, 291 F.3d 806, 816 (Fed. Cir. 2002).

[37] 47 U.S.C. §§ 227 (b)(1)(A)(i)-(iii), 227(b)(2)(B).

[38] *NPRM*, 17 FCC Rcd 17459 at ¶ 26.

[39] The courts have rejected categorically agencies' suggestions that they possess "*plenary* authority to act within a given area simply because Congress has endowed it with *some* authority to act in that area." *Railway Labor Executives Assoc. v. Nat'l Mediation Bd.*, 29 F.3d 655 (D.C. Cir. 1994). In other words, "the *duty* to act under certain carefully defined circumstances simply does not subsume the *discretion* to act under other, wholly different, circumstances, unless the statute bears such a reading." *Id.* (emphasis in original).

abandoned call settings is unrelated to Congress' concern about tying up multiple business lines, and does not implicate the same health and safety and cost-shifting considerations that motivated the TCPA's other express restrictions on the use of autodialers.[40]

Accordingly, if the FCC believes that further restrictions on the use predictive dialers would serve the public interest, it should make findings to this effect and seek additional congressional authorization to regulate in this area. Nonetheless, if the Commission concludes that it has authority to regulate abandoned calls, and it is inclined to do so, any rules that it issues should be no more restrictive than the abandoned call policy adopted by the FTC in its amended TSR.

Although the TSR ostensibly prohibits all abandoned calls,[41] it creates a safe harbor for telemarketers that adhere to a maximum three percent call abandonment rate, and comply with certain record-keeping, ring time, and answer time requirements.[42] The FTC concluded that this safe harbor was appropriate in light of its finding that

> a total ban on abandoned calls, which would amount to a ban on predictive dialers, would not strike the proper balance between addressing an abusive practice and allowing for the use of a technology that provides substantially reduced costs for telemarketers.[43]

The FTC concluded that a maximum abandonment rate of three percent "strikes a reasonable balance" that ensures "consumers will benefit from a substantial reduction in the number of abandoned calls they receive, but telemarketers will not be deprived of a large part of the

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[40] *See, e.g.*, H.R. REP. NO. 102-317, at 10, 24 (1991); S. REP. NO. 102-178, at 2-3 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1969-70.

[41] 16 C.F.R. § 310.4(b)(1)(iv).

[42] *Id.*

[43] TSR Statement of Basis and Purpose, 68 Fed. Reg. at 4642.

efficiency benefits that accrue from the use of predictive dialers."[44] The FTC took note of parties' submission that "consumers who make purchases via the telephone ultimately benefit from these reduced costs in the form of lower prices."[45]

Like the record in the instant proceeding, the record before the FTC indicated that a maximum abandonment rate setting below three percent would result in a severe loss of call center productivity.[46] Nextel's internal estimates confirm this conclusion. At a maximum three percent abandonment rate setting, Nextel projects that its contractors' call centers will operate at an average productivity level of approximately ten contacts per operator, per hour. At a maximum one percent abandonment rate, Nextel estimates that average call center productivity would plummet to only three or four contacts per operator, per hour. This would result in a cost-prohibitive loss of productivity and possibly force Nextel to severely curtail or even eliminate outbound calling. For these reasons, Nextel urges the Commission not to require any maximum call abandonment rate that is lower than three percent.[47]

As an additional matter, the FCC should reject the TSR's separate requirement that a telemarketer play a recorded message stating its business name and telephone number following an abandoned call. This requirement appears to conflict with the TCPA's existing restrictions on the delivery of prerecorded voice messages to residential telephone subscribers, creating yet

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[44] *Id*.

[45] *Id.*

[46] *Id.*

[47] This maximum abandonment level was not only endorsed by the FTC but also adopted by the California Public Utilities Commission's ("CPUC") interim Opinion regarding predictive dialer use and abandoned calls. The CPUC concluded that "most responsible users of predictive dialing equipment are either already at or near a 3 percent error rate or can achieve it with minimum programming effort." CPUC Interim Opinion, Rulemaking 02-02-20 (June 27, 2002) at 20.

more ambiguity in an area where clarity is needed.[48] For many consumers, the prerecorded message contemplated by the FTC's safe harbor rules would only exacerbate the nuisance of receiving an abandoned call. Indeed, when it enacted the TCPA, Congress expressly found that "residential telephone subscribers consider automated or prerecorded telephone calls, regardless of the content or the initiator of the message, to be a nuisance and an invasion of privacy."[49]

Whatever decision the FCC makes with respect to abandoned calls, it should clarify that prerecorded messages transmitted to comply with the TSR's safe harbor requirements are not prohibited under the TCPA. Such messages should be exempt under the FCC's existing rules as both calls that are "not made for a commercial purpose" and that do not transmit "unsolicited advertisements," as defined by the statute.[50] The FCC also should clarify that an incidental reference to a product or service, whether as part of the name of a business or otherwise made as necessary to identify a caller, should not transform a message delivered to comply with the requirements of the TSR into an illegal prerecorded commercial solicitation or advertisement.

Apart from the issue of conflict with existing TCPA requirements, as a matter of sound public policy, the FCC should reject the FTC's requirement for telemarketers to leave a prerecorded message following every abandoned call. The mandatory transmission of Caller ID information would impart the same information in a medium that is more useful and less intrusive to consumers and less expensive for telemarketers. Companies would have to retrofit their call centers and purchase expensive new equipment if the FCC requires them to play

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[48] *See* 47 U.S.C. § 227(b)(1)(B).

[49] 47 U.S.C. § 227 (Finding No. 10).

[50] 47 C.F.R. § 64.1200(c)(1)-(2). An "unsolicited advertisement" means "any material advertising the commercial availability or quality of any property, goods or services which is transmitted to any person without that person's prior express invitation or permission." 47 U.S.C. § 227(a)(4).

recorded message following every abandoned call. By contrast, most telemarketers currently are capable of transmitting Caller ID information using their existing equipment. Instead of adopting the TSR requirement for telemarketers to leave prerecorded messages following abandoned calls, the FCC can achieve the same intended benefits, without the attendant harms, by implementing Caller ID requirements following the same principles as the FTC.

The FTC's amended TSR soon will require telemarketers to transmit telephone numbers and, where made available by their carrier, their business names to any Caller ID service in use by consumers.[51] When it issued the amended TSR, the FTC declined to require telemarketers to transmit the telephone numbers specifically used by their sales representatives as Caller ID information. The FTC recognized that such a requirement would be unduly burdensome and would create significant expense for companies that rely on T-1 trunks for their telemarketing operations.[52] Instead, the TSR provides that telemarketers may transmit any number that will allow the called consumer to identify the caller or seller, including a customer service number, a number assigned to the telemarketer by its carrier, or a number used by the telemarketer's carrier to bill for the call.[53] The FCC should adopt a similarly flexible approach if it chooses to regulate the transmission of Caller ID in telemarketing calls, and it should preempt any state Caller ID laws or regulations that would prohibit such substitutions of names and numbers.

Like the FTC, the FCC should acknowledge that, "there are occasions in which Caller ID information does not reach the called consumer even when telemarketers arrange for the

[51] 16 C.F.R. § 310.4(a)(7).

[52] TSR Statement of Basis and Purpose, 68 Fed. Reg. at 4625.

[53] *Id.*

transmission of that information."[54] Accordingly, any Caller ID rules the FCC may adopt should contain an appropriate safe harbor, similar to the TSR, for companies that have made arrangements with their carriers to transmit Caller ID information, but are unable to transmit such information with particular calls.[55] Similarly, the FCC should clarify that any regulations it may adopt will not require telemarketers to relocate their call centers (or sellers to terminate their relationships with call center operators) that are served by carriers lacking the ability to transmit Caller ID information.[56] Through careful adoption of useful aspects of the TSR and elimination of requirements that do not fit the TCPA framework, the Commission can minimize regulatory duplication and maximize operational efficiency for consumers, businesses and regulators, in fulfillment of the directive of the Do-Not-Call Act.

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[54] *Id.*

[55] *Id.*

[56] *Id.*

## CONCLUSION

For the foregoing reasons, the FCC should follow the FTC's general framework for the national do-not-call registry, Caller ID, safe harbor provisions and regulatory exemption for business-to-business telemarketing. At the same time, the FCC should preempt state do-not-call requirements and retain and codify its current formulation of the EBR for common carriers.

Respectfully submitted,

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