

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	CG Docket No. 02-278
)	CC Docket No. 92-90
Rules and Regulations Implementing)	
)	
the Telephone Consumer Protection)	
)	
Act of 1991)	

Comments of Joe Shields to Further Notice of Proposed Rulemaking

Introduction

My name is Joe Shields. I am a resident of Harris County, Texas. I want to thank the Commission for providing the opportunity for the public to comment on the Commission's rules and regulations implementing the Telephone Consumer Protection Act (TCPA) of 1991 and more specifically the Further Notice of Proposed Rulemaking.

The Commission has asked for comment on the implementation of the Federal Do-Not-Call Implementation Act, Pub. L. No. 108-10, 117 Stat. 557 (2003). Under the Public Law both the Federal Communications Commission ("FCC") and the Federal Trade Commission ("FTC") have been tasked to implement a national do-not-call law. Additionally, both Commissions have been tasked with addressing any inconsistencies between the rules promulgated by each Commission and the effect of any such inconsistencies on consumers.

Discussion and Comments

National Do-Not-Call List

Public outcry over the intrusiveness of the telemarketing industry has risen to a level where Congress has heard the outcry and has stepped in to protect the public from this intrusion into the private property of the public.

Telemarketing calls today are all "automated" – rarely, if ever, are any telemarketing calls dialed by hand. The Telephone Consumer Protection Act of 1991 ("TCPA") was created to address these automated telemarketing calls.

"Computerized calls are the scourge of modern civilization. They wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of bed; they hound us until we want to rip the telephone right out of the wall."

"It is telephone terrorism and it has got to stop."

Senator Hollings Comments on the Automated Telephone Consumer Protection Act, 137 Cong. Rec S16204-01 (1991)

These comments of the Honorable Senator Hollings were made twelve years ago!

Since then, and in the last twelve years, the telemarketing industry has furthered the use of automated dialing devices to the point where the public has had enough of this telemarketing terrorism. Twenty-nine (29) states have enacted do-not-call laws and more states are in the process of creating their own lists.

Some of the state do-not-call laws are effective, others are not. The State of Texas, for example, of which I am a resident, has a do-not-call list. Comparing enforcement actions of the no call law of Texas to that of Missouri, the Texas No Call law has, after one (1) year of implementation, had no enforcement. In comparison, the Missouri do-not-call law in its first year generated fines against more than one hundred (100) telemarketing entities and more than one thousand (1,000) telemarketing entities have been sent warning notices. The Texas No Call list has generated close to four (4) million dollars in revenue for the state since implementation without any enforcement action having taken place. Apparently, the Texas No Call law is more a revenue maker than a consumer protection law.

Additionally, some states, due to lobbying efforts, have exempted certain sectors for example the realty industry, insurance industry and media subscription services. The FTC similarly has no jurisdiction over some business types such as telecommunications providers and banks.

This disparity of levels of consumer protection between state do-not-call laws and breadth of FTC jurisdiction will be addressed by the adoption of the national do-not-call list by the FCC. By adopting the national do-not-call list created by the FTC, the FCC will "close" these business-specific loopholes and broaden the do-not-call list to include all telemarketing entities which will afford an even level of consumer protection in all states.

To that end, the Commission needs only to add to its current rules that a telemarketing call made to a telephone number on the national do-not-call list is a violation of both the TCPA and the Commission's rules. Furthermore, the Commission should clarify that the TCPA and the Commission's rules apply to **both** interstate and intrastate telemarketing calls¹.

¹ ***The TCPA applies not only to interstate but also to intrastate telemarketing calls and faxes. To conclude otherwise would ignore the statute's conforming amendment, its language with respect to local calls, the FCC's administrative interpretations, and the clear legislative history.*** State of Texas v American Blast Fax, Inc., No. A 00 CA 085 SS (W.D. Tex., Feb. 8, 2001).

Enforcement Action

Enforcement action will be critical to a successful national do-not-call list. Due to the more than one hundred million (100,000,000) telemarketing calls per day, enforcement action cannot be handled by overburdened state and federal agencies alone. For that reason, it is imperative that the FCC establish that the private right of action provided by the TCPA in 47 USC § 227 (c) (5) apply to a telemarketing call made to a telephone number on the national do-not-call list.

Established Business Relationship and Company Specific Do-Not-Call Lists

The FTC has set certain time periods to allow for telemarketing calls to a telephone number on the national do-not-call list based on an existing business relationship (“EBR”). I believe that allowing calls after a do-not-call request conflicts with the FCC’s rules on termination of the telemarketing portion of an EBR.

If a member of the public places their telephone number on the national do-not-call list then all telemarketers, even those telemarketing entities with an established business relationship should have the courtesy to honor a request from a consumer not to receive unexpected telemarketing calls. Certainly, placing one’s telephone number on a national do-not-call list is a consumers “no-trespassing” sign to *all* telemarketers.

If the Commission decides to permit telemarketing calls to consumers whose telephone numbers are on the national do-not-call list due to an EBR, then the Commission must make it clear that any product or service that is telemarketed must be substantially related to the product purchased or inquiry made that created the relationship. Otherwise an exemption would be created for an unlimited number of “affiliate” telemarketing calls².

The Commission should retain its company-specific do-not-call list requirement so that members of the public can terminate the telemarketing portion of any business relationship. The Commission should clarify that there is no safe harbor for telemarketing calls based on a prior business relationship if the consumer has terminated the telemarketing portion of the business relationship.

Additionally, the Commission should establish rules that a telemarketing call to a number on the national do-not-call list after termination of the EBR is a violation of both the company-specific and national do-not-call rules.

Hang-up or Dead-air Calls and Predictive Dialers

The FTC has granted a safe harbor to telemarketing entities to “hang up” on 3% of all initiated telemarketing calls. This conflicts with the TCPA and the FCC rules.

² “Citigroup, for instance, owns more than 1,500 different companies, all of which can use your financial information to market their products.” CBS 60 Minutes II, Your Private Life For Sale, April 30th, 2003

According to the TCPA and FCC rules **all** telemarketing calls³ regardless of how they are received must provide identification of the individual caller, the name of the entity represented and making the telemarketing call and the contact information of the entity represented and making the telemarketing call. The FCC cannot change what the TCPA requires and any initiated telemarketing call that does not provide the required identification is a violation of the TCPA.

This conflict will not change the way the TCPA is enforced whether by the FCC or the public. As this identification requirement is not specifically addressed in Public Law No. 108-10 it does not present a conflict between the FTC and FCC regulation of a national do-not-call list.

Nevertheless the Commission should make it irrevocably clear that **all** initiated telemarketing calls regardless of how they are received must meet the identification requirements of the TCPA and Commission rules and that hang-up or dead air calls do not meet those requirements.

Prerecorded Telephone Solicitations

The FTC has granted a safe harbor to telemarketing entities that use predictive dialers and cannot connect to a live operator when one is not available by playing a prerecorded message to the called party. This conflicts with the TCPA and the FCC rules. All prerecorded messages that introduce a business are in fact by definition an advertisement:

"Notice given in a manner designed to attract public attention." Edwards v. Lubbock Count, Tex. Civ. App, 33 S.W. 2d 482, 484

So is this material "advertising?" Webster's dictionary defines "advertise" as "to make something known to : notify." This is a pristine example of where the application of the time honored "duck test" is appropriate - "If it walks like a duck, quacks like a duck, and looks like a duck, then it's a duck." BMC Industries, Inc. v. Barth Industries, Inc., 160 F.3d 1322, 1337 (11th Cir., 1998). Harjoe v. Colonial Life & Accident Ins. Co., No 01AC-11555 (Div. 35) (Mo. Cir. Ct., May 2, 2002)

Telemarketers will use this FTC safe harbor as an excuse to initiate unlawful artificial or prerecorded messages.

The FCC should make it clear that **all** artificial or prerecorded messages are a violation of the TCPA and Commission rules if not introduced by a live person.

³ call: In communications, any demand to set up a connection; call attempt: In a telecommunications system, a demand by a user for a connection to another user. Federal Standard 1037C (Date of Publication: August 7, 1996)

*All this legislation requires is that when a person is called at home, there must be a live person at the other end of the line. This applies regardless of the message being delivered because it is an equal invasion of privacy whether the computerized message is **made for political, charitable, or commercial purpose.***
Automated Telephone Consumer Protection Act, 137 Cong. Rec S16204-01 (1991)

This conflict does not change the way the TCPA is enforced whether by the FCC or the public. As this safe harbor is not specifically addressed in Public Law No. 108-10 it does not present a conflict between the FTC and FCC implementation of a national do-not-call list.

Conflicts between the FTC Rules, the TCPA and FCC Rules and Regulations

Congress did not grant the FTC the authority to legalize hang-up or dead air calls. Neither did Congress grant the FTC the authority to legalize artificial or prerecorded messages to residential telephone lines or businesses to aid in the efficiency of intrusive predictive dialing telemarketing calls.

Congress has authorized the FCC to regulate telecommunications. The FCC has not delegated any authority to the FTC to regulate telecommunications nor has it been directed to do so by Congress. The FCC should clarify that, by the authority vested in the FCC by Congress, its rules pre-empt all other rules dealing with telecommunications. That includes any state or federal agency that, even with good intentions, has crossed into FCC jurisdiction.

The FCC should exercise its authority and clarify that hang-up or dead air telemarketing calls which do not identify the caller have always been and will remain violations of the TCPA until Congress modifies the TCPA.

Furthermore, the FCC should exercise its authority and clarify that **all** prerecorded messages including those made because a live agent is not available have always been and will remain violations of the TCPA until Congress modifies the TCPA.

I would like to remind the FCC of the purpose of Congress in enacting the TCPA:

*These computerized calls, which I would anticipate because of their cheapness and efficiency, will only increase in their usage, are a far more serious inconvenience, invasion of privacy **and threat to safety** than is the case of similar things, such as junk mail.* Statement of John M. Glynn, Telemarketing Practices Hearing, HR Cong. Rec 101-43 (1989); 101st Cong Sess, 1st Sess on HR 638, HR 2131 and HR 2184

Due to the threat to the safety of the public some states have even criminalized artificial or prerecorded messages that are not introduced by a live person. Apparently the FTC did not sufficiently research the effect on the safety of the public when it

created a safe harbor for predictive dialing telemarketing calls that connect to a called party and no live caller is available. The FCC, under the mandate of Congress and the TCPA, has no authority for the creation or adoption of such a safe harbor. The FCC should clarify that such a safe harbor will interfere with the protections afforded consumers under the TCPA, has not been authorized by Congress and such artificial or prerecorded messages are a violation of the TCPA and FCC rules.

Additional Comments

I have read the reply comments of the American Teleservices Association (“ATA”) filed as usual at the last moment on the last day of the original reply comment period. In the ATA reply comment it appears that the ATA has become fixated with the attached table to my original comment. I would like to clarify the information provided in the table for both the Commission and the ATA.

The table is a log of **unlawful** telemarketing calls initiated to my **residential** telephone line. Every listed call in the table, whether live or prerecorded, violated the TCPA. As the table states at the bottom: “The above calls are verified calls only – hang up calls or blocked caller ID calls are not included unless actually received and verified as a telephone solicitation.” There have been many more calls to my residence that due to the failure of providing the identification of the caller to me (hang-up or dead air calls) could not be identified as a telemarketing call.

Contrary to the assumptions of the ATA in their reply comments (page 6 & 7 at footnote 11), **all** of the calls in the table are telemarketing calls that violated the TCPA. The table **is** empirical data of an epidemic of non-compliance with a federal consumer protection law! Consequently, the challenge by the ATA to the table I submitted is based on nothing more than generalization, hyperbole and groundless assumption.

The associations that represent the telemarketing industry have had their chance and have done nothing more than consistently misrepresent to Congress, to state and federal agencies and to the people of this country that their outbound cold telemarketing calls are a welcome intrusion. Eileen Harrington of the FTC could not have said it better:

FTC Official Faces Industry Music, June 24, 2002, By: Scott Hovanyetz, Senior Reporter

"You don't have a lot of credibility, to be perfectly honest," Harrington, the FTC's director of marketing practices, told the audience of approximately 50 telemarketers.

If telemarketers had adhered to the present rules, which give each company one shot at each consumer and require them to honor all DNC requests, a national DNC list would not be under discussion, Harrington said.

"This industry since 1995 has had a chance to make a company-specific do-not-call system work," Harrington said. "This is an industry that was given more than an inch and has taken more than a mile."

In her own personal experience, Harrington said, she was aware that telemarketers often try to circumvent the rules by hanging up when consumers ask to be placed on their DNC lists, or by denying that their calls are for sales purposes, then trying to make a sale.

“You don't have a lot of credibility...” Mrs. Harrington’s statement says it all.

The ATA continues to misrepresent to the FCC and the courts that telemarketing is speech and has First Amendment protections. Telemarketing regulation is not regulation of speech it is regulation of a method of delivering speech:

*The bill I am introducing today falls well within the scope of the first amendment. The first amendment allows the government every right to place reasonable time, place and manner restrictions on speech when necessary to protect consumers from a nuisance and an invasion of their privacy. . . . **The bill does not ban the message; it bans the means used to deliver that message.** 137 Cong.Rec. S9840 (daily ed. July 11, 1991) (statement of Sen. Hollings).*

Appropriating the property of another (i.e. a telephone line) without that person's consent is inconsistent with the fundamental view of property rights as significant, regardless of how much of it is at stake. The Supreme Court described this maxim in *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 170 (1998), in addressing the question of whether taking property that had no economic value was still a taking of property. The Court reiterated:

Our longstanding recognition that property is more than economic value. . . ; it also consists of the group of rights which the so-called owner exercises in his dominion of the physical thing, such as the right to possess, use, and dispose of it . . . possession, control, and disposition are nonetheless valuable rights that inhere in the property.

Junk faxers have tried First Amendment challenges to the junk fax law many times. The highest court to address the question was a panel of judges on the 9th Circuit Court of Appeals in *Destination Ventures v. FCC*, 46 F.3d 54 (9th Cir.1995) In that case, the junk fax law was declared perfectly constitutional, and the junk faxers lost. Junk faxers have now lost their bogus First Amendment arguments in federal courts in Oregon, Texas, Indiana, Minnesota and Missouri.

Now we have the ATA and other telemarketing associations (Direct Marketing Association – “DMA”) challenging in court the constitutionality⁴ of the right of consumers to erect a no-call sign at their homes and businesses. Such actions of the ATA and the DMA place them squarely in bed with those junk faxers and their frivolous and groundless attacks on the constitutionality of a federal consumer protection law.

I have filed complaints with the Commission on each and every call listed in the table. The Commission has issued seven (7) citations⁵ on my complaints on calls contained in the table and surely with more to come.

One citation in particular may be of significant interest – an attorney representing the telemarketing industry replied to one of my complaints with this statement in his letter:

“My review of the Telephone Consumer Protection Act (TCPA) shows that you have not received a “telephone solicitation” within the meaning of the term as defined by 47 USC § 227 (a)(3) because of your established business relationship with the Ford dealers in question.”

This representative of the telemarketing industry purposely overlooked my do-not-call requests which had terminated the business relationship! The Commission's citation states in part:

“It has come to our attention that your company, or an entity acting on behalf of your company, delivered a telephone solicitation to a residential telephone line despite a previous do-not-call request by a member of the household.” (EB-02-TC-259 – FCC Citation on Newgen Results Corporation, December 10th, 2002)

This is a good example of how the telemarketing industry has tried to create its own exemptions, misrepresents the law and fraudulently manipulates state and federal agencies and the courts. This example also underscores the lack of credibility telemarketing entities and their associations, intent on creating a safe harbor under an EBR, have. The attorney's letter as well as the Commission citation *with my complaint to the FCC* is attached.

⁴ *“It is untenable that conduct such as vandalism is protected by the First Amendment merely because those engaged in such conduct intend thereby to express an idea.”* In re Michael M., 86 Cal.App.4th 718, 729 (2001) citing Texas v. Johnson, 491 U.S. 397, 404 (1989). *The United States Supreme Court recognizes the governmental interest in protecting the privacy of the home – the “last citadel of the tired, the weary, and the sick” in Justice Black’s famous phrase – is “of the highest order.”* See Frisby v. Schultz, 487 U.S. 474, 484 (1988) *“The First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another person’s home or office.”* Dietman v. Time Inc. 449 F.2d 245, 249 (9th Cir. 1971)

⁵ EB-01-TC-065, EB-02-TC-062, EB-02-TC-064, EB-02-TC-122, EB-02-TC-132, EB-02-TC-257 and EB-02-TC-259

Additionally, to further establish the credibility of the table of unlawful telemarketing calls I attached in my earlier comments, I am attaching decisions rendered by the courts on my complaints that *clearly prove* that the artificial or prerecorded voice messages and live calls listed in the table were violations of the TCPA and Commission rules implementing the TCPA.

I would like to point out that some defendants actually continued to initiate artificial or prerecorded voice messages and live telemarketing calls to my residence *after* litigation had commenced!

I am also including some letters from attorneys representing telemarketing entities accusing me of criminal behavior (i.e. harassment, extortion, etc.) and demanding money from me for daring to exercise my right to be free of unlawful telemarketing activity to my residence. Such unfounded and unwarranted attacks on consumers enforcing the TCPA are typical and speak volumes of the telemarketing industry and their representative association's attitude as a whole toward a federal consumer protection law and the FCC rules and regulations implementing the federal consumer protection law.

Conclusion

There is no conflict between the FTC and FCC regulation of a single national do-not-call list *as long as* the FTC and FCC enforce their own rules respectively. The implementation of the intent of Congress for a national do-not-call list in the TCPA authorizes the FCC to enforce its rules and regulations on such a list regardless of how the list was created or by whom the list was created. Whether such a list is maintained by the FTC or FCC is irrelevant when it comes to the intent of Congress to authorize the FCC or a consumer to enforce compliance with such a list.

In closing I want to again thank the Commission for providing the opportunity for the public to comment on the Commission's rules and regulations implementing the Telephone Consumer Protection Act (TCPA) of 1991. My family and I look forward to signing on to a national do-not-call list and being able to enjoy *"...domestic tranquility⁶..."* as the founders of this great country intended.

Respectfully submitted,

/s/

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⁶ Preamble to the Constitution "...to insure domestic tranquility": domestic – Lat. domesticus – home; tranquility – tranquil – Lat. tranquillus – free from agitation or other disturbance. Free from agitation or other disturbance in our homes! *Free from telemarketing terrorism in our homes!*