

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

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

**REPLY COMMENTS OF JOHN A. SHAW**

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374 Cromwell Drive  
Rochester, NY 14610  
john@jashaw.com

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## **1. INTRODUCTION**

I respectfully submit these comments in reply to other comments to the Commission's *Further Notice of Proposed Rulemaking* ("FNPRM")<sup>1</sup> in the above-referenced docket. I comment as a telephone subscriber only. I have no relationship with any telemarketer, telecommunications business, or user of telemarketing services. I have no particular expertise in telephone business or technology.

I am a resident of New York State and use the New York State Do Not Call list to block telemarketing calls to my home..

## **2. HOW THE FCC CAN MAXIMIZE CONSISTENCY WITH THE FTC'S RULE**

The major difference between the FCC regulation and the FTC's recent amendments to the Telemarketing Sales Rule<sup>2</sup> is that the TSR covers only those businesses regulated by the FTC while the FCC regulations will cover all types of businesses. Also, the TSR covers only interstate calls; the FCC regulations should apply to intrastate calls as well.

The National Association of Insurance and Financial Advisors comments<sup>3</sup> that, in order to maximize consistency with the FTC's DNC regulation, as required by the DNC Act<sup>4</sup>, the Commission should exempt industries that are exempted from the FTC regulations.

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<sup>1</sup> *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Further Notice of Proposed Rulemaking, CG Docket No. 02-278, FCC 03-62 ("FNPRM").

<sup>2</sup> 16 C.F.R. Part 310 ("TSR")

<sup>3</sup> National Association of Insurance and Financial Advisors ("NAIFA") at 2.

<sup>4</sup> Do-Not-Call Implementation Act, Pub.L. 108-10, 117 Stat. 557 (2003)

There is no justification to assume that the DNC Act's goal of consistency should be interpreted to limit the FCC's jurisdiction to the FTC's jurisdiction. To do so would eliminate any reason for FCC involvement in the Do-Not-Call regulations.

### **3. THE EXISTING BUSINESS RELATIONSHIP DEFINITION MUST BE CAREFULLY CRAFTED**

One part of the rules that is important to allow reasonable protection of business interests, but which also offers the greatest opportunity for abuse by businesses is the existing business relationship (EBR) exemption.

It is certainly important to allow a business that has an on-going and continuing relationship with a customer to contact the customers on matters relating to the business relationship. On the other hand, the simple fact that a consumer made a purchase from a business should not allow the business to repeatedly call the customer to solicit other, unrelated business.

I reply to several comments on existing business relationships:

#### *Securities Brokers*

The Securities Industry Association ("SIA") comments<sup>5</sup> that brokers should be able to initiate contact with customers to discuss financial information or market changes.

Naturally, a person with an account with a securities broker should receive calls from the broker. However, a person who at one time in the past did business with a broker but who

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<sup>5</sup> Securities Industries Association ("SIA") comments at 2.

no longer has an account or an on-going relationship should have his DNC listing respected and should not be considered to have an EBR with the broker.

*Extension of EBR to corporate affiliates*

Several commenters<sup>6</sup> suggest that an EBR with one company should be extended to other companies within the same corporate umbrella. The FTC's considered the issue when promulgating their DNC list amendment to the TSR. I believe that the conclusion of the FTC is appropriate:

Thus, under the amended Rule, some but not all affiliates will be able to take advantage of the established business relationship exemption to the national "do-not-call" registry. The Commission intends that the affiliates that fall within the exemption will only be those that the consumer would reasonably expect to be included given the nature and type of goods or services offered and the identity of the affiliate. The consumer's expectations of receiving the call are the measure against which the breadth of the exemption must be judged.<sup>7</sup>

The EBR exemption should extend only to the product or service type that the customer has purchased or used. Although it is reasonable to expect that a different corporate entity may actually make a telemarketing call under the EBR exemption, the exemption should not be available for telemarketing calls to sell a product service not directly related to the product or service that established the EBR.

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<sup>6</sup> see e.g. SAI comment at 2, and Mortgage Bankers Association ("MBA") comments at 4.

<sup>7</sup> see FTC Final Amended Rule and Statement of Basis and Purpose at 39, 68 Fed. Reg. 4594.

### *Time Limit of EBR*

Several commenters were concerned with the time that an EBR exists<sup>8</sup> and asked that no time limit be placed on the EBR. The FTC's TSR specifies that an EBR will last eighteen months after a purchase or rental and three months after an inquiry.<sup>9</sup>

If there is no time limit on an EBR, telemarketers will be able to contact former customers who they had, years before, done business with but had no further contact with. After a few years of making occasional inquiries and individual purchases, a consumer may be on telemarketing lists of many businesses.

The FTC time limits are reasonable and should be adopted by the Commission. Further, the EBR should be ended immediately if the consumer indicates a wish not to be contacted again. A simple inquiry, such as the location of a business or the price and availability of a product, should not establish an EBR except for the purposes of answering that specific inquiry.

#### **4. THERE SHOULD BE NO EXEMPTION FOR INSURANCE, FINANCIAL SERVICES, OR OTHER INDUSTRIES**

Stonebridge Life Insurance Company<sup>10</sup> and the American Council of Life Insurance<sup>11</sup> comment that the McCarran-Ferguson Act<sup>12</sup> prohibits the application of the DNC regulation to sales of life insurance.

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<sup>8</sup> *see e.g.* Direct Marketing Association comments at 4, Mortgage Bankers at 4, Intuit comments at 4, Scholastic comments at 3.

<sup>9</sup> 16 C.F.R. § 310.2(n)

The McCarran-Ferguson Act provides that “that "no Act of Congress shall be construed to invalidate . . . any law enacted by any State for the purpose of regulating the business of insurance . . .”<sup>13</sup>. Stonebridge and ACLI comment that the TCPA, if applied to insurance companies, “would ‘invalidate, impair or supersede’ state law enacted for the purpose of regulating the business of insurance,...”<sup>14</sup> and “...the McCarran-Ferguson Act bars application of FCC telemarketing rules to the business of insurance.”<sup>15</sup>

The application of the McCarran-Ferguson Act to the TCPA depends upon the meaning of the term “business of insurance”. According to the U.S. Supreme Court a three part test determines whether an activity falls within the term “business of insurance”:<sup>16</sup> Does the activity have the effect of transferring or spreading a policyholder’s risk, is the activity an integral part of the policy relationship between the insurer and the insured, and is the practice limited to entities within the insurance industry? Addressing these tests individually:

- Telemarketing has no effect on the policy holders’ risk.

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<sup>10</sup> Stonebridge Life Insurance Company (“Stonebridge”) comments at 2.

<sup>11</sup> American Council of Life Insurers (“ACLI”) comments at 2.

<sup>12</sup> 15 U.S.C. §1011 *et seq.*

<sup>13</sup> 15 U.S.C. §1012(b).

<sup>14</sup> ACLI comments at 2.

<sup>15</sup> Stonebridge comments at 6.

<sup>16</sup> *Union Labor Life Insurance Co. v. Pireno*, 458 U.S.119, 129 (1982).

- Telemarketing is not an integral part of the policy relationship between the insurer and the insured. It is communications between the insurer and a prospective customer.
- The practice of telemarketing is not limited to entities within the insurance industry, nor are the state or TCPA regulations of telemarketing so limited.

Based on these three tests one has to conclude that telemarketing is not part of the “business of insurance”; therefore its regulation under the TCPA is not limited by the McCarran-Ferguson Act. As the court noted in *Royal Drug*: “The exemption is for the ‘business of insurance’, not the ‘business of insurers’”.<sup>17</sup>

The Securities Industry Association (“SIA”) comments that “[the DNC] registry should continue not to cover registered broker-dealers.”<sup>18</sup> Their reason is based on the various methods consumers have to complain about the content of the solicitation. It is true that consumers can complain to industry organizations and government agencies about the content of calls and deceptive sales practices. However, the purpose of the DNC list is not to stop deceptive sales practices or consumer losses due to fraud, but to prevent the disruption of the consumer’s activities by unwanted sales calls, even honest calls.

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<sup>17</sup> Group Life & Health Insurance Co. v. Royal Drug Co., 440 U.S. 205 (1979).

<sup>18</sup> Securities Industry Association (“SIA”) comments at 3.

Scholastic, Inc., in an *ex parte*<sup>19</sup> meeting with several of the Commission's staff on March 21, 2003, stated that "...people who sign up on the DNC list do not know that they will lose access to such educational materials." and asked for an educational materials exemption to the regulations. People who sign up on the DNC list will not lose access to educational materials unless telemarketing is the only way prospective customers could learn of Scholastic's products. Other means of advertising are available to Scholastic, just as they are to all other businesses.

### *Conclusion*

The insurance industry should not be exempted from the DNC regulations. If a court determines that the McCarran-Ferguson Act exempts insurance companies from the DNC regulations the Commission should still apply the regulations to telemarketing firms making calls on behalf of insurance companies.

Industries that are exempt from the FTC regulation, as well as other industries, should not be exempt from the DNC regulations. If a consumer does not want to be called, he should not be called, regardless of what the caller is selling.

All businesses, including educational material, should be equally subject to the same DNC regulations.

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<sup>19</sup> Letter from Charles B. Deull of Scholastic, Inc. to Marlene H. Dortch, March 24, 2003.

## **5. CALLS TO SET UP A FACE-TO-FACE MEETING SHOULD NOT BE EXEMPT**

Several commenters would exempt “Face-to-Face” calls, that is, calls in which the telemarketer does not attempt to complete a transaction during that call but instead attempts to persuade a prospective customer to meet with a sales agent.

The Mortgage Bankers Association<sup>20</sup> commented that face-to-face calls should be exempt for intrastate calls. The National Association of Realtors<sup>21</sup> refers to “the ‘face to face’ exemption of the current FTC rule meets the needs of this local telephone activity.”

NAIFA comments that “The FCC also should follow ... the FTC’s rule in exempting from its coverage calls in which no sale is final and no payment is authorized until there has been a face-to-face meeting.”<sup>22</sup>

The TCPA and the proposed DNC list are intended to reduce the disruption of sleep or other activities of the telephone subscriber, not just to reduce the chance of deceptive sales practices. A call to invite the consumer to a meeting is just as disruptive as any other call. It does not matter if the call is from within the state or from outside the state. The disruption is the same. The FTC, in their final DNC rule, removed the exemption because of consumer concerns of disruption.<sup>23</sup>

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<sup>20</sup> Mortgage Bankers Association (“MBA”) comments at 3.

<sup>21</sup> National Association of Realtors comments at 2.

<sup>22</sup> NAIFA comments ¶3.

<sup>23</sup> FTC Final Amended Rule and accompanying Statement of Basis and Purpose at 201, 203-206, 68 Fed. Reg. 4654-4656 (January 29, 2003).

### *Conclusion*

The Commission should follow the lead of the FTC and reject proposals to exempt calls requesting a face-to-face meeting.

### **6. BUSINESS NUMBERS LOCATED AT A RESIDENCE SHOULD BE ALLOWED ON THE DNC LIST**

The National Association of Insurance and Financial Advisors (“NAIFA”) comments<sup>24</sup> that the FCC DNC list should not include business numbers because consumers do not find the same annoyance to calls to business numbers as to calls to their homes, and “In short, people expect business calls to their business phones”.

In general, this is true. It is unlikely that someone will be awakened from sleep due to a call to a business (or, at least, it is unlikely that someone will have a legitimate complaint about being awakened.)

While people expect business calls to their business phones, they may be annoyed at calls from life insurance agents to their office phones, although the annoyance is in no way as great as the annoyance typically experienced by unwanted calls to residences.

However, not all “business numbers” are wired to business locations. Often persons who are employed by businesses but work from their homes (including field sales and support personnel) have business lines wired into their homes for the purpose of receiving calls from customers or from their employer. These people should be allowed to list these

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<sup>24</sup> NAIFA comments ¶3.

numbers on the DNC list to avoid unwanted interruptions from telemarketers while at home.

The Yellow Pages Integrated Media Association comments that “Directory publishers should not be liable for violations of the Telephone Consumer Protection Act or the FTC Telemarketing Sales Rules for calls made to residential telephone lines that are being used to operate a business.”<sup>25</sup>

I do not agree that there should be any general exception for telemarketing calls to numbers on the DNC list that happen to be business numbers wired to residences or residential numbers that are also used for business. Any general exception such as this would open the door to telemarketers to call residential numbers that have been used to make business calls. Many owners of home operated small businesses will desire to make use of the services of the Yellow Pages or other business services, and will either call the services or decide not to place the number they use for business on the DNC list.

If the commission does decide to exempt calls to business numbers that have been placed on the DNC list it should clearly limit the exemption to calls to promote business-to-business sales only and not allow consumer related calls to business numbers on the DNC list.

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<sup>25</sup> Yellow Pages Integrated Media Association comments at 2.

## 7. A *DE MINIMIS* EXCEPTION SHOULD BE INCLUDED

NAIFA commented<sup>26</sup> that the Commission should include a *de minimis* exception allowing businesses to make a small number of telemarketing calls without checking a DNC list.

Because the details of EBR, other exemptions to a national DNC list, and other regulations can easily become very complex, and there may be situations that haven't been, or cannot easily be, defined in the regulations, a *de minimis* exception would cover seldom occurring situations.

A *de minimis* exception should also cover objections raised by Vector Marketing Corporation in their *ex parte* communications<sup>27</sup> and the Direct Selling Association's comment to the NPRM that a national DNC list should not apply to a direct seller's occasional calls<sup>28</sup>.

### *Conclusion*

I agree with the concept. I encourage the Commission to adopt language in the regulations to provide a *de minimis* exemption that would allow a limited number of calls per day to be exempt from certain regulation, provided that such calls are not made using an automatic dialer or a predictive dialer and that such calls are not made to numbers

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<sup>26</sup> NAIFA comments at ¶5.

<sup>27</sup> *see* letter from Judith L. Harris and James Philip Schulz to Marlene H. Dortch, April 29, 2003 and to Richard Smith, April 28, 2003.

<sup>28</sup> *see* Direct Selling Association NPRM comments at 6.

obtained by the caller from any list of phone numbers rented or purchased from other companies.

## **8. REFERRAL CALLS SHOULD NOT BE ALLOWED UNDER THE EBR EXEMPTION**

NAIFA<sup>29</sup> requests that the Commission exempt from the DNC regulations calls to prospective customers recommended to an insurance agent by an existing customer.

NAIFA states that “Referral calls are not anonymous cold calls.” They are cold calls if made to a prospective customer who did not ask for the call.

### *Conclusion*

The FTC’s TSR does not allow referral calls to be exempt from the DNC regulations. To allow a referral exemption to be to allow people other than the consumer to override a consumers DNC preference and would defeat the purpose of the DNC list.

## **9. DNC RULES WILL NOT STIFLE COMPETITION FOR LOCAL TELEPHONE SERVICES**

World Com, Inc. (d/b/a MCI) states that “The FCC Should Ensure that the Do Not Call Rules Do Not Stifle Competition for Local Telecommunications Services”<sup>30</sup> Winstar Communications, LLC comments that the DNC regulations should exempt telecommunications providers or implement rules that prevent incumbents from using the EBR to maintain monopoly positions<sup>31</sup>.

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<sup>29</sup> NAIFA comments at ¶4.

<sup>30</sup> WorldCom, Inc. at comments at 5.

<sup>31</sup> Winstar Communications, LLC comments at 4.

If the only way that competitive local exchange carriers (CLECs) could sell local telephone service was through outbound telemarketing, the DNC list would stifle competition. However, local service, like long distance service, is sold through many advertising media.

If there is a competition problem of incumbent local exchange carriers (ILECs) using an established business relationship (EBR) exemption to contact subscribers, the best solution would be to limit the EBR exemption to prevent its use by the ILECs as well as by the CLECs. However, in my experience, while I did (before the New York State DNC list) receive CLEC telemarketing calls I did not receive any telemarketing call from my ILEC (Frontier). It is less likely that, since they have nothing to sell, an ILEC will call me and ask me to buy nothing.

To prohibit CLECs from calling customers who do not wish to be called is not unfair to the industry because they have little if anything to gain from annoying prospective customers who otherwise might respond to an advertisement and call the carrier at their own convenience.

### *Conclusion*

The DNC list regulations should apply to the telecommunications industry, including CLECs and ILECs, just as it applies to other industries. The EBR exemption should not allow ILECs to call a customer to sell the customer additional services or products.

## **10. CONCLUSION**

I thank the Commission for the opportunity to submit these comments and continue to urge the adoption of a national Do-Not-Call list.

Respectfully submitted,

/s/ John A. Shaw