

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

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

**REPLY COMMENTS OF THE NATIONAL ASSOCIATION  
OF STATE UTILITY CONSUMER ADVOCATES  
ON FURTHER NOTICE OF PROPOSED RULEMAKING**

The National Association of State Utility Consumer Advocates (“NASUCA”) replies to comments filed in response to the *Further Notice of Proposed Rulemaking* (“*Further Notice*”) in this proceeding.<sup>1</sup> The vast majority of comments submitted by telemarketing interests merely echo the positions these parties had taken in earlier comments filed in this proceeding. Specifically, the telemarketing parties urge the Federal Communications Commission (“Commission”) to:

- ▶ preempt state laws that establish do-not-call registries or that regulate other telemarketing activities;<sup>2</sup>
- ▶ broaden the definition of “established business relationship” that was adopted by the Federal Trade Commission (“FTC”);<sup>3</sup> and
- ▶ undermine the FTC’s regulations that are designed to reduce the call abandonment rate for predictive dialers.<sup>4</sup>

The proposals advanced by the telemarketing interests would weaken the consumer protections already provided by the Commission and the FTC, and run counter

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<sup>1</sup> FCC 03-62, adopted March 24, 2003, 68 Fed. Reg. 16250 (April 3, 2003).

<sup>2</sup> See, e.g., Comments of the Direct Marketing Association (“DMA”) at 3-4; Comments of Sprint Corporation at 2-3; Comments of Software & Information Industry Association (“SIIA”) at 2-3; Comments of the Securities Industry Association at 1-2; Comments of MBNA America Bank, N.A. (“MBNA”) at 5-8.

<sup>3</sup> See, e.g., DMA Comments at 4-5; Comments of Intuit, Inc. at 4-5.

<sup>4</sup> See, e.g., DMA Comments at 4; Comments of Infocision Management (“Infocision”) at 5.

to the mandates contained in the Telephone Consumer Protection Act of 1991 (“TCPA”).<sup>5</sup> NASUCA thus urges the Commission to reject the telemarketing interests’ proposals.<sup>6</sup>

**I. THE TCPA PREVENTS THE COMMISSION FROM PREEMPTING STATE LAWS THAT GIVE CONSUMERS GREATER PROTECTIONS.**

In the *Further Notice*, the Commission asked for comments that parties had not already presented in earlier comments in this proceeding.<sup>7</sup> Nevertheless, the telemarketing interests renew their call for the Commission to preempt state do-not-call programs. Using essentially the same arguments they advanced in their earlier comments, the telemarketing interests assert that the Commission has the authority to preempt state laws that have more restrictive do-not-call provisions than that adopted by the FTC.<sup>8</sup>

NASUCA’s earlier comments discussed the Commission’s limited ability to preempt state laws,<sup>9</sup> and NASUCA will not repeat that discussion here. Suffice it to say, the Commission should not lessen the protections given consumers by their elected state officials. In addition, there is no merit to the argument presented by telemarketing interests that the TCPA prohibits states from maintaining do-not-call programs if the Commission adopts a “single, national” database.<sup>10</sup> Each state is only required to

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<sup>5</sup> Pub. L. No. 102-243, 105 Stat. 2394, codified at 47 U.S.C. § 227.

<sup>6</sup> Failure in these Reply Comments to address an issue raised by a party should not be construed as NASUCA’s acquiescence to the party’s position.

<sup>7</sup> *Further Notice*, ¶ 6.

<sup>8</sup> The FTC’s Final Amended Rule was published at 68 Fed. Reg. 4580 (January 29, 2003).

<sup>9</sup> See NASUCA Comments, filed December 9, 2002, at 14-15.

<sup>10</sup> See, e.g., DMA Comments at 3.

“include the part of such national database that relates to such State.”<sup>11</sup> Thus, states may not require consumers who are in the national database to register again at the state level. Because some states charge a fee to register numbers with their do-not-call databases, this provision allows consumers to register for free.<sup>12</sup>

MBNA asserts that Congress directed the Commission to balance the interests of consumers and telemarketers.<sup>13</sup> Such a balancing of interests, according to MBNA, would require the Commission to preempt state do-not-call laws as a means to prevent telemarketers from being subjected to multiple regulations.<sup>14</sup>

MBNA misses the mark. Any balancing of interests must be weighted toward consumers. In the TCPA, Congress directed the Commission to adopt regulations “to implement methods and procedures for protecting the privacy rights [of residential telephone subscribers] in an efficient, effective, and economic manner and without the imposition of any additional charge to consumers.”<sup>15</sup> Thus, the interests of telemarketers are secondary to protecting the privacy rights of consumers.

The fact that telemarketers may face multiple regulatory schemes in various states, in and of itself, is not a good reason for the Commission (or the FTC) to preempt state laws. Preemption can be accomplished only within the structure of the TCPA and general principles of preemption. The TCPA allows the Commission to preempt only

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<sup>11</sup> 47 U.S.C. § 227(e)(2).

<sup>12</sup> See 47 U.S.C. § 227(c)(3)(E). The statute also makes a nullity of Infocision’s recommendation (at 7) that the Commission charge subscribers to place telephone numbers on the Registry.

<sup>13</sup> MBNA Comments at 5.

<sup>14</sup> *Id.*

<sup>15</sup> 47 U.S.C. § 227(e)(2).

those state laws that are less restrictive than federal law.<sup>16</sup> In addition, without specific Congressional direction, an agency may preempt state law only if there is actual conflict between federal and state law, where compliance with both federal and state law is impossible, where there is implicit in federal law a barrier to state regulation or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.<sup>17</sup> In these instances, the Commission and the FTC must make a state-by-state analysis of do-not-call laws and preempt only those laws that cannot coexist with federal law.

In proposing preemption of state laws, SIIA (at 2) suggested that the Commission eliminate the company-specific do-not-call list requirement, suggesting that the national do-not-call registry (“Registry”) would obviate the need for company-specific lists. This proposal ignores the fact that some entities are exempt from the prohibition on calling numbers listed on the Registry. Without company-specific lists, consumers would have no way of stopping calls from, for example, companies with which they have an established business relationship or from charities. The Commission must retain its requirement that companies maintain company-specific do-not-call lists.<sup>18</sup>

## **II. THE COMMISSION SHOULD NOT BROADEN THE FTC’S DEFINITION OF “ESTABLISHED BUSINESS RELATIONSHIP” OR CREATE NEW EXEMPTIONS.**

Some telemarketing interests want the Commission to broaden the FTC’s definition of “established business relationship” by extending the timeframes adopted by

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<sup>16</sup> 47 U.S.C. § 227(e)(1).

<sup>17</sup> *Louisiana Public Service Comm. v. FCC*, 476 U.S. 355 (1986).

<sup>18</sup> As discussed in the next section, the Commission should also clarify that companies must honor do-not-call requests from consumers with whom the companies have an established business relationship.

the FTC.<sup>19</sup> Others would have the Commission alter the nature of the relationship.<sup>20</sup> Still others would have the Commission carve specific exemptions.<sup>21</sup>

The proposals proffered by the telemarketing interests would result in inconsistencies between the agencies' rules. The proposed extensions would make it a violation of the FTC's rules for a magazine publisher, for example, to call a consumer two years after the last event establishing a business relationship. If the Commission were to adopt a longer timeframe, however, a mortgage company – which is not under the FTC's jurisdiction – could make calls to consumers after the 18-month window and not be in violation of the Commission's rules. This would create confusion among consumers who register and thwart the purpose of the Registry.

In developing its new definition of “established business relationship,” the FTC noted that the exemption “must be narrowly crafted to avoid defeating the purpose of the ‘do-not-call’ registry.”<sup>22</sup> The FTC rejected timeframes of longer than two years because consumers would be “surprised” by such calls and find them to be “unexpected.”<sup>23</sup> The FTC determined that the 18-month period “strikes a balance between industry's needs and consumers' privacy rights and reasonable expectations about who may call them and when.”<sup>24</sup>

Similarly, adding exemptions would reduce the effectiveness of the Registry. Consumers who register will expect unwanted telemarketing calls to practically

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<sup>19</sup> See, e.g., Comments of the American Council of Life Insurers at 3-4.

<sup>20</sup> See, e.g., Comments of WorldCom at 5-7.

<sup>21</sup> See, e.g., SIIA Comments at 3.

<sup>22</sup> 68 Fed. Reg. at 4593.

<sup>23</sup> *Id.* at 4592.

<sup>24</sup> *Id.*

disappear. Expanding exemptions will cause consumer confusion that will lead to dissatisfaction among consumers.

The Commission should reject proposals that would broaden the definition of “established business relationship” or create additional exemptions to its telemarketing rules. Consumers need more, not less, protection from unwanted telemarketing calls. Proposals to expand the established business relationship or to create more exemptions would only expose consumers to additional intrusions into their privacy and would undermine the effectiveness of the Registry.

In addition, NASUCA agrees with the FTC that the Commission should clarify that companies must honor do-not-call requests from consumers with whom the companies have an established business relationship.<sup>25</sup> The apparent exemption noted by the FTC not only runs counter to Congressional intent, as expressed in the TCPA,<sup>26</sup> it is also inconsistent with the FTC’s less ambiguous rule.<sup>27</sup> In adopting its rule, the FTC noted that a consumer’s ongoing business relationship with a seller does not give the seller unfettered rights to continue calling the consumer:

Once the consumer asks to be placed on the seller’s “do-not-call” list, the seller may not call the consumer again regardless of whether the consumer continues to do business with the seller. If the consumer continues to do business with the seller after asking not to be called, the consumer *cannot* be deemed to have waived his or her company-specific “do-not-call” request.<sup>28</sup>

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<sup>25</sup> FTC Comments at 27-28.

<sup>26</sup> See 47 U.S.C. § 227(c)(1)(A), which directed the Commission to compare and evaluate various alternatives, “individually or in combination,” for the protection of consumers’ privacy rights “to avoid receiving telephone solicitations to which they object.”

<sup>27</sup> 16 C.F.R. § 310.4(b)(1)(iii)(A).

<sup>28</sup> 68 Fed. Reg. 4634 (emphasis in original).

The Commission should make clear that an established business relationship does not bar consumers from stopping unwanted telemarketing calls, even from those with which consumers continue to do business.

### **III. THE COMMISSION SHOULD MAKE THE FTC’S RULE ON ABANDONED CALLS BY PREDICTIVE DIALERS APPLICABLE TO ALL ENTITIES UNDER COMMISSION JURISDICTION.**

The DMA asserts that the FTC’s standards concerning the use of predictive dialers are not rational or workable.<sup>29</sup> The DMA claims that the FTC’s rules “would prohibit marketers from making prerecorded calls – by treating such calls as abandoned – in circumstances where the TCPA expressly permits such calls.”<sup>30</sup> The DMA neither elaborates on such circumstances nor cites any statute that addresses the use of predictive dialers. Presumably, DMA’s argument is that because the FTC’s rule requires abandoned calls to include a recorded message giving the name and telephone number of the seller on whose behalf the call is made,<sup>31</sup> a telemarketer abandoning a call would be in violation of 47 U.S.C. § 227(b)(1)(B), which prohibits calls using prerecorded messages without the called party’s express consent.<sup>32</sup>

The DMA’s concern is unfounded. In adopting the TCPA, Congress found that consumers consider calls using prerecorded messages to be a nuisance and an invasion of privacy,<sup>33</sup> and determined that banning such calls except with the consent of the called

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<sup>29</sup> DMA Comments at 4.

<sup>30</sup> *Id.*

<sup>31</sup> 16 C.F.R. § 310.4(b)(4)(iii).

<sup>32</sup> See also 47 C.F.R. § 64.1200(a)(2). In addition to the exemptions found in 47 U.S.C. § 227(b)(2)(B), the Commission has also exempted calls made within an established business relationship and calls made by tax-exempt organizations. 47 C.F.R. § 64.1200(c)(3) and (4).

<sup>33</sup> Pub. L. No. 102-243, § 2(10), 105 Stat. 2395.

party or in emergency situations “is the only effective means of protecting telephone consumers from this nuisance and privacy invasion.”<sup>34</sup> Nevertheless, Congress also provided the Commission with flexibility in regulating calls containing prerecorded messages:

While the evidence presented to the Congress indicates that automated or prerecorded calls are a nuisance and an invasion of privacy, regardless of the type of call, the Federal Communications Commission should have the flexibility to design different rules for those types of automated or prerecorded calls that it finds are not considered a nuisance or invasion of privacy, or for noncommercial calls, consistent with the free speech protections embodied in the First Amendment of the Constitution.<sup>35</sup>

In establishing its identification requirement, which in fact is a “safe harbor” against enforcement actions for telemarketers, the FTC noted that consumers’ primary concern regarding abandoned calls is the fear that the caller may be a criminal trying to determine whether the consumer is at home.<sup>36</sup> The FTC set out to “strike a balance” between stemming an abusive practice and allowing telemarketers to continue using predictive dialer technology that reduces their costs.<sup>37</sup> The FTC found that requiring the use of a recorded message identifying the seller and the seller’s telephone number substantially mitigates consumers’ fears and allows telemarketers to continue using predictive dialer technology.<sup>38</sup>

Because the essential nuisance aspect of abandoned calls – the “hang up” or “dead air” – is substantially mitigated by the FTC’s identification requirement, the Commission

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<sup>34</sup> *Id.*, § 2(12).

<sup>35</sup> *Id.*, § 2(13).

<sup>36</sup> 68 Fed. Reg. at 4644.

<sup>37</sup> *Id.* at 4642.

<sup>38</sup> *Id.* at 4644.

has the flexibility to adopt a regulatory approach for the prerecorded message required by the FTC that is different from the regulations applicable to other prerecorded messages. NASUCA urges the Commission to make an exception for prerecorded messages that are used to comply with the FTC's "safe harbor" provision.

#### **IV. CONCLUSION**

It is clear that the Commission may adopt rules that are consistent with the FTC's telemarketing rules without preempting more restrictive state laws, providing additional exemptions or expanding the FTC's definition of "established business relationship." The Commission should also enhance the effectiveness of the Registry by extending its applicability to those entities that are not within the FTC's jurisdiction. NASUCA recommends that the Commission reject the arguments presented by the telemarketing interests that would make the Registry a less effective tool for consumer protection.

Respectfully submitted,

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May 19, 2003