

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

In the Matter of)	
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Rules and Regulations Implementing the)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991)	CC Docket No. 92-90
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SUPPLEMENTAL REPLY COMMENTS AND RECOMMENDATIONS OF THE
ATTORNEYS GENERAL OF ALABAMA, ARIZONA, ARKANSAS, CALIFORNIA,
COLORADO, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, IDAHO, ILLINOIS,
INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MAINE, MARYLAND,
MASSACHUSETTS, MINNESOTA, MISSOURI, MONTANA, NEVADA, NEW
HAMPSHIRE, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH
DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH
CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VERMONT, VIRGINIA,
WASHINGTON, WEST VIRGINIA, WISCONSIN, and THE CORPORATION COUNSEL OF
THE DISTRICT OF COLUMBIA

We, the undersigned Attorneys General, write to join in the attached Reply Comments and Recommendations submitted by Indiana Attorney General Steve Carter on May 19, 2003 [hereinafter “Carter Reply Comments at ___”] in the above-referenced matter. In addition, we supplement those Comments with the following Comments and Recommendations, which stress the practical and detrimental effects FCC preemption of state do-not-call [DNC] laws would have on our efforts to protect our citizens’ privacy.

Introduction

As Attorney General Carter noted in his May 19th Comments, “[s]tates have a long-established history of enforcing their consumer protection and deceptive trade practices laws against fraudsters who call from other states.” [Carter Reply Comments at 12]. Also, it is well-settled that preemption should not be lightly inferred, especially when dealing with an area of traditional state concern. In *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146-47 (1963), the Supreme Court held that there must be an “unambiguous congressional mandate” of preemption when dealing with “historic police powers,” which in that case were consumer protection powers. Likewise, the Court has stated that preemption “should not be lightly inferred” when dealing with “the traditional police power of the State.” *Fort Halifax Packing*

Co., Inc. v. Coyne., 482 U.S. 1, 21 (1987)(establishment of labor standards).¹

¹ Similarly, the TCPA does not preempt state DNC laws under the doctrine of conflict preemption, as Visa argues in its Reply Comments, filed with the FCC on January 31, 2003, at 7-9. [hereinafter “Visa Reply Comments at ___”] Conflict preemption arises when State law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190, 204 (1983), quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Conflict preemption may also arise if “compliance with both federal and state regulations is a physical impossibility.” *Pacific Gas, supra*, 461 U.S., at 204, quoting *Florida Lime & Avocado Growers, Inc. v. Paul, supra*, 373 U.S., at 142-43. Visa does not claim that that coexistence of the TCPA and state do-not-call laws is “physically impossible.” In fact, Visa concedes that “it may be possible to comply with both the state and federal requirements at the same time.” [Visa Reply Comments at 7].

To strike down a conflicting law, there must be an “actual conflict” between State and federal law. The Supreme Court “has observed repeatedly that preemption is ordinarily not to be implied absent an ‘actual conflict.’... The ‘teaching of this Court’s decisions...enjoins seeking out conflicts between state and federal regulation where none clearly exists.’” *English v. General Electric Co.*, 496 U.S. 72, 90 (1990) (citations omitted). On a facial challenge, the conflict between State and federal law must be a necessary and not simply a possible outcome: the State law must “require or authorize conduct that necessarily constitutes a violation” of federal law “in all cases.” *Rice v. Norman Williams Co., supra*, 458 U.S. at 661 (emphasis added). Or, conversely, there must be no means of implementing the State law

without creating a conflict. Any “defects [must] inhere in the regulations as written.” *Department of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 69 (1994). Any “possible set of ... conditions not pre-empted by federal law is sufficient to rebuff [the] facial challenge....” *California Coastal Commission v. Granite Rock Co.*, 480 U.S. 572, 589 (1988). Because State DNC laws enhance rather than frustrate the goals of the TCPA, and do not actually conflict with the TCPA, the Commission should reject Visa’s argument.

As Attorney General Carter noted, WorldCom has suggested that DNC laws are not an area of traditional state concern. [Carter Reply Comments at 12]. Attorney General Carter stressed, however, that consumer protection and privacy protection are within traditional state police powers. Moreover, DNC laws advance what may be the *most* traditional state police power: protection of private property. When a telemarketer makes an unsolicited telephone call, the telemarketer is using the consumer's property – the consumer's telephone located within the consumer's residence – without the consumer's permission. Unlike solicitors who use direct mail, billboards, or newspapers, the telemarketer uses the recipient's property as the medium of communication of the solicitation. State DNC laws are a modest means of discouraging unauthorized appropriation of another's property. They are triggered only when the consumer tells prospective telemarketers, through registration on a DNC list, that the consumer does not grant the telemarketer permission to electronically enter the consumer's home and use the consumer's property for a solicitation. Thus, in addition to enforcing virtual no-solicitation signs for consumers' residential telephones, DNC laws also protect property and, therefore, function like "no trespassing" signs. Certainly, it is hard to conceive of more traditional state functions than protecting private property from misappropriation or trespass.

If the FCC were to follow the suggestions of the telemarketing industry and preempt the operation of state DNC laws, limit the states' enforcement of their DNC laws to intrastate calls, and/or limit state enforcement against out-of-state telemarketers to TCPA actions in federal court, this would leave a gaping hole in the protection of the telephone privacy rights of consumers throughout the nation.

Such preemption would strip the states of effective means to hold out-of-state businesses accountable for victimizing their citizens; dramatically increase the complaint-handling, investigatory, and enforcement resources the FCC would have to devote to DNC violators; drastically diminish the effectiveness of state Attorneys General as productive and complementary investigatory and enforcement partners in this area; overburden federal courts, which would be required to entertain a great majority of these cases; and free illegal telemarketers from the historical state-federal consumer protection enforcement approach to which many other industries (e.g., credit reporting agencies, pay-per-call) are currently subject.

State Attorney General Enforcement of State DNC Laws

In the relatively short history of state DNC law enforcement, State Attorneys General have actively, expeditiously, and effectively enforced their states' DNC laws in state courts. For example, since Kentucky's no-call law became effective in July 2002, Kentucky Attorney General Ben Chandler has lodged 93 enforcement actions, 86% of which were against telemarketers calling into Kentucky from other states. Likewise, since Oklahoma Attorney General Drew Edmondson began enforcing his state's don't-call law in February 2003, his office has taken enforcement action against 27 telemarketers, 81.4% of which were calling into Oklahoma from out of state. Idaho's no-call law went into effect in January 2001. Since that time, Attorney General Lawrence Wasden's office has taken 79 enforcement actions, 73% of

which were against telemarketers calling into Idaho from outside that state's borders. In addition, the Idaho Attorney General has sent no-call "warning letters" to 433 different businesses, 258 (60%) of which were located outside Idaho.

Similarly, since Colorado's enforcement of its no-call law began in July 2002, Colorado Attorney General Ken Salazar has taken 225 enforcement actions. Two-thirds (150) of these actions were taken against out-of-state telemarketers calling into Colorado, while the remaining 75 were filed against Colorado businesses. Pennsylvania's DNC law became enforceable in November 2002. Pennsylvania Attorney General Mike Fisher has filed 17 enforcement actions, 11 (65%) of which involved out-of-state companies and six (35%) of which involved Pennsylvania telemarketers. The no-call enforcement efforts of Missouri Attorney General Jay Nixon began in July 2001. Since that time, Missouri has obtained 94 court orders against no-call law violators. Forty-two (45%) of those orders were entered against Missouri entities, while the remaining 52 (55%) were obtained against out-of-state telemarketers. Since Oregon's no-call law became effective in January 2000, Attorney General Hardy Myers has opened 212 enforcement actions, 115 (54.2%) of which involved out-of-state telemarketers and 97 (45.8%) of which involved Oregon businesses. Lastly, since Tennessee's no-call law became effective in August 2000, 50% of Tennessee's DNC-law settlements (13 of 26) have been with out-of-state telemarketers.

Attorney General Enforcement of Other State Laws Against Illegal Telemarketers

Those Attorneys General whose states have not yet enacted no-call laws rely on their states' Unfair and Deceptive Acts and Practices statutes, criminal laws, and regulations to address illegal telemarketing. For example, since January 2001, the office of Ohio Attorney General Jim Petro has undertaken 15 interstate telemarketing criminal cases in which they have assisted local law enforcement in the investigation and/or were appointed as special prosecutor in the county in which the cases were tried. In addition, the Ohio Attorney General has pursued eight civil cases against interstate telemarketers. These actions resulted in three assurances of voluntary compliance and five consent judgments. Between 1995-2001, the office of Washington Attorney General Christine Gregoire filed 33 lawsuits against illegal telemarketing entities. Over 60% (20) of those actions were against out-of-state telemarketers, while the remaining 13 defendants were based in Washington.

Telemarketing-Related Complaint-Handling by State Attorneys General

State Attorneys General are the primary repository for and handlers of consumer protection complaints filed in their states. A substantial percentage of those complaints relate to illegal telemarketing practices. NAAG's annual survey of Attorney General offices for their top-ten consumer complaints placed telemarketing as the fifth most-common complaint in 2000 and 2002, and as the sixth most-common complaint in 2001. For example, since August 2000, the office of Missouri Attorney General Jay Nixon has logged in 37,991 complaints alleging violations of Missouri's no-call law. Between May 2001 and May 2003, Idaho Attorney General Lawrence Wasden's office logged 3,683 telemarketing complaints, 2,614 (71%) of which were no-call complaints. Seventy-four percent (2,739 out of 3,683) of the complaints related to non-

Idaho businesses; 65% (1,688 of 2,614) of the no-call complaints were filed against out-of-state companies. Since 2000, the office of Texas Attorney General Greg Abbott has received 1,454 no-call and other telemarketing-related complaints, 825 (57%) of which were about non-Texas entities. In addition, Kentucky Attorney General Ben Chandler's office received 7,783 telemarketing-related complaints between July 2002 and May 2003. Eighty-three percent of the complaints related to out-of-state telemarketers. Washington Attorney General Christine Gregoire reports similar numbers for her state. In 2002, 217 of 280 telemarketing complaints (78%) were filed against out-of-state enterprises.² Ohio Attorney General Jim Petro reports that between May 2002 and May 2003, two-thirds of the telemarketing-related complaints his office received (1,394 out of 2,106) were against out-of-state companies.³ Since January 2001, the office of North Carolina Attorney General Roy Cooper has received 2,370 complaints against interstate telemarketers. Lastly, the office of Florida Attorney General Charlie Crist reports that, between 1995 and 2002, Florida received an average of more than 7,400 telemarketing-related complaints annually.

The foregoing statistics illustrate the very large number of consumer complaints generated by violations of existing state no-call laws and other state laws and regulations that address illegal telemarketing, as well as the high percentage of those complaints that relate to interstate telemarketing. These statistics also underscore the resulting additional investigatory and enforcement burden the Commission would undertake were it to severely limit the role of State Attorneys General as partners in the investigation and prosecution of illegal interstate telemarketing by limiting them to enforcing illegal intrastate telemarketing and enforcing interstate telemarketing violations via the TCPA in federal court.

For the foregoing reasons, as well as those expressed in the attached Reply Comments and Recommendations submitted by Indiana Attorney General Steve Carter on May 19, 2003 in this matter, we urge the Commission, when establishing a national DNC rule and registry, to expressly declare that its rule and registry do not preempt any similar state laws or registries.

² The Washington Attorney General's office reports an additional 70 telemarketing complaints in 2002 for which the telemarketer's location was unknown.

³ Attorney General Petro reports receiving an additional 139 telemarketing-related complaints during this time period for which the perpetrator's address was unknown.

