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8 **Before the**
9 **Federal Communications Commission**
10 **Washington, D.C. 20554**
11

12
13 In the Matter of:] CG Docket No. 02-278
14]
15 Rules and Regulations] PETITION FOR DECLARATORY RULING
Implementing the]
16 Telephone Consumer]
Protection Act of 1991]
17]

18
19 **QUICK SUMMARY**

20 This petition is brought by petitioner Mark Boling individually and on behalf of
21 California Consumers and California businesses which compete with those business entities
22 that allegedly utilize unlawful business practices ("Defendants"), to seek a declaratory ruling
23 by the Commission of any "conflict preemption" between the California Consumer Legal
24 Remedies Act ("CLRA") [*California Civil Code* §§ 1750 et. seq.] and the Federal Telephone
25 Communication Protection Act ("TCPA") [47 U.S.C. 227] regarding Defendants'
26 dissemination and/or initiation of unsolicited prerecorded telephone messages to California
27 residents, including petitioner, **by interstate calling** in connection with the advertisement,
28 offer for sale and/or sale of consumer Products in California.

1 Petitioner has acted as an individual party, representative party and/or legal
2 representative in numerous California lawsuits regarding the prosecution of the subject state
3 and federal violations. Recently, defendants assert a defense that the relevant provisions of
4 the CLRA regarding the subject unsolicited prerecorded messages by interstate calling are
5 preempted by the TCPA and therefore a real and significant controversy exists as to this
6 issue and needs to be resolved by the Commission.

7 **REPORT AND ORDER**

8 The pertinent parts of the FCC's REPORT AND ORDER, Adopted: June 26, 2003 and
9 Released: July 3, 2003 that raises the issue of "conflict preemption" are as follows:

10 80. At the outset, we note that many states have not adopted
11 any do-not-call rules. The national do-not-call rules will govern exclusively
12 in these states for both intrastate and interstate telephone solicitations.¹
13 Pursuant to section 227(f)(1), all states have the ability to enforce
14 violations of the TCPA, including do-not-call violations, in federal district
15 court.² Thus, we conclude that there is no basis for conflict regarding the
16 application of do-not-call rules in those states that have not adopted do-
17 not-call regulations.

18 81. For those states that have adopted do-not-call regulations,
19 we make the following determinations. First, we conclude that, by
20 operation of general conflict preemption law, the federal rules constitute a
21 floor, and therefore would supersede all less restrictive state do-not-call
22 rules.³ We believe that any such rules would frustrate Congress'
23 purposes and objectives in promulgating the TCPA. Specifically,
24 application of less restrictive state exemptions directly conflicts with the
25 federal objectives in protecting consumer privacy rights under the TCPA.
26 Thus, telemarketers must comply with the federal do-not-call rules even if
27 the state in which they are telemarketing has adopted an otherwise
28 applicable exemption. Because the TCPA applies to both intrastate and
interstate communications, the minimum requirements for compliance are
therefore uniform throughout the nation. We believe this resolves any

24 ¹ Section 2(b) provides the Commission with the authority to apply the TCPA to intrastate communications. *See* 47
U.S.C. § 152(b).

25 ² 47 U.S.C. § 227(f)(1).

26 ³ *See, e.g., Geier v. American Honda Motor Co.*, 529 U.S. 861, 873 (2000) (where state law frustrates the purposes and
27 objectives of Congress, conflicting state law is "nullified" by the Supremacy Clause); *City of New York v. FCC*, 486 U.S.
28 57, 64 (1988) ("The statutorily authorized regulations of an agency will preempt any state or local law that conflicts with
such regulations or frustrates the purposes thereof.").

1 potential confusion for industry and consumers regarding the application
of less restrictive state do-not-call rules.

2 82. Second, pursuant to section 227(e)(1), we recognize that
3 states may adopt more restrictive do-not-call laws governing intrastate
4 telemarketing.¹ With limited exceptions, the TCPA specifically prohibits
5 the preemption of any state law that imposes more restrictive intrastate
6 requirements or regulations. Section 227(e)(1) further limits the
7 Commission's ability to preempt any state law that prohibits certain
8 telemarketing activities, including the making of telephone solicitations.
9 **This provision is ambiguous, however, as to whether this prohibition
10 applies both to intrastate and interstate calls,² and is silent on the
11 issue of whether state law that imposes more restrictive regulations
12 on interstate telemarketing calls may be preempted.** As set forth
13 below, however, we caution that more restrictive state efforts to regulate
14 interstate calling would almost certainly conflict with our rules.

15 83. We recognize that states traditionally have had jurisdiction
16 over only intrastate calls, while the Commission has had jurisdiction over
17 interstate calls.³ Here, Congress enacted section 227 and amended
18 section 2(b) to give the Commission jurisdiction over both interstate and
19 intrastate telemarketing calls. Congress did so based upon the concern
20 that states lack jurisdiction over interstate calls.⁴ Although section 227(e)
21 gives states authority to impose more restrictive intrastate regulations, we
22 believe that it was the clear intent of Congress generally to promote a
23 uniform regulatory scheme under which telemarketers would not be
24

25 ¹ 47 U.S.C. § 227(e)(1).

26 ² Section 227(e)(1) provides that:

27 (e) Effect on State Law. –

28 (1) State Law Not Preempted. – Except for the standards prescribed under subsection (d)
and subject to paragraph (2) of this subsection, nothing in this section or in the regulations
prescribed under this section shall preempt any State law that imposes more restrictive
intrastate requirements or regulations on, or which prohibits—

- (A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;
- (B) the use of automatic telephone dialing systems;
- (C) the use of artificial or prerecorded voice messages; or
- (D) the making of telephone solicitations.

³ See *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986); *Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133 (1930).

⁴ S. REP. NO. 102-178, at 3; see also *id.* at 5 (“Federal action is necessary because States do not have jurisdiction to protect their citizens against those who . . . place interstate telephone calls.”); Cong. Rec. S16205 (Nov. 7, 1991) (remarks of Sen. Hollings) (“State law does not, and cannot, regulate interstate calls.”); TCPA § 2(7) (finding that “[o]ver half the States now have statutes restricting various uses of the telephone for marketing, but telemarketers can evade their prohibitions through interstate operation.”).

1 subject to multiple, conflicting regulations.¹ We conclude that inconsistent
2 interstate rules frustrate the federal objective of creating uniform national
3 rules, to avoid burdensome compliance costs for telemarketers and
4 potential consumer confusion. The record in this proceeding supports the
5 finding that application of inconsistent rules for those that telemarket on a
6 nationwide or multi-state basis creates a substantial compliance burden
7 for those entities.²

8 84. We therefore believe that any state regulation of interstate
9 telemarketing calls that differs from our rules almost certainly would
10 conflict with and frustrate the federal scheme and almost certainly would
11 be preempted. **We will consider any alleged conflicts between state
12 and federal requirements and the need for preemption on a case-by-
13 case basis.** Accordingly, any party that believes a state law is
14 inconsistent with section 227 or our rules may seek a declaratory ruling
15 from the Commission. We reiterate the interest in uniformity – as
16 recognized by Congress – and encourage states to avoid subjecting
17 telemarketers to inconsistent rules.

18 RELEVANT PROVISIONS UNDER FEDERAL TCPA

19 It shall be unlawful for any person within the United States to
20 **initiate any telephone call** to any residential telephone line using
21 an artificial or prerecorded voice to deliver a message without the
22 prior express consent of the called party, unless the call is initiated
23 for emergency purposes or is exempted by rule or order by the
24 Commission under paragraph (2)(B). 47 U.S.C. 227(b) (1) (B)

25 The Commission shall prescribe regulations to implement the
26 requirements of this subsection. In implementing the requirements
27 of this subsection, the Commission -

28 (B) may, by rule or order, exempt from the requirements of
paragraph (1)(B) of this subsection, subject to such conditions as
the Commission may prescribe -

(i) calls that are not made for a commercial purpose; and

(ii) such classes or categories of calls made for commercial
purposes as the Commission determines -

(I) will not adversely affect the privacy rights that this
section is intended to protect; and

(II) do not include the transmission of any unsolicited
advertisement. 47 U.S.C. 227(b) (2) (B)

¹ See, e.g., 137 Cong. Rec. S18317-01, at 1 (1991) (remarks of Sen. Pressler) (“The Federal Government needs to act now on uniform legislation to protect consumers.”).

² See, e.g., AWS Further Comments at 7 (separate state requirements will confuse customers and increase costs and burdens for telemarketers); Intuit Further Comments at 2-4 (Congress intended that more restrictive state laws be preempted); Visa Further Comments at 8 (contending that state lists that are inconsistent with federal requirements should be preempted).

1 order by the Commission under paragraph (2) (B). The Congress finds that such telephones
2 calls are a nuisance and an invasion of privacy. [PL102-243, Sec.2 Findings (1991)]

3 "Conflict preemption" can only be found if it is "impossible" to reconcile the above
4 state and federal standards into a unified standard, because:

5 "[S]tate law is preempted [only] to the extent that it actually conflicts with
6 federal law... Such conflict must be of substance and not merely trivial of
7 insubstantial. It exists when it is **impossible** to comply with both state and
8 federal requirements or when state law stands as an obstacle to the full
9 purposes and objectives underlying federal law. Although state law is
10 preempted to the extent that it actually conflicts with federal law, it is preempted
11 to that extent and no further *Peatros v. Bank of America* (2000) 22 Cal.4th
12 147,158 (internal citations and quote marks omitted).

13 In this instance, the CLRA controls the DISSEMINATION of a prerecorded message
14 and does NOT control the telephone call containing that message. The TCPA controls the
15 CALL, and not the dissemination of the message. Therefore, when the defendant initiates
16 the unlawful call it violates TCPA and when the unlawful message is received in California it
17 violates the CLRA. Under the CLRA, **the interstate nature of the sending call is**
18 **irrelevant**. The fact that the dissemination (reception) of the unlawful activity is made in
19 California is relevant to the violation of the CLRA. **No conflict exists** in the enforcement of
20 the TCPA or the CLRA as it relates to the activities set forth in this action, as the actionable
21 conduct in **each law is separately defined**.

22 Furthermore, under its SAVINGS CLAUSE, the TCPA expressly created a private right
23 of action for a violation of such unsolicited telephone calls:

24 **"(3) PRIVATE RIGHT OF ACTION.--**A person or entity may, if otherwise
25 permitted by the laws or rules of court of a State, bring in an appropriate court
26 of that State--

27 "(A) an action based on a violation of this subsection or the regulations
28 prescribed under this subsection to **enjoin** such violation,

"(B) an action to recover for actual monetary loss from such a violation, or to
receive **\$500 in damages for each such violation**, whichever is greater, or

"(C) **both** such actions. [47 USC 227(b)(3)]

Absent state law to the contrary, consumers may immediately file suit in state court if a
caller violates the TCPA's prohibitions on the use of automatic telephone dialing system and

1 artificial or prerecorded voice messages. . . States retain the power to initiate action in state
2 court for violations of state telemarketing statutes. *In the Matter of Rules and Regulations*
3 *Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Section
4 55 to the Report and Order adopted September 17, 1992 before the FCC.

5 As an exception, the TCPA specifically preempts state law where it **conflicts** with the
6 technical and procedural requirements for identification of senders of telephone facsimile
7 messages or autodialed artificial or prerecorded voice messages. (*Id.*, §56).

8 In this case the subject violations set forth in the CLRA [*California Civil Code* §1770(a)
9 (22)] and the TCPA [47 U.S.C. 227(b) (1) (B)] do not pertain to technical and procedural
10 requirements AND compliance with each statute does not conflict with the other.

11 **CONCLUSION**

12 The **purpose and aims** of the CLRA, *California Civil Code* §1770(a) (22) is
13 **consistent** with the TCPA to deter the nuisance and invasion of privacy caused by the
14 unsolicited prerecorded messages.

15 The language of the CLRA and TCPA regarding the enforcement of prerecorded
16 messages by telephone are not in conflict regardless of the interstate nature of the call.
17 There is no mystery as to how Defendants can comply with California state law, while also
18 complying with Federal law: Stop sending unsolicited prerecorded messages by telephone in
19 California. Defendants are welcome to advertise its clients' product/services in California in
20 the same manner as competing business lawfully operate. Or, if they would rather not
21 comply with California law, then they can stop availing themselves of California business.

22 Based upon the foregoing, petitioner respectfully requests that the Commission
23 issue a declaratory ruling that the **provisions of California Civil Code §1770(a) (22)**
24 **regarding interstate calling are not preempted by the TCPA.**

25
26 Dated: August 4, 2003



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Attorney for Petitioner