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COMMENTS OF WAYNE G. STRANG ON THE AMENDED REGULATIONS ISSUED PURSUANT TO NOTICE OF PROPOSED RULEMAKING (NPRM) IN THE MATTER OF THE TELEPHONE CONSUMER PROTECTION ACT/DO-NOT-CALL IMPLEMENTATION ACT
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Background

I am a resident of the State of California interested in protecting my right to privacy through enforcement of the Telephone Consumer Protection Act (TCPA) of 1991.

I thank the Commission for giving me the opportunity to comment on the new regulations issued pursuant to the Telephone Consumer Protection Act of 1991 on July 3, 2003. Report and Order 03-153 implements the majority of these new regulations 30-days subsequent to publication in the Federal Register.

The Commission is to be lauded for the overall thrust of these new regulations and the added protections given to the consumer in these days of more and more intrusive telemarketer behavior. For the most part, these regulations and clarifications contained in the Report and Order are responsive to the needs of both telemarketers and the general population.

However, there are a few areas that need to be addressed by the Commission, two of which I believe are high priority.

Prior express invitation or permission - artificial or prerecorded voice calls (HIGH PRIORITY)

The Commission has properly determined that prior consent to telemarketing calls or junk faxes must be memorialized in writing. However, the Commission has **failed to include this requirement in the regulations for prerecorded or artificial voice messages**.

Section 64.1200(a)(2) **must** be amended to read:

(i) "For the purposes of paragraph (a)(2) of this section, "prior express consent" must be documented by a signed and dated, written statement that includes the telephone number to which recorded advertisements may be placed, and clearly indicates the recipient's consent to receive such advertisements from the seller."

It makes no sense to require prior consent be in writing for both faxes and live operator calls, but fail to include that requirement for calls using an artificial or prerecorded voice. This oversight must be corrected as soon as possible.

In addition, the Commission failed to require an **effective date** for any evidence of prior invitation or permission. This opens the door for unscrupulous companies to present an undated document at trial, possibly one even signed by a complainant, and professing prior consent when in fact consent not exist at the time of the call/transmission.

Section 64.1200(a)(3)(i) should be amended to read, "...as evidenced by a signed and dated written statement..."

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Section 64.1200(c)(2)(ii) should be amended to read, "...must be evidenced by a signed and dated written agreement..."

Artificial or prerecorded voice calls and the "established business relationship" (EBR) (HIGH PRIORITY)

Regrettably, the Commission continues to insist that there is an exemption for calls using an artificial or prerecorded voice to deliver an unsolicited advertisement from entities which have an "established business relationship" (EBR) with the called party. In maintaining this exemption, the Commission in the Report and Order[1], references only the previous Report and Order which erroneously established the exemption.

In Report and Order 92-443, the Commission stated, "We conclude, based upon the comments received and the legislative history, that a solicitation to someone with whom a prior business relationship exists does not adversely affect subscriber privacy interests. Moreover, such a solicitation can be deemed to be invited or permitted by a subscriber in light of the business relationship [n61]. Additionally, the legislative history indicates that the TCPA does not intend to unduly interfere with ongoing business relationships;[n62]" Footnote 62 then references House Report 102-317, 102d Cong., 1st Session (1991), p. 13, **which in turn is discussing telephone solicitations and not calls using an artificial or prerecorded voice to deliver an unsolicited advertisement**[2].

The Commission therefore, exempted calls using an artificial or prerecorded voice to subscribers where there is an EBR, and improperly used a discussion of "telephone solicitations"[3] to justify it[4]. What is worse, the Commission has at least **twice** properly noted that "[The TCPA] provides an exemption for commercial calls which do not adversely affect residential subscriber privacy interests **and do not include any unsolicited advertisement.**"[5]

The Commission has now at least **twice** ignored the conjunctive **"and"** between those phrases and permitted calls using an artificial or prerecorded voice to deliver an unsolicited advertisement, so long as there is an EBR between the parties. At best, this is **implied** consent, which is not what Congress intended when it required prior **express** consent for any unsolicited advertisement.

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[1] See Report and Order 03-153, note 460

[2] "Under H.R. 1304, the term **"telephone solicitation"** means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services which is transmitted to any person (A) without that person's prior express invitation or permission, or (B) with whom the caller does not have an established business relationship. Such term does not include a call or message by a tax exempt nonprofit organization." House Report 102-317, 102d Cong., 1st Session (1991), p. 13 [emphasis added]

[3] The term "telephone solicitation" itself appears **only** in subsection (c) of the TCPA

[4] The EBR exemption for telephone solicitations is justified by the definition of the term.

[5] R&O 92-443 at paragraph 34, and R&O 03-153 at paragraph 136

Congress in drafting the TCPA specifically used the conjunction "**and**" between the phrase "will not adversely affect the privacy rights that this section is intended to protect" and the phrase, "do not include the transmission of any unsolicited advertisement" Even if the Commission concludes that a call from an entity where an EBR exists does not adversely effect the subscriber's privacy rights, if the call contains an unsolicited advertisement, by the plain language of the law the Commission lacks the requisite authority to exempt it.

Not only does this fly in the face of the plain language of the law, the Commission has ignored 47 USC 227(c)(6) which reads in its entirety, "(6) RELATION TO SUBSECTION (B).--The provisions of this subsection[6] **shall not be construed to permit a communication prohibited by subsection (b)"** By allowing the EBR exemption in the manner that it has, the Commission has done precisely this. It has allowed a communication that is prohibited by subsection (b)[7].

The Commission must revisit yet again, and this time correct, this glaring error.

Calls by tax-exempt nonprofit organizations

The clarifications in the Report & Order make it relatively clear that prerecorded and artificial voice calls placed by or on behalf of a tax-exempt nonprofit organization are **not** exempted if there is a for-profit motive. However, as we have seen in the past, many organizations will try to, and sometimes succeed in, improperly claim this exemption. The Commission could avoid this situation by a simple change in (a)(2)(v):

Section 64.1200(a)(2)(v) should be amended to read: "(v) Is made by or on behalf of a tax-exempt nonprofit organization, provided that the call does not contain, or introduce an unsolicited advertisement or telephone solicitation."

Exemption for radio/TV stations for calls using an artificial or prerecorded voice

While the Commission concluded that, "…if the purpose of the message is merely to invite a consumer to listen to or view a broadcast, such message is permitted under the current rules as a commercial call that 'does not include the transmission of any unsolicited advertisement'…"[8], it did not give sufficient guidance to avoid the inevitable.

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[6] Subsection (c) of the TCPA, deals with the protection of subscriber privacy rights and directs the Commission to, "…initiate a rulemaking proceeding concerning the need to protect residential telephone subscribers' privacy rights to avoid receiving **telephone solicitations**…" [emphasis added] The "established business relationship" is identified within the definition of "telephone solicitation" and it is **only** within subsection (c) that that term is used!

[7] It cannot be stated often enough. The term "established business relationship" appears **only** within the definition of "telephone solicitation", which in turn appears **only** in subsection (c) of the TCPA. Further, Congress forbade the Commission from construing subsection (c) to affect the subsection (b) prohibitions.

[8] R&O 03-153 at paragraph 145

While this type of call may not be pervasive at this time, this commenter can guarantee that we will soon be besieged by calls that say, "Listen to WXXX for your chance to win a brand new Diddlysquat, the car that takes you to nowhere!" Radio and television stations will leap at the opportunity to use their "exemption" to hawk all manner of wares for local merchants while cloaking the advertisements as a prize offered in their latest station promotion.

Relying on the Commission's statement, radio and television stations will claim that their message is only an attempt to win listeners by offering a prize and is therefore exempt from the Commission's rules. In reality, this message **would** constitute the "commercial availability or quality of property, goods or services", in this case the Diddlysquat automobile, and would be an "unsolicited advertisement" as defined in the statute and the regulations.

Most TCPA cases are brought in small claims courts, where it would be difficult if not impossible to determine if the local Diddlysquat dealer was involved in the promotion. Even though the mention of a specific brand name indicates that the advertiser is a part of the promotion, probably by offering the "prize" in exchange for the advertising, it is difficult for a Pro Se plaintiff to demonstrate that fact in court. It is therefore imperative that the Commission unequivocally state that this type of promotion, where the specific brand name or value of a prize is given, is **not** allowed.

The Commission should give clear examples of what is allowed and what is not. "Tune into KFI to hear the hilarious John and Ken as they take on the California establishment! Listen every weekday from 3-7 PM" is possibly allowed. "Tune into KFI to hear the hilarious John and Ken as they take on the California establishment! Listen every weekday from 3-7 PM for your chance to win a Chevrolet Corvette" is not.

Definitions of "seller", "telemarketer" and "telemarketing"

The Commission has inadvertently exempted from the rules for company specific do-not-call lists, those entities that use prerecorded messages and faxes to transmit unsolicited advertisements that are not also telephone solicitations. The definitions at 64.1200(f)(5), (6) and (7) should be modified to read:

64.1200(f)(5)

"The term seller means the person or entity on whose behalf a telephone call or message is initiated to advertise the commercial availability or quality of property, goods or services, or for the purpose of encouraging..."

64.1200(f)(6)

"The term telemarketer means the person or entity that initiates a telephone call or message to advertise the commercial availability or quality of property, goods or services, or for the purpose of encouraging.."

and 64.1200(f)(7)

"The term telemarketing means the initiation of a telephone call or message to advertise the commercial availability or quality of property, goods or services, or for the purpose of encouraging…"

Although the R&O makes the **intent** of the regulations obvious, telemarketers in the past have bulled their way through far smaller loopholes than this. It is of course necessary to make the obvious, obvious to those that plan to evade the rules.

To avoid this problem in the future, the Commission may want to specifically state that **all** telephone solicitations are unsolicited advertisements though **some, but very few,** unsolicited advertisements are not telephone solicitations[9].

Honoring a do-not-call request

For eleven years there has been a humorous typographical error in the regulations that continues in the latest iteration. Under "Maintenance of do-not-call lists.", the word "caller's" still exists where the term "called party's" was meant to be.

Please change the paragraph to read:

"(6) Maintenance of do-not-call lists. A person or entity making calls for telemarketing purposes must maintain a record of a **subscriber's** request not to be called…"

Changing the word to "subscriber's" allows for the submission of a do-not-call request by any means including mail, e-mail, through the company's website, or during a call initiated by either party, and does not lead to the erroneous, though humorous belief that the Commission believes the telemarketer will make the do-not-call request.

Conclusion

Although it has made some errors, the Commission has done an admirable job in drafting and explaining the new regulations. Even the errors that I believe it has made are generally, though not in all cases, tolerable. It should be heartily proud of the job it has done in fairly balancing the consumer's right to peace and quiet in his own home, with the industry's dubious right to invade it.

Now it is besieged with requests to eliminate or modify new protections, needed updates, required corrections and common sense interpretations. This organized campaign by the industry seeks to negate much needed changes. It is imperative that the Commission carefully and fairly

[9] For example, all unsolicited advertisements also encourage the purchase or rental of, or investment in, property, goods or services. However, those transmitted to a person who has an EBR with the seller, while still an unsolicited advertisement, by definition cannot be considered a telephone solicitation.

consider all points of view and make only those changes that further the purposes of the law. It is also necessary to remind the Commission that the needs of the industry are **not** paramount in this process. No matter how much they protest to the contrary, **it is not their right to have unimpeded access to our homes to dispense their drivel!**

In the event that the Commission decides to re-open these proceedings for reconsideration, I ask that these comments be filed in the appropriate drawer to be resurrected at the appropriate time.

Wayne G. Strang August 18, 2003