

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

In the Matter of)	
)	
Rules and Regulations Implementing)	CG Docket No. 04-53
the Controlling the Assault of)	
Non-Solicited Pornography and)	
Marketing Act of 2003)	
)	
Rules and Regulations Implementing)	CG Docket No. 02-278
the Telephone Consumer Protection)	
Act of 1991)	

COMMENTS OF THE AMERICAN TELESERVICES ASSOCIATION

The American Teleservices Association (“ATA”) hereby submits its comments on the Further Notice of Proposed Rulemaking in the captioned proceeding inquiring about the need for a safe harbor for telemarketers that inadvertently call wireless telephone numbers recently ported from wireline service, and as to whether the FCC should revise its National Do-Not-Call Registry (“DNCR”) regulations to reflect changes to parallel Federal Trade Commission (“FTC”) rules adopted under the 2004 Appropriations Act. 1/

I. WIRELESS SAFE HARBOR

ATA agrees with the Commission’s inclination that a safe harbor is necessary to protect against liability from autodialer and prerecorded calls that reach phone numbers assigned to wireless services, 2/ even though the calling party takes reasonable efforts

1/ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991* CG Docket No. 02-278, Further Notice of Proposed Rulemaking, FCC 04-52, ¶¶ 43-53 (rel. March 19, 2004), 69 Fed. Reg. 16873 (Mar. 31, 2004) (“*FNPRM*”).

2/ See 47 U.S.C. § 227(b)(1)(A)(iii); 47 C.F.R. § 64.1200(a)(1)(iii); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd 14014, 14109-17 (2003) (“*TCPA Order*”). In response to petitions seeking reconsidera-

to avoid such calls. *FNPRM*, ¶¶ 43-49. In the *TCPA Order*, the Commission adopted several findings to conclude that special rules to account for the then-pending advent of wireless local number portability (“WLNP”) were not necessary, ^{3/} but this has not been the case in practice. The record now amply demonstrates that mechanisms existing at the time of the *TCPA Order* are insufficient to allow telemarketers to address WLNP issues. ^{4/} Even carriers with direct access to numbering resources have experienced tracking difficulties arising from WLNP becoming reality. ^{5/} ATA appreciates the

tion or clarification of the *TCPA Order*, ATA urged the Commission to address the incongruity of finding predictive dialers to be “automated telephone dialing systems,” *id.* at 14090-92, while avowing an intent “not to prohibit ... live telephone solicitations to wireless” phones, *id.* at 14115, given that virtually all telemarketing calls, including those involving solely “live solicitations,” are placed using predictive dialers. ATA Opposition and Comments in Response to Petitions for Reconsideration, CG Docket 02-278, filed Oct. 14, 2003, at 4-6. ATA respectfully asks that the Commission take the opportunity presented by the wireless telemarketing liability issues raised by the *FNPRM* to address the request for clarification on this matter. See *FNPRM*, ¶ 43 & n.93.

^{3/} *TCPA Order*, 18 FCC Rcd at 14115-16 (finding that “there is no indication that ... measures [telemarketers have taken in the past] would not continue to be effective for identifying wireless numbers affected by ... porting,” that “information is available from a variety of sources to assist telemarketers in determining which numbers are assigned to wireless carriers,” and that “there are various solutions that will enable telemarketers to identify wireless numbers in a pooling and number portability environment”).

^{4/} See, e.g., Letter from Dan A. Sciallo, Counsel to North American Portability Management LLC, to Marlene H. Dortch, Secretary, FCC, in Docket Nos. 95-116 and 02-278, Mar. 4, 2004; Letter from Dean Garfinkel, Chairman, Call Compliance, Inc., and Anthony Rutkowski, Vice President of Regulatory Affairs, VeriSign Communications Services, to Marlene H. Dortch, Jan. 27, 2004 (service based on cell phone number database not yet available); Letter from Jerry Cerasale, Senior Vice President, Direct Marketing Association (“DMA”), to K. Dane Snowden, Chief, Consumer and Governmental Affairs Bureau, FCC, Dec. 2, 2003; Letter from Mindy J. Ginsburg, Director, Government Relations and Public Policy, NeuStar, Inc. (“NeuStar”), to Marlene H. Dortch, Nov. 24, 2003; Letter from Mindy J. Ginsburg, NeuStar, to Marlene H. Dortch, Nov. 21, 2003. See also Petition for Declaratory Ruling, filed by DMA and Newspaper Association of America (“NAA”), Docket No. 02-278, Jan. 29, 2004.

^{5/} See, e.g., *Wireless Portability Complaints: Approximately 6,640 Consumer Complaints Since Porting Began on Nov. 24*, News Release (rel. Mar. 30, 2004); *AT&T Responds to Wireless Bureau’s December 4, 2003, Letter on Local Number Portability*,

Commission's apparent recognition, as illustrated by issuance of the *FNPRM*, that additional rules are necessary in this area.

The teleservices industry and numbering resource administrators have worked diligently since adoption of the *TCPA Order* to create a mechanism that will permit compliance with TCPA and FCC wireless-related prohibitions in a WLNP environment. Specifically, ATA has joined DMA, NAA and others in working with NeuStar to develop and grant access to a WLNP database that will allow telemarketers to ascertain when numbers have been ported from wireline to wireless for purposes of complying with the TCPA and FCC rules. It is ATA's understanding that NeuStar will soon make available to subscribers in a web-based format an "Intermodal Ported TN Identification Service" that will provide porting data updated on a daily, cumulative basis. The service will consist of two files – one containing data reflecting numbers ported from wireline to wireless services, and other data reflecting numbers ported from wireless to wireline. Entities subscribing to the service will pay an annual fee to download the files.

The creation of this database, however, does not mean "LNP and pooling do not make it impossible for telemarketers to comply with the TCPA" and the FCC's rules as currently formulated and interpreted. *TCPA Order*, 18 FCC Rcd at 14116. The Intermodal Ported TN Identification Service does not allow real-time access to ported number changes. Accordingly, there necessarily will be some lag between the time a consumer ports a number from wireline to wireless during which a telemarketer using an autodialer or prerecorded message might inadvertently reach a wireless subscriber.

posted at <http://wireless.fcc.gov/wlnp/releases.html> (Dec. 10, 2003). See also <http://www.fcc.gov/cgb/NumberPortability/welcome.html#howlong> ("A wireline to wireless port will probably take longer to complete, and could take several days.").

Accordingly, the Commission is correct that once a number is ported to wireless, telemarketers will not have access to information immediately in order to avoid calling the new wireless number, *FNPRM*, ¶ 48, so adoption of a safe harbor is necessary.

To prevent companies from incurring liability arising from such circumstances over which they lack control, the FCC should adopt a safe harbor period after a phone number is ported to a wireless phone, during which companies are not liable for violating autodialer or prerecorded message prohibitions if they reach a ported number. ATA submits this period should be thirty-one (31) days. Specifically, the FCC should adopt a safe harbor in Section 64.1200(a)(1)(iii), similar to Sections 64.1200(c)(1)(i)(D) and 64.1200(d)(3), so that there is no liability for entities using a process to prevent autodialer or prerecorded calls to numbers assigned to a paging, cellular, specialized mobile, or other radio common carrier services, if the caller employs WLNP information acquired no more than thirty-one (31) days prior to the date of any call. 6/

A safe harbor period that would require companies to update and scrub their call lists every thirty-one days is appropriate for several reasons. Updating and scrubbing

6/ On reconsideration of the *TCPA Order*, it was suggested that “[a]s a legal matter ... numbers ported from a wireline carrier to a wireless carrier remain ‘assigned’ to the wireline carrier” and thus calls to such numbers cannot run afoul of autodialer and prerecorded call prohibitions. Opposition of MCI to Petitions for Reconsideration, CG Docket 02-278, filed Oct. 14, 2003, at 9 (citing, *inter alia*, *Numbering Resource Optimization*, 15 FCC Rcd 7574, ¶ 18 (2000); 47 C.F.R. §§ 52.15(f)(2) & (f)(5)). As noted, the Commission has not addressed the petitions for reconsideration of the *TCPA Order*, see *supra* note 2, yet the *FNPRM*, though it does not address MCI’s argument or the legal authority cited, suggests by raising WLNP liability issues that MCI’s contention has been rejected. As with ATA’s request for clarification, *id.* ATA urges the Commission to address here the legal point MCI raises. ATA also requests that, in deciding the *FNPRM*’s issues regarding liability for autodialer and prerecorded calls to wireless phones, the Commission explicitly hold that it does not violate the TCPA or FCC rules – regardless of any safe harbor adopted here – if a telemarketer reaches a wireless phone because the subscriber uses services such as call forwarding to transfer the call.

calling lists entail not insignificant costs. Each update requires manpower both to oversee the process and to undertake quality control to ensure it is done properly. In some cases, operations must be suspended during scrubbing for the time it takes to substitute the new list for the old, thereby resulting in lost revenue owing solely to regulatory requirements. The more frequently an entity must scrub, the more frequently it must bear these costs. ^{7/} A thirty-one day safe harbor will allow companies to merge scrubbing efforts conducted for WLNP purposes with those for DNCR purposes, the required frequency of which the FTC recently increased to every thirty-one days (an approach to which ATA acquiesces, *infra*, if the FCC changes its rules at all in this regard). This will allow companies to realize, at least, efficiencies from scrubbing and updating only once each month. A more frequent WLNP safe harbor requirement – which would result from a shorter safe harbor period such as seven (7) days, the other alternative offered for consideration, *FNPRM*, ¶ 49 – would only unduly increase costs. ^{8/}

A thirty-one day safe harbor also will not adversely affect consumers in any significant manner. The safe harbor will apply only to telephone numbers ported from wireline to wireless service. Many such numbers assigned to subscribers wishing to avoid unwanted telephone solicitations likely already appear on the DNCR and conse-

^{7/} Notably, the FTC accepted ATA's showing in this regard in its recent order tripling the frequency with which entities must access updated DNCR data by reducing the safe harbor from quarterly requirement to a 31-day rule. *Telemarketing Sales Rule*, 69 Fed. Reg. 16368, 16371 (2004) ("*FTC Safe Harbor Order*") ("In its comment [recommending the effective date the FTC adopted], ATA ... noted that '... allowing substantial lead time ... could moderate the impact of the rule change.'). See also Comments of Manuel Couto, Mar. 7, 2004, and Lee Pappernow, Apr. 12, Docket No. 02-278,.

^{8/} This is particularly true for small businesses engaged in telemarketing, which have limited resources, operate on thin margins, and are typically the type of entities most likely to use equipment that requires shutting down operations for any scrubbing.

quently may not be called by telemarketers using autodialers or otherwise. 47 C.F.R. § 64.1200(c)(2). The DNCR registration will necessarily follow the number as it is ported to the wireless phone. Wireline subscribers not already on the DNCR but who are interested in reducing the possible window during which autodialed or prerecorded message calls reach them on a wireless phone to which they port their number may register with the DNCR in advance of porting.

In addition, even after porting a number to a wireless phone, subscribers who have not already done so while the number was assigned to wireline may sign up for the DNCR to avoid calls. *TCPA Order*, 18 FCC Rcd at 14037. Subscribers who have ported their wireline numbers to wireless phones also can reduce the safe harbor with respect to entities that have the capacity to update their company-specific “do-not-call” lists in less than thirty days by making such a request. See *id.* at 14069 (“telemarketers with the capability to honor ... company-specific do-not-call requests in less than thirty days must do so”). These options, which are available to consumers notwithstanding any safe harbor the Commission adopts, will safeguard against unmitigated autodialer and/or prerecorded message calls to wireline numbers ported to wireless phones.

II. FREQUENCY OF DO-NOT-CALL REGISTRY DOWNLOADS

ATA submits that there is no obligation for the Commission to amend its DNCR safe harbor to require use of data obtained no more than 30 days prior to the date a call is made, that there is no need for such an amendment, and that even if the Commission opts to amend its rule, the safe harbor period should be no shorter than that the FTC

recently adopted. ^{9/} As the Commission recognizes, “[t]he Appropriations Act does not require the FCC to amend its rules.” *FNPRM* ¶ 52. Though the Do-Not-Call Implementation Act directed the FCC to consult and coordinate with the FTC, Pub. L. 108-10, Section 3 (2003) (“Implementation Act”), Congress surely was aware at the time it adopted the 2004 Appropriation Act just months later that both the FCC and FTC have rules implementing the DNCR and enforcing it. Congress nevertheless required only the FTC – and not the FCC – to modify its rules to require more frequent downloads of DNCR data. Accordingly, the FCC need not – and should not – reduce the data download obligation in its safe harbor provision from a quarterly requirement to something substantially shorter.

The Implementation Act does not require the Commission to modify its safe harbor provision to match that the FTC adopted. The Commission necessarily found in the *TCPA Order* that the Implementation Act does not require the agencies’ rules to be identical. Specifically, it adopted rules that differ slightly from those adopted by the FTC with respect to, *inter alia*, personal relationship calls, the abandonment rate calculation, and the speed of implementation for company-specific do-not-call requests. ^{10/} Thus, there is no statutory impediment to the FCC maintaining a quarterly DNCR data update requirement notwithstanding the FTC’s change to a monthly requirement.

^{9/} See *FNPRM* ¶¶ 50-53 (citing *Telemarketing Sales Rule*, 69 Fed. Reg. 7330-01 (2004); Consolidated Appropriations Act of 2004, Pub. L. 108-199, Div. B, Tit. V (“2004 Appropriations Act”)). See also *FTC Safe Harbor Order*, 69 Fed. Reg. 16368 (amending 16 C.F.R. § 310.(b)(3)(iv) to specify 31-day updates for FTC DNCR safe harbor).

^{10/} Compare 47 C.F.R. §§ 64.1200(a)(6), 64.1200(c)(2)(iii) and 64.1200(d)(3), with 16 C.F.R. § 310.4(b)(4)(i).

There also is no need to subject teleservices providers and companies engaged in telemarketing to a rule requiring call list scrubbing three times more frequently than the current rule. Indeed, the Chairman of the FTC recently extolled telemarketers for “exceptional compliance” with the DNCR. ^{11/} There consequently is little need to force the industry to adhere to even more stringent rules, particularly where the rules treble compliance costs that only recently have been newly levied.

It is notable in this regard that the mandate for a new FTC requirement was adopted into the 2004 Appropriations Act without factfinding, debate, hearing, or any other legislative process exploring the need for, or the efficacy or costs of, the change. This contrasts with the fact that both the FTC and this Commission thoroughly considered the frequency with which companies must update their DNCR data and found a quarterly requirement optimally met the competing interests involved. Significantly, the FTC originally proposed a rule similar to a monthly requirement, but after careful analysis modified its 30-day proposal to provide for quarterly downloads in the final rule, finding in particular that a shorter period offered little benefit to consumers but imposed significant burdens on industry. ^{12/} This burden easily outweighs whatever benefits

^{11/} *Compliance with Do Not Call Registry Exceptional*, News Release, Feb. 13, 2004, available at <http://www.ftc.gov/opa/2004/02/dncstats0204.htm>.

^{12/} See *Telemarketing Sales Rule*, 68 Fed Reg. 4580, 4645-47 (2003). In rejecting the proposal, the FTC noted that “[i]ndustry commenters were unanimous ... that a 30-day requirement would be extremely burdensome,” and that such a “requirement would be virtually impossible to meet without shutting down operations for a day to scrub their lists.” *Id.* at 4646. This latter impact, the FTC found, would be “particularly burdensome for small businesses with few employees or those that do not use sophisticated technology.” *Id.* These factors “persuaded [the FTC] that the costs of requiring monthly updating outweigh any additional benefits ... to consumers from such a provision.” *Id.* at 4647. The Appropriations Act obliterates this careful deliberation after only a few months’ experience with the rules, and with no discernible concern for the economic harm the new requirement will impose. See also note 7 and accompanying text.

there may be from the FTC and FCC rules being consistent in this regard, *compare FNPRM ¶ 52* (expressing concern that “telemarketers will face inconsistent standards”), and the Commission should not vary from the quarterly requirement it adopted.

Should the Commission feel constrained to adopt a monthly DNCR data download requirement, ATA respectfully submits that it should not adopt any requirement more frequent than the thirty-one (31) days the FTC adopted, *see FTC Safe Harbor Order*, 69 Fed. Reg. 16368, including the 30-day requirement the Commission has proposed. *FNPRM ¶ 53*. The FTC adopted the thirty-one day requirement for the salutary reason that it “will provide businesses the maximum flexibility allowable” under any monthly regime, *FTC Safe Harbor Order*, 69 Fed. Reg. at 16369 n.10, and the FCC should do no less, and should consider periods longer than 31 days to the extent they permit companies greater flexibility to deal with more frequent downloads. 13/

In addition, if the Commission amends its rule to comport with the new FTC requirement, the new rule should take effect no earlier than January 1, 2005, the effective date specified by the FTC for its revised rule. *Id.* at 16368. Setting the effective date at the first of next year is necessary to allow both telemarketers *and the FTC* the necessary time to modify their systems to permit for three times more frequent downloads of registry data, it matches the lead time allowed for original implementation

13/ Notably, the FCC is not constrained by the same statutory requirement for “monthly” downloads as was the FTC under the 2004 Appropriations Act. *See FTC Safe Harbor Order*, 69 Fed. Reg. at 16370 (rejecting, *inter alia*, “range of dates” and other approaches that would have allowed potential safe harbors of more than 31 days as inconsistent with 2004 Appropriations Act’s “once a month” requirement).

of the DNCR rules, and it will help blunt the significant financial impact faced by business (especially small business) that, after just having updated their equipment and systems to comply with the DNCR as originally enacted, find themselves required to do so yet again for the revised rule. *Id.* at 16368-69, 16371-72.

CONCLUSION

For the foregoing reasons, ATA respectfully submits that the Commission should adopt a safe harbor of thirty-one (31) days for autodialer and prerecorded calls that inadvertently reach a phone number recently ported to a wireless service and, that it should refrain from adopting any change at all to its National Do-Not-Call Registry safe harbor, but that if it does so it should not adopt any requirement more frequent than the thirty-one (31) days the FTC recently adopted.

Respectfully submitted,

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