

**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)

**COMMENTS OF THE NATIONAL ASSOCIATION
OF STATE UTILITY CONSUMER ADVOCATES**

I. INTRODUCTION AND SUMMARY

The Federal Communications Commission (“FCC” or “Commission”) has issued a *Further Notice of Proposed Rulemaking* (“*Further Notice*”) in this proceeding,¹ seeking comment on two matters regarding the Commission’s rules implementing the Telephone Consumer Protection Act of 1991 (“TCPA”).² First, the Commission asks whether it should provide a “safe harbor” for telemarketers who use autodialers or prerecorded messages to call a wireless telephone number that had recently been ported from a wireline service provider.³ Second, the Commission seeks comment on whether its rules should mirror those recently adopted by the Federal Trade Commission (“FTC”), which now has a “safe harbor” for telemarketers only if they access the national registry for consumers who do not wish to receive telemarketing telephone calls (“national do-not-call registry”) at least once every 31 days.⁴

¹ FCC 04-52 (released March 19, 2004), summarized at 69 Fed. Reg. 16874 (March 31, 2004).

² Pub. L. No. 102-243, 105 Stat. 2394, codified at 47 U.S.C. § 227.

³ See *Further Notice*, ¶ 2.

⁴ *Telemarketing Sales Rule*, Final Rule, 69 Fed. Reg. 16368 (March 29, 2004).

The National Association of State Utility Consumer Advocates (“NASUCA”)⁵ submits these Comments on the *Further Notice*. NASUCA does not object to a “safe harbor” for automated or prerecorded calls made to wireless telephone numbers that have been ported from wireline providers, but only if (1) the duration of the “safe harbor” is based on the most efficient technology available, (2) the called number is listed on neither the national do-not-call registry nor the company-specific do-not-call list for the entity that initiated the call, and (3) telemarketers are otherwise required to abide by all of the Commission’s telemarketing rules. In addition, the Commission should adopt the FTC’s “safe harbor” for telemarketers that access the national do-not-call registry at least once every 31 days.⁶

II. ANY “SAFE HARBOR” FOR CALLS TO WIRELESS TELEPHONE NUMBERS THAT HAD RECENTLY BEEN PORTED FROM A WIRELINE PROVIDER MUST BE OF LIMITED DURATION AND INCLUDE ADHERENCE TO THE OTHER TELEMARKETING RULES.

The TCPA prohibits automated or prerecorded calls to wireless telephone numbers except in emergency situations or with the consent of the called party.⁷ The

⁵ NASUCA is a voluntary, national association of 44 consumer advocates in 42 states and the District of Columbia, organized in 1979. NASUCA’s members are designated by the laws of their respective states to represent the interests of utility consumers before state and federal regulators and in the courts. *See, e.g.*, Ohio Rev. Code Chapter 4911; 71 Pa. Cons. Stat. Ann. § 309-4(a); Md. Pub. Util. Code Ann. § 2-205(b); Minn. Stat. Ann. Subdiv. 6; D.C. Code Ann. § 34-804(d). Members operate independently from state utility commissions, as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (*e.g.*, the state Attorney General’s office). Associate and affiliate NASUCA members also serve utility consumers, but have not been created by state law or do not have statewide authority.

⁶ Simultaneously with the *Further Notice* the Commission issued a *Notice of Proposed Rulemaking* in GC Docket No. 04-53 to address issues concerning unwanted commercial electronic mail (“e-mail”) messages. The Comment and Reply Comment schedule for that proceeding is different from the schedule for this proceeding. NASUCA’s members are aware that unwanted commercial e-mails are a source of increasing frustration and annoyance for many of the consumers that NASUCA’s members serve. Thus, NASUCA supports the Commission’s efforts to alleviate this growing problem.

⁷ 47 U.S.C. § 227(b)(1)(A).

Commission has recognized, however, that telemarketers may inadvertently call wireless telephone numbers that have been recently ported from wireline providers, due to lag time in the updating of databases that show ported numbers.⁸ Thus, the Commission is considering whether to implement a “safe harbor” for telemarketers who call such numbers.

NASUCA does not object to a “safe harbor” that is limited in duration. The “safe harbor,” however, should not be greater than the lag time created by the most efficient technology available. This is necessary to minimize the harm to wireless customers, who generally must pay for the minutes used by calls they receive. As the Commission noted, the Direct Marketing Association and the Newspaper Association of America have filed a petition seeking a 30-day “safe harbor.”⁹ If there is technology available that allows updates of the ported number database in less than 30 days, however, the Commission should use that time frame as the basis for its “safe harbor.”

In addition, the “safe harbor” should apply only to wireless telephone numbers that, when they were wireline numbers, were included on neither the national do-not-call registry nor the company-specific do-not-call list for the entity initiating the call. This point appears to have been lost in the *Further Notice*; thus, the Commission should reinforce this principle if a “safe harbor” is created.

Moreover, the *Further Notice* did not explain how the “safe harbor” would interact with the Commission’s other telemarketing rules. The Commission’s rules, for example, contain specific identification requirements for artificial or prerecorded

⁸ *Further Notice*, ¶ 48.

⁹ *Id.*, ¶ 45.

telephone messages, including the identity of the entity that is responsible for initiating the call and a telephone number where the called party may make a do-not-call request.¹⁰ The Commission's rules also require the entity that initiates the telemarketing call to honor company-specific do-not-call requests for five years.¹¹ These and other telemarketing rules provide valuable consumer protections. The Commission should make clear that any "safe harbor" it creates does not obviate the need for telemarketers to abide by the Commission's other telemarketing rules.

III. BY MIRRORING THE FTC'S RULES REGARDING THE "SCRUBBING" OF TELEMARKETING LISTS, THE COMMISSION WOULD FURTHER THE INTENT OF TWO ACTS OF CONGRESS AND MINIMIZE CONFUSION FOR CONSUMERS AND TELEMARKETERS.

There is no question that the Commission's rules should mirror the FTC's "safe harbor" rules for telemarketers to access the national do-not-call registry database in order to "scrub" their calling lists. As NASUCA noted in its comments to the FTC,¹² and as the Commission has recognized,¹³ the Do-Not-Call Implementation Act ("Implementation Act")¹⁴ requires the agencies to maximize consistency between their rules. Although this language specifically referred to the Commission's initial rulemaking required under the Implementation Act, section 4(b)(3) of the Implementation Act requires the agencies to report annually on the coordination between the agencies regarding the enforcement and operation of the national do-not-call registry. This makes

¹⁰ 47 C.F.R. §§ 64.1200(b).

¹¹ 47 C.F.R. §§ 64.1200(d)(6).

¹² *In the Matter of Monthly Registry Access*, FTC Project No. R411001, Comments of NASUCA (February 26, 2004) at 7-8.

¹³ See *Further Notice*, ¶ 52.

¹⁴ Pub. L. No. 108-10, 117 Stat. 357 (2003).

maximizing the consistency between the agencies' rules an ongoing effort. Thus, although the Consolidated Appropriations Act of 2004 directed only the FTC to amend its rules to require monthly scrubbing of telemarketers' calling lists,¹⁵ the directive in the Implementation Act that the agencies' rules be consistent dictates that the FCC similarly amend its rules.

Furthermore, the Commission's rules should mirror the FTC's rules in order to avoid confusion for consumers. If the rules were inconsistent, consumers who place their number on the national do-not-call registry would not know which telemarketers would have to cease making nonexempt telemarketing calls 31 days after the number is registered per the FTC's rules and which could continue making such calls for 90 days, as currently allowed by the Commission's rules. This may cause some consumers to file erroneous complaints or become disenchanted with the national do-not-call registry. The effectiveness of the national do-not-call registry would be undermined.

Telemarketers also may be confused, because they would have to determine which sellers are subject to the FTC's 31-day rule and which are subject to the Commission's 90-day rule. This, in turn, may cause some telemarketers to inadvertently call numbers that are on the national do-not-call registry in violation of the FTC's rules. This would also undermine the effectiveness of the national do-not-call registry.

In order for the national do-not-call registry to be effective, it is imperative that the Commission's rules mirror the FTC's rules. The Commission should adopt the 31-day "safe harbor" recently promulgated by the FTC.

¹⁵ Pub. L. No. 108-199, 188 Stat. 3, Division B, Title V (2004).

IV. CONCLUSION

Any “safe harbor” for telemarketers who inadvertently call wireless telephone numbers that had recently been ported from wireline providers must be limited in scope, as NASUCA discusses herein. Such a “safe harbor” must also contain the express proviso that telemarketers still must comply with the Commission’s other telemarketing rules. In addition, in order to further Congressional intent and avoid confusion for consumers and telemarketers, the Commission should adopt the FTC’s “safe harbor” for telemarketers to access the national do-not-call registry.

Respectfully submitted,

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April 15, 2004