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	)	

REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES

I. INTRODUCTION

The National Association of State Utility Consumer Advocates ("NASUCA") replies to comments filed in response to the *Further Notice of Proposed Rulemaking* ("*Further Notice*") in this proceeding.[1] The Federal Communications Commission ("Commission") seeks comment on whether its rules should (1) provide a "safe harbor" for telemarketers that use automated means to call a wireless telephone number that had recently been ported from a wireline service provider, and (2) mirror the Federal Trade Commission's ("FTC's") "safe harbor" for telemarketing to numbers listed on the national registry for consumers who do not wish to receive telemarketing calls ("national do-not-call registry").[2] As a result of Congress's mandate in the 2004 Consolidated Appropriations Act ("Appropriations Act"),[3] the FTC has a "safe harbor" for only those telemarketers that access the national do-not-call registry at least once every 31 days.[4]

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

[2] See *Further Notice*, ¶ 2.

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

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

Based on the comments filed, NASUCA believes that a limited "safe harbor" for automated telemarketing to wireless telephone numbers that had recently been ported from a wireline service provider is reasonable. Such a "safe harbor" should be less than 30 days, however, if the most efficient technology available makes it possible for telemarketers scrub their lists more frequently. Moreover, the Commission's rules concerning a "safe harbor" for telemarketing calls placed to numbers on the national do-not-call registry should mirror the FTC's rules. In addition, the Commission should reject proposals to create additional exemptions from its telemarketing rules.[5]

II. A LIMITED "SAFE HARBOR" FOR TELEMARKETING CALLS MADE TO WIRELESS NUMBERS THAT HAVE RECENTLY BEEN PORTED FROM WIRELINE PROVIDERS IS REASONABLE.

There seems to be a consensus that the Commission should adopt a "safe harbor" for telemarketers that call telephone numbers that have recently been ported from a wireline provider to a wireless provider.[6] Although most commenters recommend a 30-day "safe harbor," technology is or soon will be available to allow telemarketers to scrub their lists more frequently.[7] NASUCA reiterates its view that such a "safe harbor" should be less than 30 days if the most efficient technology available makes it possible for telemarketers to scrub their lists more frequently.[8] The Commission should examine the availability of such technology and establish a "safe harbor" accordingly.

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[5] Failure in these Reply Comments to address an issue raised by a party should not be construed as NASUCA's acquiescence to the party's position.

[6] See, e.g., Comments of the Direct Marketing Association and the Newspaper Association of America at 3; Comments of the American Teleservices Association ("ATA") at 4; Comments of Cingular Wireless LLC ("Cingular") at 2-4; Sprint Comments at 1.

[7] See Comments of Call Compliance, Inc. at 1; Comments of NeuStar, Inc. at 2.

[8] NASUCA Comments at 2-4.

III. THE COMMISSION'S RULES REGARDING A "SAFE HARBOR" FOR CALLS MADE TO NUMBERS ON THE NATIONAL DO-NOT-CALL REGISTRY SHOULD MIRROR THE FTC'S.

Unlike the wireless issue, commenters are split concerning the issue of the Commission's rules adopting the FTC's new "safe harbor" for telemarketers that access the national do-not-call registry every 31 days. At least five parties, in addition to NASUCA, support or do not oppose mirroring.[9]

Several parties, however, oppose such a move.[10] Most of these parties assert that the Commission should ignore the Congressional directive to the FTC.[11] They complain that Congress passed the Appropriations Act without hearing or debate,[12] and some disclose that they are lobbying Congress to amend the directive in the Appropriations Act.[13] MBA asserts that its lobbying efforts should cause the Commission to postpone considering the mirroring of the FTC's rule.[14] ATA and NAR temper their comments, however, by urging the Commission to adopt the FTC's rule, if the Commission finds that it should amend its rule.[15] Countrywide, on the other hand, recommends that the Commission adopt yet another rule – a 62-day "safe harbor" – while urging the Commission to work with Congress and the FTC to develop standards.[16]

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[9] Comments of AT&T Corp. at 10-11;Comments of BellSouth at 4; Cingular Comments at 4; Comments of SBC Communications Inc. at 2-3; Sprint Comments at 4.

[10] Comments of the National Automobile Dealers Association at 2; ATA Comments at 8-9; Comments of the Mortgage Bankers Association ("MBA") at 2; Comments of the National Association of Realtors ("NAR") at 1; Comments of Countrywide Financial Corporation ("Countrywide") at 2.

[11] ATA Comments at 8-9; MBA Comments at 2; NAR Comments at 1; Countrywide Comments at 2.

[12] ATA Comments at 8; NAR Comments at 1; Countrywide Comments at 2.

[13] MBA Comments at 2; Countrywide Comments at 5.

[14] MBA Comments at 2.

[15] ATA Comments at 9; NAR Comments at 2.

[16] Countrywide Comments at 2-6.

The Commission should not delay its mirroring of the FTC's new "safe harbor" rule. Congress has already spoken on this subject, and the Commission should not assume that Congress will reverse itself. Delay would only result in inconsistent regulations and uncertainty as to what will be required of telemarketers.

Similarly, Countrywide's proposal for a 62-day "safe harbor" should be rejected. As NASUCA's comments pointed out, inconsistent regulations between the agencies will cause confusion for consumers and telemarketers alike, to the detriment of both.[17] The public interest – and Congress's express directive in the Do-Not-Call Implementation Act ("Implementation Act")[18] that the agencies have consistency in their telemarketing rules – would not be served.

By mirroring the FTC's new "safe harbor" rule, the Commission would provide consumers and telemarketers with the regulatory certainty that the Implementation Act requires. The Commission should disregard the calls to delay mirroring the FTC's new "safe harbor" rule, and reject Countrywide's proposal for a "safe harbor" that is inconsistent with the FTC's.

IV. THE COMMISSION SHOULD NOT ALTER THE ESTABLISHED BUSINESS RELATIONSHIP EXEMPTION.

The Commission should reject the proposal of the American Council of Life Insurers ("ACLI") to include "pre-existing business relationships" in the established business relationship exemption from the Commission's telemarketing rules.[19] ACLI raises the concern that the 18-month limitation on exempt business relationships,

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[17] NASUCA Comments at 4-5.

[18] Pub. L. No. 108-10, 117 Stat. 357 (2003).

[19] ACLI Comments at 3-4.

contained in both the Commission's and the FTC's rules, would not apply to insurance or annuity transactions in which a payment is made only at the initiation of the transaction.

ACLI argues that the exemption should include "pre-existing business relationships," because Congress last year enacted the Fair and Accurate Credit Transactions Act of 2003 ("FACT Act").[20] According to ACLI, one provision of the FACT Act exempts "pre-existing business relationships" from a prohibition on insurers making marketing solicitations using information about a consumer that was obtained from an affiliate.[21] ACLI asserts that this "reflects Congressional policy" that insurers should be permitted to market to consumers "with whom they have an established relationship in the form of a policy or annuity in force or other continuing relationship."[22]

ACLI's argument is faulty. If Congress had intended to allow a "pre-existing business relationship" exemption from the FTC's and the Commission's do-not-call rules, Congress would have included such an exemption in the agencies' telemarketing statutes when it amended the FACT Act. Because Congress did not do so, the Commission should reject ACLI's proposal.

V. CONCLUSION

The Implementation Act mandates that the Commission's telemarketing rules are consistent with the FTC's. Thus, the Commission should not delay amending its "safe harbor" rules to mirror the FTC's. In addition, the Commission should establish a "safe harbor" for telemarketers who call wireless numbers that have been recently ported

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[20] Pub. L. No. 108-159, 177 Stat. 1952.

[21] ACLI Comments at 3.

[22] *Id.*

from a wireline provider, so long as the "safe harbor" is based on the most efficient technology available. The Commission should also reject attempts to broaden the established business relationship exemption.

Respectfully submitted,

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April 26, 2004