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April 28, 2004

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Ex Parte* Submission Regarding CG Docket No. 02-278 (Do-Not-Call Rules)

Dear Ms. Dortch:

On April 27, 2004, Robert Bailey, co-owner and co-broker of Bailey Properties, Inc.,¹ Lynn Sheri King of the NATIONAL ASSOCIATION OF REALTORS® (NAR), and the undersigned, its counsel, met with Sheryl Wilkerson, legal advisor to Chairman Powell, and June Taylor of the Bureau of Consumer and Governmental Affairs Bureau to discuss pending petitions for reconsideration in the above captioned docket regarding telephone calls to home businesses. The attached, one-page handout was distributed at the meeting.

The parties focused on calls to homeowners who sometimes decide to enter the marketplace to sell a home without engaging a real estate professional—i.e., “for sale by owner” (FSBO). FSBOs will often place advertising signs on their front lawns or advertisements in newspapers indicating that they are selling their homes and give their number to call regarding the sale. We discussed the importance of the Commission’s clarifying that a real estate professional’s call to a person advertising that he or she is selling his or her own home is, in essence, a call to a home business when the telephone number of the seller is listed on the ad.

The Telephone Consumer Protection Act of 1991 (TCPA) instructed the Commission to implement rules that would “protect *residential* telephone subscribers’ privacy rights.”² Notably, the TCPA does not define this term, and the Commission has not defined this term in its rules. When a homeowner voluntarily enters the market and encourages phone calls about selling the home, the person is engaging in the business of

¹ Bailey Properties, Inc. is an independent brokerage firm in Santa Cruz County, California.

² 47 U.S.C. § 227(c)(1) (emphasis added); *see also* 47 C.F.R. § 64.1200(c)(1) & (2), (d) (referring to calls to residential subscribers).

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selling a home. Calls from real estate professionals are therefore business-to-business calls, and the Commission should clarify that they fall outside the scope of the TCPA.

This question of calls to home-based businesses already has been addressed by the Commission's sister agency in the telemarketing field, the Federal Trade Commission. The FTC has clarified that, if the call is to a home business, it is not covered by the do-not-call rules because it is a business-to-business call. Specifically, the FTC said:

A number of commenters asked the [Federal Trade] Commission to clarify coverage of its "do-not-call" provisions. Some queried whether calls to home businesses would be subject to the "do-not-call" requirements. The Rule exempts telemarketing calls to businesses (except for sellers or telemarketers of nondurable office or cleaning supplies). Therefore, calls to home businesses would not be subject to the amended Rule's "do-not-call" requirements.³

Clearly calls to FSBOs are not the type of calls Congress intended to preclude when it passed the TCPA. The House Committee on Energy and Commerce "found that subscribers' objections to telemarketing initiatives were twofold. The first element pertains to the volume of unwanted calls. The second involves the unexpected nature of the calls."⁴

Neither of these factors is implicated in real estate professionals' calls to FSBOs. Here, the FSBO has advertised his or her telephone number and *invited calls about the sale of the underlying good*—the home. Rather than bombarding unsuspecting homeowners with random solicitations for products, often initiated because of information mined without the homeowner's consent, calls by real estate professionals to individuals advertising their sale of their homes is not typically unwanted⁵ and, in any event, not unexpected. The real estate professional is merely offering the FSBO to outsource the business in which he or she is engaged.

³ *Telemarketing Sales Rules*, Final Amended Rules, 68 Fed. Reg. 4580, 4632 (2003).

⁴ H.R. Rep. 102-317, at 14 (1991).

⁵ If a FSBO does not want such calls, he or she can easily notify potential listing agents by including on the sign a request that "agents only" or "principals only" call.

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In the Do-Not-Call Implementation Act, Congress directed the Federal Communications Commission to issue rules that “maximize consistency with the rule promulgated by the Federal Trade Commission.”⁶ The FTC has already clarified that calls to home businesses are outside the scope of the TCPA; the Commission should make the same clarification, noting that the selling of a home by the owner is engaging in the business of selling a home.

Respectfully submitted,



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Attachment

cc: Ms. Sheryl Wilkerson
Ms. June Taylor
Mr. Robert Bailey
Ms. Lynn King

⁶ Do-Not-Call Implementation Act, Pub. L. 108-10, 117 Stat. 557 (2003), § 3.

FSBOs CALLS SHOULD FALL OUTSIDE THE TCPA

Calls to FSBOs are business-to-business calls.

- The Telephone Consumer Protection Act of 1991 (TCPA) only restricts calls to protect the privacy interests of *residential* telephone subscribers.
- Calls by real estate professionals to individuals who have listed their properties as FSBOs are in essence business-to-business calls, and therefore the Commission should clarify that they fall outside the scope of the TCPA.
- A real estate professional who places a telephone call to the FSBO seller is acting no differently than a business that calls a second business to ask whether, instead of performing a particular service in-house, that entity might wish to contract for that service.
- The FTC has already clarified that calls to home-based businesses were excluded from the do-not-call rules. The FCC should do the same.

Calls to FSBOs are not the type of calls Congress intended to preclude.

- In passing the TCPA, Congress was responding to residential subscribers' objections to the volume of unwanted calls and the unexpected nature of the calls.
- Calls by real estate professionals to FSBOs are made in response to an advertisement by the consumer, who has openly and willfully entered the market as a seller.
- These are not the types of calls Congress intended to regulate, and the Commission should clarify this distinction.
- An individual who lists property as for sale (or rent) by owner and does not wish to receive these calls can easily notify potential listing agents by including on the sign a request that agents not call.