

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

In the Matter of:

ccAdvertising

**Petition for Expedited
Declaratory Ruling**

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CG Docket No. 02-278

**COMMENTS OF THE AMERICAN TELESERVICES ASSOCIATION IN
SUPPORT OF CCADVERTISING'S PETITION FOR EXPEDITED
DECLARATORY RULING**

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**COMMENTS OF THE AMERICAN TELESERVICES ASSOCIATION IN
SUPPORT OF CCADVERTISING'S PETITION FOR EXPEDITED
DECLARATORY RULING**

The American Teleservices Association (“ATA”) respectfully submits these comments in support of ccAdvertising’s Petition for an Expedited Declaratory Ruling to preempt certain provisions of the North Dakota Century Code which prohibit the dissemination of prerecorded messages during noncommercial interstate telephone calls, as these provisions are significantly more restrictive than the Commission’s Rules and Regulations implementing the Telephone Consumer Protection Act of 1991.

1. Statement of Interest

The ATA is a national trade organization with an industry-wide membership that collectively produces over \$500 billion in annual sales. Its member organizations represent all facets of the teleservices industry, and provide traditional and innovative services to Fortune 500 companies, nonprofit organizations, charitable institutions and organized political parties. Particularly in the weeks and months preceding Election Day, many ATA members initiated interstate telephone calls that disseminated prerecorded messages to residents of North Dakota and other states to conduct political polling in statistically significant demographic regions. The

telephone calls frequently utilized interactive voice response speech recognition (“TVSR”) technology to collect the polling information and to disseminate “get-out-the-vote” messages. In no event did the prerecorded messages solicit the sale of goods or services, and they are therefore not considered “commercial” telephone calls.

2. The Commission Rules

The Commission’s revised Rules and Regulations Implementing the Telephone Consumer Protection Act (“TCPA”) of 1991 (“Commission Rules”) expressly authorize entities to initiate telephone calls that disseminate a prerecorded message, provided that the telephone call:

- i) is for an emergency purpose;
- ii) is not made for a commercial purpose;
- iii) is made for a commercial purpose but does not include or introduce an unsolicited advertisement or constitute a telephone solicitation;
- iv) is made for a commercial purpose but does not include or introduce an unsolicited advertisement or constitute a telephone solicitation; or
- v) is made by or on behalf of a tax-exempt nonprofit organization.

Likewise, the Commission Rules permit calls to conduct surveys, political polling and “get-out-the-vote” campaigns utilizing a prerecorded message since they are not made for a commercial purpose.¹

¹ *In re Rules and Regulations Implementing The Telephone Consumer Protection Act of 1991*, CC Dkt. 92-90, Report and Order, 7 FCC Rcd. 8752, ¶41 (“We find that the exemption for non-commercial calls from the prohibition on prerecorded messages to residences includes calls conducting research, market surveys, political polling or similar activities which do not involve solicitation as defined by our rules.”).

3. The North Dakota Statute

Sections 51-28-01 and 51-28-02 of the North Dakota Century Code (“North Dakota Statute”) read together prohibit the transmission of all prerecorded messages with the limited exceptions of: i) messages from school districts to students, parents or employees; ii) messages to subscribers with whom the caller has a current business relationship; or iii) messages advising employees of work schedules.² The North Dakota Statute restricting the use of prerecorded messages contains no exemption for noncommercial telephone calls to conduct surveys, political polling and “get-out-the-vote” campaigns.

ATA and its members are particularly concerned that the North Dakota Attorney General intends to enforce this statute against ccAdvertising and other interstate callers, despite the fact that it is significantly more restrictive than the Commission Rules and imposes significantly higher compliance burdens and costs.³

4. **North Dakota’s Limited Exemptions are Inconsistent with the Commission Rules and Must be Preempted.**

In its 2003 rulemaking, the Commission opted not to restrict the use of prerecorded messages in non-commercial telephone calls.⁴ The Commission intended that its rules be the uniform rule of the land, recognizing the importance of supporting Congress’ objective of creating uniform national rules:

Although section 227(e) gives states authority to impose more restrictive intrastate regulations, we believe that it was the clear intent of Congress generally to promote a uniform regulatory

² N.D. Cent. Code § 51-28-02.

³ The Commission Rules authorize states to promulgate and enforce regulations that are more restrictive than those established by the Commission, but only with respect to intrastate telemarketing. 68 Fed. Reg. at 44155.

⁴ See 68 Fed. Reg. at 44147 (referencing H.R. Rep. No. 102-317 at 13, 102nd Cong., 1st Sess. (1991) (“[T]he Committee does not intend the term “telephone solicitation” to include public opinion polling, consumer or market surveys, or other survey research conducted by telephone.”)).

scheme under which telemarketers would not be subject to multiple, conflicting regulations. We conclude that inconsistent interstate rules frustrate the federal objective of creating uniform national rules, to avoid burdensome compliance costs for telemarketers and potential consumer confusion. The record in this proceeding supports the finding that application of inconsistent rules for those that telemarket on a nationwide or multi-state basis creates a substantial compliance burden for those entities.

We therefore believe that any state regulation of interstate telemarketing calls that differs from our rules almost certainly would conflict with and frustrate the federal scheme and almost certainly would be preempted. We will consider any alleged conflicts between state and federal requirements and the need for preemption on a case-by-case basis. Accordingly, any party that believes a state law is inconsistent with section 227 or our rules may seek a declaratory ruling from the Commission. We reiterate the interest in uniformity—as recognized by Congress—and encourage states to avoid subjecting telemarketers to inconsistent rules. [Emphasis added].⁵

The North Dakota Statute contravenes the clear intent of Congress to create uniform national rules, and to ensure that individual privacy rights and public safety interests are balanced with the legitimate interests of businesses to engage in free speech and trade. Instead, North Dakota's laws directly conflict with, and disregard, the same legitimate interests of the teleservices industry that the Commission and Congress sought to preserve. This contradictory regulatory environment forces entities to comply with multiple inconsistent rules, and serves only to create undue burdens on interstate activities, increase compliance costs and create confusion among consumers and businesses alike.

The Commission Rules clearly and unambiguously request state legislators and attorneys general not to implement and enforce restrictions on interstate telephone calls that are more

⁵ 68 Fed. Reg. at 44155.

restrictive than the Commission Rules.⁶ Although at the time of the rulemaking it was reasonable for the Commission to expect these parties would comply with the Commission's admonishment, this unquestionably has not been the case, as the Commission is currently considering two similar petitions for declaratory ruling which seek to preempt certain provisions of other states' rules which were either implemented after the publication of the Commission Rules or were the subject of enforcement actions initiated by attorneys general after publication of the Commission Rules.

Attorneys general enforcement of state laws that are inconsistent and more restrictive than the Commission Rules applicable to interstate telemarketing gives rise to an untenable regulatory environment which frustrates the federal objective of creating uniform national rules, and instead creates uncertainty, confusion and increased costs for marketers and consumers alike.

For these reasons, ATA supports ccAdvertising's petition and urges the Commission to preempt the North Dakota Statute to the extent it is more restrictive than the Commission Rules.

Respectfully submitted,

AMERICAN TELESERVICES ASSOCIATION

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⁶ *Id.*