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January 12, 2005

VIA ELECTRONIC FILING

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

Re: Ex Parte Presentation re: CG Docket No. 02-278

Dear Ms. Dortch:

This letter is being filed to notify you that on January 11, 2005, Al Mansell, the President of the NATIONAL ASSOCIATION OF REALTORS®, Lynn Sheri King of the NATIONAL ASSOCIATION OF REALTORS®, and the undersigned, its counsel, met with Chairman Powell and his Legal Advisor Sheryl Wilkerson; and with Commissioner Adelstein and his Legal Advisor Scott Bergmann, to discuss pending petitions for reconsideration in the above-captioned docket regarding telephone calls to home-based businesses. The attached, one-page handout was distributed at the meeting and captures the issues that were discussed. In addition, the parties discussed the attached letter.

If you have any questions, please contact the undersigned.

Respectfully submitted,


Gerard J. Waldron

Attachments

cc: Chairman Powell
Ms. Sheryl Wilkerson
Commissioner Adelstein
Mr. Scott Bergmann



NAR URGES FCC TO NOT INCLUDE FSBO CALLS IN TELEMARKETING RULES

FCC is considering petitions to reconsider its telemarketing rules.

- The Commission has under review a Petition for Reconsideration filed by the National Association of Realtors concerning the FCC's telemarketing rules. In our Petition, we commented on both the fax and telemarketing rules, but today we want to focus on the issue of greatest importance to the one million members of NAR: calls to persons selling their homes.
- The Commission's rule as currently written interferes with this vital part of the real estate business and more significantly, it runs counter to the expectations of the home seller.

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 For Sale By Owners ("FSBOs") are in fact business-to-business calls, and therefore the Commission should clarify that they fall outside the scope of the TCPA.
- A real estate professional who calls 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 already held that calls to home-based businesses were excluded from the do-not-call rules. The FCC should do the same. *Telemarketing Sales Rule*, 68 FR at 4632.

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. Chairman Upton's recent letter supports this view.
- 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.

FCC should follow the logic of the FTC and rule that calls to persons selling their home are not covered by the TCPA.

FRED UPTON
6TH DISTRICT, MICHIGAN

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**Congress of the United States
House of Representatives**

December 14, 2004

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The Honorable Michael K. Powell
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Dear Chairman Powell:

I would like to draw your attention to an outstanding issue pending before the Federal Communications Commission (FCC) stemming from the agency's 2003 Report and Order implementing the Telephone Consumer Protection Act (TCPA). As the Commission reconsiders its rules on telemarketing, we urge the Commission to explicitly clarify that calls made to home-based business and some residential consumers engaging in commercial sales are outside the scope of the TCPA.

As you know, Congress enacted the TCPA in 1991 for the purpose of protecting individual person's privacy and harassment from unwanted telemarketing calls. The do-not-call rules were specifically aimed at prohibiting certain calls to residential subscribers. Significantly, Congress wrote the law to shield consumers but not to disrupt the normal course of business calls to those selling goods and services.

The Federal Trade Commission already has clarified that the do-not-call rules do not apply to home-based businesses.¹ This interpretation clearly makes sense in the context of the do-not-call rules because here a person has deliberately and consciously entered the market for the purpose of engaging in a business transaction.

Home-based businesses are common today. Application of the business exception is warranted in these cases. However, we would also argue that the exception should be applied in those situations where residential subscribers enter into the market to engage in sophisticated and/or complex business transactions that involve numerous interactions with firms offering services in support of that sales transaction as well. This is the case, for example, in the residential real estate market context.

We all have seen signs by homeowners looking to sell their home -- they often place advertisements on their lawn indicating that the property is "for sale by owner" ("FSBO") and provide a telephone number to call. However, what was once an

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

undertaking of only a very small number of homeowners is now a significant segment of the home sales market. In 2003, for example, approximately fourteen percent of the over 6 million home sales were sold by owners without the help of a listing agent.²

Additionally, a growing number of firms assist the homeowner who is selling their own home today. The services provided by these firms allow these homesellers to market a home in a manner that is sometimes indecipherable from those used by the real estate professional. Firms like ForSaleByOwner.com, Help-You-Sell and Buy Owner provide the homeowner with a range of services that can include the a listing in the Multiple Listing Services (MLS) used by real estate professionals, professionally produced signage, marketing websites with multiple photos and/or video home tours of the home, ads on a corporate website or in a magazine of home for sale by owners, open house flyers, 24-hour information hotlines and other equally sophisticated or professional marketing means.

Also setting the FSBO residential subscriber apart from other residential subscribers who might sell a used appliance or vehicle is the fact that the FSBO seller must also interact – oftentimes via phone - with a wide range of other service providers required by terms of the home sale. These include appraisers, home inspectors, pest control services, surveyors, title and/or escrow companies, lawyers, roof inspection services, etc. In their role as the manager of their home sale, the FSBO seller acts in the same capacity as the real estate sales agent and must be accessible to and interact with a very wide range of service providers who may or may not be acting at their request. This, I believe, puts the FSBO in a very different class than the typical residential subscriber or even one who is selling an occasional personal item.

Given the size of the home-based business segment and the size, complexity and sophistication of some financial transactions engaged in by residential subscribers, I believe that it is important that the FCC clarify that calls to home-based businesses are not covered by the do-not-call requirements and that in circumstances where a person has deliberately and consciously entered the market to engage in a complex and sophisticated financial transaction, such as the sale of a home, that person clearly is doing business and should be treated as such by the FCC's rules.

Very truly yours,



Fred Upton

Chairman

House Energy and Commerce

Subcommittee on Telecommunications and the Internet

² While fourteen percent of homes sold in 2003 were sold by owners, the number of homeowners who initially try to sell their homes without the help of a real estate professional is typically higher. Many homes originally listed as for sale by owner are ultimately sold by a real estate professional because professionals have expertise in dealing with the complexities associated with selling property.