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July 29, 2005

Hon. Kevin J. Martin, Chairman
Federal Communications Commission
445 Twelfth Street, N.W.
Washington, D.C. 20554

Dear Chairman Martin,

This letter is submitted on behalf of Teleytics, LLC in response to the FCC request for comment on the *Petition for Declaratory Ruling Relating to Commission's Jurisdiction Over Interstate Telemarketing*, ("Joint Petitioners' Request"), and its reopening of the public comment period on related *Petitions for Declaratory Ruling Relating to Preemption of State Telemarketing Laws* involving preemption of state laws in New Jersey, North Dakota, Indiana, Wisconsin and Florida pursuant to the invitation in the Report and Order in *Implementation of the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd 14014, ¶ 84 (2003) ("*TCPA Order*"). Teleytics filed comments on the North Dakota, Florida and New Jersey petitions when they were originally put out for public comment. It offers this updated version of those comments to respectfully request that the Commission grant the Joint Petitioners' Request for a declaratory ruling that the FCC's exclusive jurisdiction over interstate telemarketing preempts states from applying any state law or rule to interstate telemarketing that impose requirements or prohibitions that differ from federal rules established by your Commission or the FTC. Teleytics also respectfully requests that the Commission grant the state-specific petitions as well.

Founded three years ago, Teleytics conducts voice broadcast marketing on behalf of non-profit organizations and political campaigns. It is our policy to comply with the National Do-Not-Call Registry, state "do-not-call" lists, and the Direct Marketing Association's Telephone Preference Service, regardless of any do-not-call exemptions or exceptions that may apply. We also maintain an internal do-not-call list regardless of whether any federal or state rule requires us to do so on our own behalf or with respect to any call campaign that we conduct.

Since we have been in business, we have been contacted by approximately a half-dozen states seeking to enforce state laws that these states claim prohibit one or more aspects of our voice broadcast marketing. We routinely advise them that all of our calls are interstate in nature, and that all calls comply with the TCPA, the *TCPA Order* and federal rules at 47 C.F.R. § 64.1200.

To date, no state has been willing to give effect to the preemptive effect of your order and rules. Rather, in every case, after we note our compliance with the federal rules and cite the applicable exemptions under the TCPA and FCC rules, the states disclaim any preemptive effect of the federal rules based on the language in the *TCPA Order* that the Commission “will consider any alleged conflicts between state and federal requirements and the need for preemption on a case-by-case basis.” The typical state position is that, unless and until this Commission or a court of competent jurisdiction issues an order specifically preempting the specific law in their specific state under which they claim to be proceeding, the *TCPA Order* is no bar to any enforcement action, even as against our interstate calls. Some states also cite language in the *TCPA Order* that they claim suggests the FCC leaves open the possibility that more restrictive state laws will not be preempted with respect to interstate telemarketing.

This clearly is not the way the Commission intended things to work when it issued the *TCPA Order*. Any fair reading of the relevant portion of the *TCPA Order* compels the conclusion that the language on which the states typically rely regarding permissibility of more restrictive state laws, while technically “leaving open the possibility” they might continue to apply to interstate calls, essentially forecloses that outcome where state law directly contravenes federal law, rules and policy.

The *TCPA Order* set forth what should have been a very clear paradigm. It established that “[b]ecause the TCPA applies to both intrastate and interstate communications, the minimum requirements are therefore uniform through the nation.” *TCPA Order* ¶ 81. Moving on to *intrastate* telemarketing, it established that “states may adopt more restrictive do-not-call laws governing intrastate telemarketing” but “caution[ed] that *more restrictive state efforts to regulate interstate calling would almost certainly conflict with [FCC] rules.*” *Id.* ¶ 82 (emphasis added). The Order goes on to “conclude that inconsistent interstate rules frustrate the federal objective of creating uniform national rules,” and accordingly established “that *any state regulation of interstate telemarketing that differs from [the federal] rules almost certainly would conflict with and frustrate the federal scheme and almost certainly would be preempted.*” *Id.* ¶¶ 83-84.

The clear import of this discussion in the *TCPA Order* should mean that any state rule or law that varies in any material way from what federal law and rules allow and/or prohibit stands little chance of surviving if applied to calls between the states, notwithstanding the FCC’s pledge to examine them case-by-case rather than ordering wholesale preemption. This surely would be the case with any state law that is diametrically opposed to the federal rule, as would be a state requirement that prohibits calls that the federal rules allow. It is instructive in this regard that the Commission “encourage[d] states to avoid subjecting telemarketers to inconsistent rules,” as it reflects the disfavor with which it appeared the FCC views divergent state rules – even those that are more restrictive – with respect to interstate telemarketing. *Id.* ¶ 84.

The North Dakota laws at issue in the petition currently before the Commission, and that state’s effort to enforce them against interstate calls regardless of any conflict between the federal and state laws, is a case in point. In September 2003, the Office of the Attorney General of North Dakota contacted us, asserting that we had violated N.D.C.C. ch. 51-28. We informed them that we were in compliance with the TCPA. The state asserted that its law applied nevertheless. Of course, we could have pursued the matter in state court in a distant forum. The North Dakota Attorney General’s office made it clear how things would have proceeded had we chosen that path:

If we receive [a] revised executed agreement by September 18, 2003, including payment, we will still settle this matter. In the meantime, we have decided to pursue our investigation and enclosed and served upon you is an Order to Produce Information. If we later require additional information, we will issue you a Civil Investigative Demand. If the matter is resolved by September 18, 2003, you will not have to respond to the Order to Produce Information

Responding to both the Order to Produce Information and the Civil Investigative Demand would have cost us thousands of dollars. Pursuing the matter in state court in North Dakota, far removed from our base of operations, would have run into tens of thousands of dollars. Instead, we chose to enter into an Assurance of Voluntary Compliance, requiring us to stop dialing to phone numbers in North Dakota and pay \$1000. We are now barred from making calls into North Dakota that the TCPA and the federal rules should allow us to place.

We have had similar problems in other states. One rationalized its authority notwithstanding the TCPA by simply claiming that it “believe[s] our state Do Not Call Laws are not in conflict with the TCPA or promulgated regulations, they are simply broader. While Congress has directed the FCC to ‘consider whether there is a need for additional [FCC] authority to further restrict telephone solicitations, including those calls’ by tax-exempt non-profit organization, the FCC has not sought statutory authority to regulate telephone solicitations by tax-exempt nonprofit organization to date. See 47 U.S.C. § 227(c)(1)(D).” This is preposterous.

The FCC has stated that application of state laws that “differ” from the federal rules to interstate calls should be preempted. It is ludicrous that a state could claim to avoid this preemptive effect by claiming its rules “are not in conflict with the TCPA ... they are simply broader.” If they are “broader,” they “differ” and should be preempted. Indeed, the *TCPA Order* even says that “more restrictive state efforts to regulate interstate calling would almost certainly conflict” and be preempted. “Broader” means “more restrictive.” It should be clear from even a cursory reading that state rules in such circumstances should be preempted. But the mincing approach taken in the *TCPA Order* allows precisely this kind of gamesmanship by the states, which they then use as leverage to enforce their laws, and/or broker settlements under them, even though this Commission intended those laws not to apply.

States have resisted the Commission’s “encouragement” to avoid imposing on interstate telemarketing state laws that differ from the federal rules. Rather, as noted, they take the position that the FCC left the door open for their rules by deciding to proceed on a case-by-case basis rather than issuing a blanket rule preempting the application of state telemarketing law to interstate calls. Now that there has been more than two years’ experience with that approach, however, it is clear it was a mistake for the Commission to adopt its case-by-case stance rather than preempting outright, as the states thumb their collective noses at the purported preemptive effect of the federal rules, and all but dare telemarketers to pursue the case-by-case option. This effectively eliminates the federal rules from having *any* preemptive effect – or even applying at all – with respect to interstate calls in cases where a state prefers its rules to the federal regime.

This is so because, unfortunately, “case-by-case” basis translates into litigation. While a large company can absorb the costs of litigation into their budget, we are not able to do so. Telelytics

is a small vendor. We have a single employee. Legal costs and fines paid to states wiped out our profit in 2004. The financial situation is equally precarious in 2005.

We are committed to complying with all applicable laws, but it is not possible for us to comply with a multitude of disparate and often contradictory state laws. For example, to comply with all state regulations on message content, we would need to create dozens of messages for each of our customers to satisfy all the permutations caused by the subtle variations in the identification. For example, some states require the legal name of the client on whose behalf we make calls while others require the name of the client as registered in the state while still others require the name of the telemarketer placing call. Another example is found in how states differ in ordering disclosures, for instance, some require identifying the caller first, while others require providing information on the method for consumers to remove their numbers from our calling list first, etc. It was clearly the FCC's intent to avoid this type of situation in implementing the TCPA when it stated that: "We reiterate the interest in uniformity – as recognized by Congress – and encourage states to avoid subjecting telemarketers to inconsistent rules." *Id.* ¶ 84

The threat of litigation by a state Attorney General's office, translates into *de facto* reverse preemption by the states. Due to the case-by-case approach set forth in the *TCPA Order*, we have few choices when confronted by a state that claims our calls violate their state laws or rules. In most cases states almost immediately insist that we sign some kind of "voluntary" assurance that we will comply with the state rules – which the *TCPA Order* clearly intended to relieve us of – and that we make a "voluntary" payment to the state in lieu of a fine. This amount is always less than it would cost to litigate the matter.

That is assuming that the state is willing to settle. We have been fortunate so far in that no state has sought to drive us out of business. But it is not difficult to imagine an elected official taking a hard-line stance against telemarketers. Indeed, their willingness to do so is what gives rise to the instant petitions. Since the statutory penalties typically run to hundreds or thousands of dollars per call, the total penalty could be enough to wipe out a company like ours. On the one hand, the cost of litigating against the resources of a state AG's office is prohibitive. On the other hand, we do not have the resources to pay a multi-million dollar fine. In this all-too-imaginable scenario, our company would be out of business. We live with this "sword of Damocles" above our head every day. It is thus clear that the states are interpreting the lack of FCC action in this arena as implicit permission to ignore the TCPA and the FCC rules when the states believe it is convenient to do so. This situation must change.

The absence of more definitive FCC action to preempt application to interstate telemarketing of state laws that differ from the federal rules is not just allowing states to run rampant. The private-cause-of-action provisions in the TCPA allow crusading professional plaintiffs to take advantage of the discrepancy between state and federal laws. Taking a page right out of the states' attorney general playbooks, they file suits that invariably cost less to settle than to litigate – even when the telemarketer, as is the case with Telelytics, complies fully with all applicable rules. Litigating these cases in distant fora is too expensive a proposition to pursue, and state courts have been unwilling to recognize the preemptive effect of the TCPA and the FCC rules, or even to suspend proceedings to allow the Commission to consider whether to preempt under its "case-by-case" approach. We are left with no choice but to surrender to plaintiff demands for

case settlements just to avoid the costs of litigation, even though we've done nothing wrong. The costs of these seriatim settlements quickly mount.

One "professional plaintiff" and retired attorney justified her demand for \$500 with the following:

"Telelytics' telemarketing campaign ... does not violate federal law. I do not dispute that fact, but this does not mean that ... conduct ... is legal in Washington state. Nor does it mean that [Telelytics] is not subject to litigation and judgment under Washington State laws if those laws are more restrictive than federal laws are."

We informed the plaintiff that the TCPA directly contradicts this interpretation. In response, she claimed that the proper interpretation of 47 U.S.C. 277(e) is that states could regulate intrastate calls *OR* calls in the 4 categories outlined in subparagraphs A-D. She claimed that this is "the way courts in this state are reading it, since they are awarding judgments for interstate ADAD calls" and that "it is not unduly burdensome for a telemarketer simply to avoid that conduct in that state." The cost of pursuing this clearly ludicrous interpretation would have been many times that settlement cost, so we were force to give in to the extortion and settle.

Other professional plaintiffs are not so easily handled. In one case currently being litigated, a well-known, serial TCPA plaintiff made his motives clear:

In choosing to pursue litigation with your clients, [plaintiff] recognizes that he faces the possibility of not recovering \$5,500 in statutory damages under the TCPA and [state law] as well as his reasonable attorney's fees[.] While not insignificant, we believe this risk pales in comparison to the consequences of an adverse judgment to Telelytics ... who faces not only the risk of a more substantial negative monetary outcome in this case, but many other claims asserted by others who have received one or more calls from your clients.... These consequence likely prove [sic] economically catastrophic to your clients and threaten their continued existence.

* * * *

We believe that your clients should understand that plaintiff's claims present significant risks which make a confidential settlement an attractive alternative to litigation. In recognition of the substantial costs of protracted litigation and the issues presented by [the TCPA], [he] is willing to resolve his claims in exchange for your clients' prompt payment to him of the sum of \$6000.

The point is obvious. The FCC has to take a clear, unambiguous position and draw a bright line between what is allowed and what is not. It is far too easy for states and professional plaintiffs to take advantage of the current legal landscape to bend the legal system to ends to which the FCC clearly did not intend. While phrases like "almost certainly pre-empted" and "case-by-case" basis were no doubt added with the best intentions of providing flexibility and balance, the track record under that framework has proven that it is not working. It is unrealistic to think that the FCC could apply its scarce resources to evaluate individual complaints on a case-by-case basis. Yet time after time, states and private individuals bring forward their complaints all claiming that their cases fall into that exceptional category that would not be preempted if the FCC were to evaluate them. Practical considerations have turned the FCC's clear intent on its head to produce

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the current situation – telemarketers are now subject to the full range of divergent and contradictory state laws on all interstate calls.

It is imperative that the FCC act in order to provide clear guidance to the states and the industry. It should issue a much stronger statement definitively preempting as to interstate telemarketing all state laws that differ from the federal rules, as sought by the Joint Petitioners' Request.

Respectfully submitted,

/s/ Scott Kaplan
President
Telelytics, LLC