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Federal Jurisdiction over Interstate Telemarketing (CG 02-278)

Presentation to the Consumer &
Governmental Affairs Bureau

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Overview

- Congress gave the FCC exclusive jurisdiction over interstate telemarketing, and the states have no authority to regulate it.
- The states are encroaching on federal jurisdiction over interstate telemarketing, instead of playing the *enforcement* role that Congress created for them in the interstate arena.
- The patchwork of incompatible state regulations of interstate telemarketing frustrates the balance and uniformity that Congress placed at the heart of federal policy on telemarketing.
- The FCC's case-by-case approach to the problem has created confusion among consumers, telemarketers, and courts regarding the boundaries of state and federal authority in this area.
- The scope of federal jurisdiction is too important, in too many areas, for the FCC to permit the states to invade it in the field of telemarketing.

The Commission Has Exclusive Jurisdiction Over Interstate Telemarketing.

- Section 2 of the Communications Act grants the FCC exclusive jurisdiction over interstate communications
- In the TCPA, Congress
 - amended section 2(b) to *expand* federal jurisdiction over *intrastate* calls;
 - did nothing to recognize or create additional *state* jurisdiction over *interstate* calls;
 - enacted a “savings clause,” section 227(e), that applies only to state regulation of *intrastate* telemarketing
- The FCC’s 2003 Order correctly recognized this jurisdictional divide but stopped short of stating its logical consequence.

States Continue to Encroach on Federal Jurisdiction

- States have enacted a patchwork of incompatible regulations, largely refusing to distinguish between interstate and intrastate calling
- State regulation is less “harmonized” with federal regulation than it was in 2003, and the situation is getting worse.
 - Established Business Relationships
 - Disclosure rules
 - Calling hours and holidays
 - Not-for-profit restrictions
 - Prerecorded messages.
- Some proposals go even farther, expanding do-not-call rules and requiring the rerouting of calls.
- Given this landscape, the Commission must clearly define and protect federal jurisdiction.

The TCPA Defined a Clear *but Non-Legislative* Role for the States

- Congress expected the states:
 - To regulate *intrastate* telemarketing (more restrictively if they wished)
 - To apply their “general civil or criminal statute[s]”
 - To enforce *federal* telemarketing rules as applied to interstate telemarketers.
- What states *cannot* do is precisely what they have done: adopt their own, state-specific rules and apply them to *interstate* telemarketing without regard for federal uniformity.

Balance and Uniformity Lie at the Heart of Federal Telemarketing Policy.

- In the TCPA, Congress struck a balance to accommodate both individual privacy and truthful commercial speech.
- As the FCC has already recognized, Congress also showed a “clear intent . . . to promote a uniform regulatory scheme under which telemarketers would not be subject to multiple, conflicting regulations.”
- Telemarketers fully support uniform national standards for interstate telemarketing and are willing to work with the FCC to ensure that the federal rules are responsive to consumers needs and strike the appropriate balance.

Patchwork Regulation Frustrates Federal Policy.

- Incompatible state regulations disrupt the balance Congress struck and the uniformity Congress sought.
- Incompatible state regulations increase compliance costs:
 - Manual suppression of calls in otherwise national campaigns
 - Tracking and interpreting the ever-growing number of state regulations
 - Researching baseless complaints
- Compliance risks are multidimensional, including litigation risks, regulatory risks, and reputational risks.
- Call-blocking technologies touted by the states do not address the primary problem
 - Depend on company-generated contact lists
 - Cannot accommodate local variations on definitions and exemptions

The Case-by-Case Approach Has Produced Confusion.

- Consumer confusion about the scope of federal and state do-not-call laws produces a high percentage of unfounded complaints.
 - MBNA had to investigate 61 federal complaints in 2004; all were revealed as baseless.
 - MBNA has also had to deal with 5 complaints from Indiana over the past several years; these too were baseless, but required considerable research.
- Courts are also confused about the extent of federal supremacy over interstate telemarketing.
 - North Dakota/FreeEats.com

Federal Jurisdiction Is Too Important for *Ad Hoc* Treatment.

- The Commission must protect federal jurisdiction because of its implications for other issues of telecommunications regulation.
- The jurisdictional conflict is already spreading to other types of telemarketing
 - Faxes
 - Non-profit telefunding
 - B2B calls
 - Inbound calling
- Proper definition of the jurisdictional boundaries is also necessary for the achievement of other important federal policies
 - VoIP
 - Truth in Billing