



LISA FINKELSTEIN
Senior Counsel
9111 Duke Blvd.
Mason, Ohio 45040
Direct dial: (513) 573-7943
Facsimile: (513) 573-7797
E-Mail: lisa.finkelstein@macys.com

May 20, 2010

Federal Communications Commission
445 12th Street S.W.
Washington, DC 20554

CG Docket No. 02-278 and FCC No. 10-18

To the Commissioners:

Thank you for the opportunity to respond to the proposal to modify the Commission's regulation implementing the Telephone Consumer Protection Act of 1991 ("TCPA"). These comments are provided on behalf of Macy's, Inc. and its subsidiaries operating as Macy's and Bloomingdale's, as well as FDS Bank, a federal stock savings bank located in Mason, Ohio, that issues and services private label and co-branded credit cards for Macy's and Bloomingdale's. We offer the following observations and explanations to support our request that the Commission not make the proposed changes.

Studies estimate that as of the end of the first half of 2009 between 22% and 23% of US households used only cell phones, and of households with landlines, approximately 14.7% rarely used their landlines, so that approximately 85 million American adults are now cell-only or "cell mostly" households.¹ These numbers are steadily growing. It is our understanding that cell phone plans have evolved in such a way the consumers are not paying for inbound voicemail messages.

When we need to reach our customers in the situations described below, autodialers or predictive dialers are an efficient and cost-effective means of doing so. Their use enables businesses to manage workloads and direct phone calls to people available to handle them, allocating calls among multiple customer service centers and across time zones. Given cell phone and landline portability and the fact that many consumers keep their cell phone numbers when they relocate, newer autodialer equipment and software has programming that compares the telephone area code and customer's address, and then uses the address to determine the time of day a call is placed. This enables calls to be made at the appropriate time of day based upon where the

¹ According to various news reports referencing the latest figures from the National Health Interview Survey (NHIS) conducted by the Centers for Disease Control and Prevention, which tracks landline and cell phone usage every six months.

customer currently lives.² By automating this process, we can assure that this match-up governs all outbound calls. If this becomes a manual process, it will be prone to human error.

Automating such matters both significantly reduces the potential for error and enables a company to better manage fluctuating volumes with less disruption to the workforce. Without automation, if business declines or accounts are closed, the company would need to lay off personnel. When business increases, a company would need to hire more employees or temporary help with associated training. That is both inefficient and costly.

Customer Expectations. We believe the Commission was correct when it adopted its 2007 Declaratory Ruling “that autodialed and prerecorded message calls to wireless numbers that are provided by the called party to a creditor in connection with an existing debt are permissible as calls made with the ‘prior express consent’ of the called party,”³ and concluded “that the provision of a cell phone number to a creditor, e.g., as part of a credit application, reasonably evidences prior express consent by the cell phone subscriber to be contacted at that number regarding the debt.”⁴ In addition, we believe the Commission was also correct in providing an “existing business relationship” exception to the prohibition on initiating any telephone call to any residential line using a prerecorded message.⁵ We believe the same ruling should be applied to all businesses, not just to creditors, such as when consumers give merchants phone numbers to use for furniture and bed deliveries or repair services. By giving their phone number at any time during both credit and merchant relationships, we believe the consumer understands and expects that she will receive non-telemarketing calls at that number, whether or not such calls qualify as an “emergency” call.

Many creditors have multi-millions of active credit accounts, with thousands of payments due each day. The following are some examples of non-telemarketing autodialer calls a creditor would make to its existing customers, and in some situations, leave a recorded message, that facilitate a creditor’s management of its volumes most effectively:

- Calls to collect a debt. These calls can be very helpful to credit card customers and are essential to our business. As to customers who missed a payment, many appreciate receiving such calls as they may simply have forgotten to pay a bill or the payment was not received. These calls give them the ability to cut off accruing interest much sooner than if they did not learn about the situation until the arrival of their next bill, and by quickly making the payment, negative credit reporting is prevented. As to customers who are in arrears, we find they are often fearful about talking to a creditor and not aware of approaches available to pay their debts.

² For example, if a California customer with a 415 area code moved to New York, we would not want to call her at 11 PM ET thinking we were calling her in California at 8 PM. Similarly, if a District of Columbia customer with a 202 area code moved to Oregon, we would not want to call her at 9 AM ET, when it is really 6 AM where she now lives.

³ Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Request of ACA International for Clarification and Declaratory Ruling, CG Docket No. 020278, Declaratory Ruling, p.1, Section I.1. (2007).

⁴ Id. at p. 6, Section III.A.9. We believe the same holds true not matter how or when the customer provides her phone number, such as over the phone when speaking with a customer service representative or marking a bill header with the new telephone number when that header is returned with a payment check.

⁵ Section 64.1200(a)(2)(iv).

- Calls relating to possible or actual data breach compromises. Creditors may themselves suffer a data security compromise or may be impacted by data security incidents occurring elsewhere (such as at a merchant or a credit card processor.⁶ It is not always clear that an account has been or will be used fraudulently: nonetheless, a card issuer may elect to reissue credit cards to minimize fraud losses. The creditor will not wish to disrupt its customers' use of a card when it may be the only credit card they have with them (especially when traveling), and would accommodate their customers by delaying the reissue until they return home. A creditor may need to make thousands and thousands of these calls in a very short period of time, and using an autodialer and prerecorded message is the most efficient and effective means to reach customers with time-sensitive and important information. It is at least questionable whether type of call would not qualify as an emergency call under the current regulation's definition of an "emergency purpose" as fraudulent use of a financial account may not be deemed to affect a consumer's health or safety.
- Calls to alert customers about possible fraud on their accounts. Many credit card issuers use fraud behavior monitoring tools to monitor account use for signs of possible fraud. For example, if a customer has never used the card on the internet or to buy electronics, and we see large dollar purchases of electronics on the internet, we might call the customer to validate the purchases. With millions of active credit card accounts, the most efficient way to place such calls is to use autodialers and deliver a prerecorded message if the customer does not answer.
- Calls to alert customers about billing statement errors. There may have been a computer glitch causing a billing statement error, such as billing twice for the same fee, calculating interest incorrectly, or failing to post a payment. To best address the error, the creditor may wish to reach thousands of people quickly to tell them to ignore the bill because a corrected bill will be forthcoming. Such messages are customer-focused as they are made to prevent the customer from paying something that needs correction and to more quickly alleviate concern should the customer see the error. They also help to prevent hundreds of incoming customer service calls.
- Calls to notify customers that they have not yet activated a credit card. Customers do not always activate credit cards when they receive them. If a customer is not expecting a reissue of her credit card, she might even put it aside in the "to be read whenever I get around to it" pile, or worse, may just throw it out. With thousands of unactivated credit cards, creditor would like to call those customers asking that they activate their card or call back if they did not receive it or mistakenly threw it out. This, too, is an important fraud prevention tool.

Merchant Service-Related Phone Calls. There are various kinds of service-related calls merchants make to their customers. The customer may provide a telephone number in person, where it may be captured in writing or electronically, or over the phone when purchase orders or service requests are taken over the telephone. The following are examples of merchant use of autodialers together with recorded messages or interactive voice messaging to deliver service efficiently:

- Calls relating to scheduling and delivery furniture and/or beds. Merchants use autodialers to (1) notify a customer that the original delivery date (identified when the

⁶ 46 states and the District of Columbia and Puerto Rico now have data breach notification statutes, and many permit notification by telephone.

item was purchased) is now the firm delivery date; or (2) place a call to remind the customer of the delivery date so that if the date is no longer convenient, the customer can then transfer to a live agent; or (3) notify the customer that custom-ordered furniture has arrived, what the scheduled delivery date is, and if that date is not convenient, the customer can then transfer to a live agent; or (4) time-sensitive calls to cancel and reschedule a delivery due to weather or other unanticipated problems; or (5) calls to provide a new delivery date when furniture does not arrive on schedule from the manufacturer. Sometimes when arranging for a new delivery date, the customer provides a different number where she can be reached. The use of autodialers enables customers to be notified more quickly and efficiently with minimal risk of human errors, such as misspeaking the date and time or even calling the wrong person.

- Calls regarding repair and warranty services. Most of these are arranged over the telephone at which time a customer provides the phone number where she can be reached. When the repairman or warranty provider schedules or reschedules the visit, this is often communicated using an autodialer similar to the manner just described in the preceding section. As is the case with furniture delivery, service dates can change or the customer provides a cell phone number at a later juncture where she prefers to be called.
- Survey calls. The use of autodialers to deliver surveys through interactive voice prompts enable merchants to obtain prompt feedback. A merchant can determine quickly if a technician was courteous and professional, arrived on time, or did anything improperly, such as track mud into the home. This enables merchants to improve performance quickly by identifying trouble spots and correcting them.

Calls to employees. Employers perceive opportunities to using autodialers to deliver messages to their employees, enabling employers to reach thousands of employees far more effectively, efficiently and less costly than by other means. Some of these calls are time sensitive, but may not rise to the level of "calls made necessary in any situation affecting the health and safety of consumers." Some examples are calls to employees (a) when a workplace is suddenly closed and employees are told not to report to work there, or to go to another location; or (b) to remind employees to enroll in annual benefits during the open-enrollment period; or (c) to remind employees to use funds in their flexible spending accounts before those accounts expire. The burden of obtaining some form of written consent, even electronic consent, and then preserving that consent in a company database is great and will become greater as more people convert to cell phone use only.

We are not objecting to banning the use of autodialers to deliver prerecorded telemarketing messages to cell phones or landlines. However, given the rapid growth of cell phone only households and the increasing numbers of "cell phone mostly" households, the proposed changes would significantly impair our ability to deliver much needed retail service, credit product support and employee telephone calls which benefit consumers in many ways, and significantly impact our costs. With millions of existing active credit card accounts, obtaining customer consent to use an autodialer to call them at a particular phone number and/or leave a recorded message would present a most daunting challenge. The vast majority of people will not respond to such opt-in requests, and they likely would receive them as to each financial relationship they then have. Moreover, people often change their telephone contact information, and repeatedly obtaining the specific consent proposed is overly burdensome.

While we have not been able to consider all systems requirements, we anticipate many programming changes would be needed. Examples are: (1) programming at point-of-sale in

stores to capture and preserve the opt-in in connection with credit card applications, furniture orders and repair services, and transferring and preserving that opt-in to other systems that then deal with those various aspects of our business; (2) ability to capture and preserve consent given over the telephone in all areas of our business; (3) recording requests to change phone numbers during the course of a customer relationship; and (4) programming all customer databases to identify whether a phone number is a cell phone number and to note whether or not consent has been given, as well as to capture the identification of a number as a cell phone number when that information is received from companies that provide such identification services.

There are also significant costs associated with identifying which telephone numbers in an existing customer database are cell phones. A company typically uses a vendor that specializes in "scrubbing" a list of phone numbers provided to identify which ones are cell phones. Millions of existing credit accounts have more than one phone number associated with them. The cost of such scrubbing one can range from \$.01 to \$.03/per telephone number. Once a phone number is identified as a cell phone and programming is put in place to capture that identification, a business would still need to keep scrubbing the other numbers again and again because consumers are porting their landline phone numbers to cell phones.

In conclusion, we respectfully request, for all the reasons stated above, that the Commission not change its current interpretation and the existing regulation, including the existing business relationship exception in Section 64.1200(a)(2)(iv). We believe the Commission made the correct decision in its 2007 interpretative ruling, and it is, in fact, the interpretation that makes the most sense given the rapid adoption of cell phone use today. Requiring written consent as contemplated by the proposed rule (and of necessity retaining evidence of such consent) is both burdensome and unnecessary as consent is clearly implied.

We also wish to take this opportunity to ask the Commission to do two things:

1. Expand its 2007 Declaratory Ruling to apply to all business relationships (including those regarding a company's employees) where a consumer has provided a telephone contact number, as illustrated in the above examples.
2. Seek a statutory change to the TCPA to remove the current prohibition on cell phone use given the extensive adoption of cell phone use in this country and the ever-increasing numbers of households giving up their landlines. While the approach made sense at the time the statute was enacted, we believe it is now outmoded.⁷

We thank the Commission for the opportunity to comment on the proposed rule and appreciate your review of our comments.

Sincerely,

Lisa Finkelstein
Senior Counsel
Macy's, Inc.

⁷ As the Commission noted in its publication of "The Truth About Wireless Phones and the National Do Not Call List," consumers concerned about receiving telemarketing calls to cell phones, whether by autodialer use or not, have always been able to protect themselves by adding their cell phone numbers to the Federal and state do not call lists, as tens of millions of consumers have already done.