Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of	)	
	)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)	CG Docket No. 02-278
	)	

COMMENTS OF SPRINT NEXTEL CORPORATION

Sprint Nextel Corporation ("Sprint") hereby respectfully submits these comments on the Notice of Proposed Rulemaking in the above captioned proceeding.[1] Sprint requests that the Federal Communications Commission ("Commission") clarify that carriers such as Sprint are not required to obtain separate, explicit written consent to place autodialed and/or prerecorded calls without charge to their wireless customers to provide account-related information or to facilitate collection of past-due accounts when the customer has provided the wireless number as the contact number on the account.

In the TCPA NPRM, the Commission invites comment on proposed revisions to the Commission's rules under the Telephone Consumer Protection Act ("TCPA")[2] in an effort to harmonize those rules with the Federal Trade Commission's ("FTC") recently amended Telemarketing Sales Rule ("TSR").[3] In particular, the Commission seeks comment on a proposal to require sellers and telemarketers to obtain telephone subscribers' express written consent (including electronic methods of consent) to receive

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[1] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Notice of Proposed Rulemaking, GC Docket No. 02-278, FCC 10-18, 75 Fed. Reg. 13471 (March 22, 2010) ("TCPA NPRM").
[2] 47 U.S.C. § 227.
[3] TCPA NPRM at ¶ 1 *citing Telemarketing Sales Rule, Final Rule*, Federal Trade Commission, 73 Fed. Reg. 51164 (August 29, 2008); http://www.ftc.gov/os/fedreg/2008/august/080829tsr.pdf.

autodialed or prerecorded telemarketing calls even when there exists an established business relationship between the caller and the consumer.[4]

Sprint fully supports the goal of avoiding telemarketing calls to consumers who do not wish to receive such calls and, as a consequence, does not engage in telemarketing activities using artificial or prerecorded messages. Moreover, Sprint supports requiring sellers and telemarketers to obtain telephone subscribers' express written consent, including electronic methods of consent, to receive prerecorded telemarketing calls even when there exists an established business relationship between the caller and the consumer insofar as this requirement will harmonize the Commission's TCPA rules with the FTC's TSR.

However, the Commission's proposal does not end there. The Commission also proposes to amend section 64.1200(a)(1)(iii) of the Commission's rules, which is applicable to "any telephone call" to wireless telephones, to require "prior express written consent of the called party" for calls made using an automatic telephone dialing system or an artificial or prerecorded voice, unless the call is made for emergency purposes.[5] Moreover, the Commission proposes that this express written consent must (1) be obtained without requiring it be executed as a condition of purchasing any good or service; (2) evidence the willingness of the recipient of the call to receive calls using an automatic telephone dialing system or an artificial or prerecorded voice; and, (3) include

[4] TCPA NPRM at ¶¶ 2, 16, 20, and 28.

[5] TCPA NPRM at ¶ 20. Proposed section 64.1200(a)(1)(iii) would read: "No person or entity may initiate any telephone call (other than a call made for emergency purposes or made with the prior express written consent of the called party) using an automatic telephone dialing system or an artificial or prerecorded voice to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call." TCPA NPRM at Appendix A.

the telephone number to which such calls may be placed in addition to the recipient's signature.[6] This burdensome proposal goes too far.

Sprint is concerned that this proposed rule change could be viewed to overturn certain Commission precedent permitting, without requiring additional consent, autodialed or prerecorded account-related calls to wireless customers that are essential to Sprint's business and that wireless customers have come to expect. These account-related calls involve calls placed without charge to wireless customers to provide information relating to the services provided by Sprint, and calls placed to wireless numbers to facilitate collection of past-due accounts when the customer has provided the wireless number as the contact number on the account. The TCPA, the TSR, and current Commission precedent permit these types of calls.[7]

Long standing Commission precedent has held that the TCPA does not apply to communications between a wireless carrier and its customers when the subscriber is not charged for the call. In its 1992 TCPA Order implementing the TCPA, the Commission explained that "[b]ased on the plain language of §227(b) (1) (iii), we conclude that the TCPA did not intend to prohibit autodiale[d] or prerecorded message calls to cellular customers for which the called party is not charged. Moreover, neither TCPA nor the legislative history indicates that Congress intended to impede communications between radio common carriers and their customers regarding the delivery of customer services by barring calls to cellular subscribers for which the subscriber is not [charged]."[8] Accordingly, the Commission concluded that wireless carriers need not obtain additional consent from their

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[6] TCPA NPRM at Appendix A.

[7] *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 7 FCC Rcd 8752 (1992) ("1992 TCPA Order"); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Request of ACA International for Clarification and Declaratory Ruling*, 23 FCC Rcd 559, 564 at ¶ 9. (2008) ("ACA Declaratory Ruling")

[8] 1992 TCPA Order at ¶ 42.

wireless subscribers prior to initiating autodialed and artificial and prerecorded message calls for which the wireless subscriber is not charged.[9]

In the ACA Declaratory Ruling released January 8, 2008, the Commission also found that "autodialed and prerecorded message calls to wireless numbers . . . are permissible when such wireless numbers are 'provided by the called party in connection with an existing debt,' because such calls are made with the 'prior express consent' of the called party."[10] As the Commission explained, 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."[11] The Commission reasoned that, "persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary."[12]

Even if the Commission determines that requiring separate express written consent is justifiable in the case of autodialed or prerecorded telemarketing calls to wireless numbers, this layer of additional protection is not appropriate in the creditor/wireless customer context. First, as the Commission has noted, autodialed and prerecorded calls from a creditor to its customers are not telemarketing.[13] Accordingly, prior written consent for these calls is not required under the Federal Trade Commission's TSR (which excludes non-telemarketing calls).[14]

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[9] *Id.*
[10] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Request of ACA International for Clarification and Declaratory Ruling*, 23 FCC Rcd 559, 564 at ¶ 9. (2008) ("ACA Declaratory Ruling")
[11] *Id.* at ¶ 9
[12] *Id., citing 1992 TCPA Order*, 7 FCC Rcd at 8769, ¶ 31.
[13] ACA Declaratory Ruling at ¶ 11.
[14] *See* 13 C.F.R. §§ 310.2(bb), 310.6(b).

In addition, although section 227(b)(1)(A)(iii) of the TCPA requires prior consent to place any autodialed or prerecorded call to a wireless telephone number, the TCPA does not require that the consent be obtained in writing. As the Commission notes, the term "prior express consent" appears in section 227(b)(1)(A) of the TCPA, however the statute is silent regarding the form of such consent (*i.e.*, oral or written).[15] The Commission further notes that the legislative history of the TCPA suggests that Congress contemplated that consent could be obtained orally or in writing, particularly when the calls involve the delivery of informational messages rather than solicitations.[16]

It is critical for Sprint to be able to contact its own customers regarding service issues, outstanding bills, or for other account-related reasons. Many of Sprint's customers do not maintain landline telephones and use only a wireless phone as their principal point of contact. In fact, as the Centers for Disease Control and Prevention recently reported, twenty-five percent, or one in four American homes have only wireless phones.[17] By providing their wireless number as their primary point of contact, most people would expect to receive these types of communications without having to provide additional consent, and it is essential for Sprint to be able to contact our customers using the numbers they have provided to us for such purpose. Moreover, it is not efficient or feasible for Sprint or our agents to make all necessary calls by manual dialing. Automatic dialers provide the ability to implement compliance-related controls to our

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[15] TCPA NPRM at

[16] TCPA NPRM at ¶ 18 *citing* S. Rep. 102-178, 102d Cong., 1st Session (Oct. 8, 1991), at 4, 5, 10 (clarifying that the bill, as reported, would allow automated calls, including prerecorded messages, to be sent so long as the called party gives his or her prior express consent either orally or in writing and providing examples involving the delivery of "automated" calls delivering prerecorded informational messages as opposed to prerecorded telemarketing messages).

[17] *See Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July–December 2009* Center for Disease Control and Prevention Report (rel. May 12, 2010): http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201005.pdf.

operations and also create efficiencies that are necessary in today's marketplace. Moreover, Sprint (and other wireless carriers) are specially situated to ensure that customers are not charged for receiving account-related autodialed calls. The proposed rule to require Sprint to obtain prior written consent for these types of messages could have the effect of eliminating essential communications that Sprint's customers want and expect. For example, our experience leaves us certain that customers with overdue accounts would prefer to receive reminder messages from Sprint as opposed to possible service disruptions or other remedies Sprint might need to employ to secure payment on overdue accounts.

For the foregoing reasons, in adopting rules to require explicit prior written consent for telemarketing calls, the Commission should continue to permit these types of account-related calls to be placed to wireless telephone numbers without requiring additional prior written consent. Specifically, the Commission should amend section 64.1200(a)(1)(iii) of its rules to clarify that the written consent requirement does not apply to calls to wireless numbers when the customer has otherwise previously consented to such calls, or calls from a carrier to its customers when such calls are not charged to the customer.

In the alternative, the Commission should, consistent with its statement that the Commission's proposed rule changes "make no changes with respect to categories of prerecorded message calls that are not covered by our TCPA rules," explicitly state in its adoption order that wireless carriers need not obtain additional consent from their cellular subscribers prior to initiating autodialed calls for which the cellular subscriber is not charged, and that a creditor may initiate autodialed and artificial or prerecorded message

calls to consumers without additional consent if the wireless number was provided by the consumer as a contact number.

Respectfully submitted,

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