

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of:

**Rules and Regulations Implementing
The Telephone Consumer Protection Act of 1991**

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CG Docket No. 02-278

COMMENTS OF THE AMERICAN TELESERVICES ASSOCIATION

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The American Teleservices Association (“ATA”) respectfully submits these comments in response to the Commission’s Notice of Proposed Rulemaking (“NPRM”) dated January 20, 2010. In the NPRM, the Commission announced its intention to amend its rules implementing the Telephone Consumer Protection Act of 1991 (“TCPA”). The proposed amendments will require, *inter alia*, that companies obtain call recipients’ written consent before transmitting prerecorded messages to them and before initiating calls to their cell phones.

ATA does not object to requiring companies to obtain call recipients’ written consent before transmitting prerecorded messages to them, provided the amended rule applies only to telemarketing calls and is identical to the restrictions recently imposed by the Federal Trade Commission.

ATA vigorously opposes the imposition of any restrictions that impose additional limitations on the ability of ATA members to contact their existing customers on their cell phones.

I. OVERVIEW

ATA is a national trade organization with an industry-wide membership that collectively produces over \$500 billion in annual sales. It is the only national trade association that is exclusively devoted to the teleservices industry. ATA's member organizations represent all facets of the teleservices industry, and provide traditional and innovative services to Fortune 500 companies, nonprofit organizations, charitable institutions, and organized political parties.

II. WRITTEN CONSENT REQUIREMENT FOR TRANSMITTING PRERECORDED MESSAGES

A. Federal Trade Commission's Telemarketing Sales Rule

In the NPRM, the Commission acknowledges that on August 19, 2008, the Federal Trade Commission issued revisions to its Telemarketing Sales Rule ("TSR") regarding the transmission of prerecorded telemarketing messages. This amendment added to the description of abusive telemarketing acts or practices the initiation of an outbound telephone call that delivers a prerecorded telemarketing message unless the seller has previously obtained the recipient's signed, written agreement to receive such calls.¹ Prior to this amendment, the FTC did not specifically restrict the transmission of prerecorded telemarketing calls.²

B. The Commission's TCPA Rules.

The Commission has a long history of regulating the transmission of prerecorded telemarketing calls through its TCPA rules.³ These rules create differing standards governing the transmission of prerecorded messages depending upon the messages' content and the terminating

¹ The FTC's amendment imposed additional technical requirements on prerecorded telemarketing calls that facilitate a recipient's ability to be added to the seller's entity-specific do-not-call list. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, FCC 10-18, Notice of Proposed Rulemaking, para. 11 (2010).

² Although it was able to regulate the practice through its restrictions on call abandonment. *Id.*

³ 47 C.F.R. § 64.1200(a)(1)-(2).

device. On the one hand, the rules prohibit *any person or entity* from transmitting prerecorded sales messages to telephone numbers assigned to emergency responders, hospitals, and cellular telephone service providers unless such calls are for emergency purposes or made with the called party's *prior express consent*.⁴ On the other hand, the rules prohibit the transmission of prerecorded messages to *residential* telephone numbers without the recipient's prior express consent unless the message:

- (i) Is made for emergency purposes,
- (ii) Is not made for a commercial purpose,
- (iii) Is made for a commercial purpose but does not include or introduce an unsolicited advertisement or constitute a telephone solicitation,
- (iv) Is made to any person with whom the caller has an established business relationship at the time the call is made, or
- (v) Is made by or on behalf of a tax-exempt nonprofit organization.⁵

Citing Congressional directive to “maximize consistency” of the Commission’s TCPA rules with the TSR,⁶ the Commission seeks comment initially on whether it should amend the TCPA rules to similarly prohibit the transmission of prerecorded telemarketing calls without the call recipient’s prior express written consent to receive such calls.⁷ However, the Commission is attempting go much further than the FTC restrictions by imposing a written consent requirement prior to transmitting a prerecorded message for *any* purpose.

⁴ See 47 C.F.R. § 64.1200(a).

⁵ 47 C.F.R. § 64.1200(a)(2).

⁶ See 15 U.S.C. § 6101.

⁷ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Federal Communications Commission, 75 Fed. Reg. 13471, 13473 (March 22, 2010).

C. Transmission of Prerecorded Messages.

ATA members transmit prerecorded messages for a variety of reasons. While some transmit messages for sales purposes, many transmit prerecorded messages for non-sales purposes as well. For example, one ATA member, a large Fortune 500 financial services company relies upon prerecorded messages to notify consumers of potential fraud on their credit card accounts, to remind consumers to activate newly issued credit cards, to alert consumers of changes in product terms and conditions, to notify consumers when their account balances have reached a certain limit, and to seek additional information from consumers who submitted incomplete applications for services. Not only have consumers grown to expect that this information will be conveyed by prerecorded messages, prerecorded messages are an efficient and cost effective means of communicating this information. In fact, this member company estimates that it will incur \$70 million to \$80 million in additional costs if it is required to initiate these calls using live operators.

The use of prerecorded messages to notify consumers of potential fraud on accounts and to notify consumers of unactivated credit cards is an invaluable tool that this and other financial institutions utilize in order to curb financial losses. By helping financial institutions detect credit card fraud, these calls assist in implementing the recommendations of The President's Identity Theft Task Force Report by keeping consumer data out of the hands of criminals, making it harder for criminals to exploit consumer data and making it easier for consumers to detect identity theft.⁸ In the context of criminal exploitation, these calls assist financial institutions in

⁸ *The President's Identity Theft Task Force Report*, available at <http://www.ftc.gov/os/2008/10/081021taskforcereport.pdf> (Federal Trade Commission, September 2008).

foreclosing criminal opportunities immediately. When consumers have no landlines, they and their financial institutions are unable to communicate regarding the suspected activity. Presumably, the institutions will instead freeze the account, send written notification, and wait for the consumers to contact them. Even when consumers have a landline, financial institutions must hope consumers are home to answer the calls or check answering machine messages to be advised of the potential fraud.

ATA acknowledges that consistency among the TSR and the TCPA's rules with respect to the transmission of prerecorded sales messages will eliminate confusion both among consumers and businesses by assisting consumers in understanding the protections afforded to them and by removing the challenges confronting businesses posed by a myriad of compliance obligations. ATA does not object to the Commission's proposed amendment to the TCPA rules that require the recipient's prior express written consent to transmit prerecorded telemarketing messages. However, ATA objects to any amendment that will impose this requirement upon informational, transactional, and other non-telemarketing calls.⁹

III. RESTRICTIONS ON CALLS TO CELL PHONES

The Commission also announced that it intends to require companies to obtain the written consent of individuals prior to initiating calls to their cell phones.¹⁰ ATA strongly urges the Commission not to impose such a requirement, as it will have a material detrimental effect on businesses and consumers alike as discussed below.

A. Increase in Cell Phone Usage by US Consumers.

⁹ 75 Fed. Reg. at 13474.

¹⁰ Id. (“[W]e tentatively conclude that any written consent requirement adopted by the Commission should apply to both provisions.”)

The use of cell phones continues to increase dramatically year over year as consumers give up their traditional landlines. The Centers for Disease Control published the following statistics for the last six (6) months of 2009:

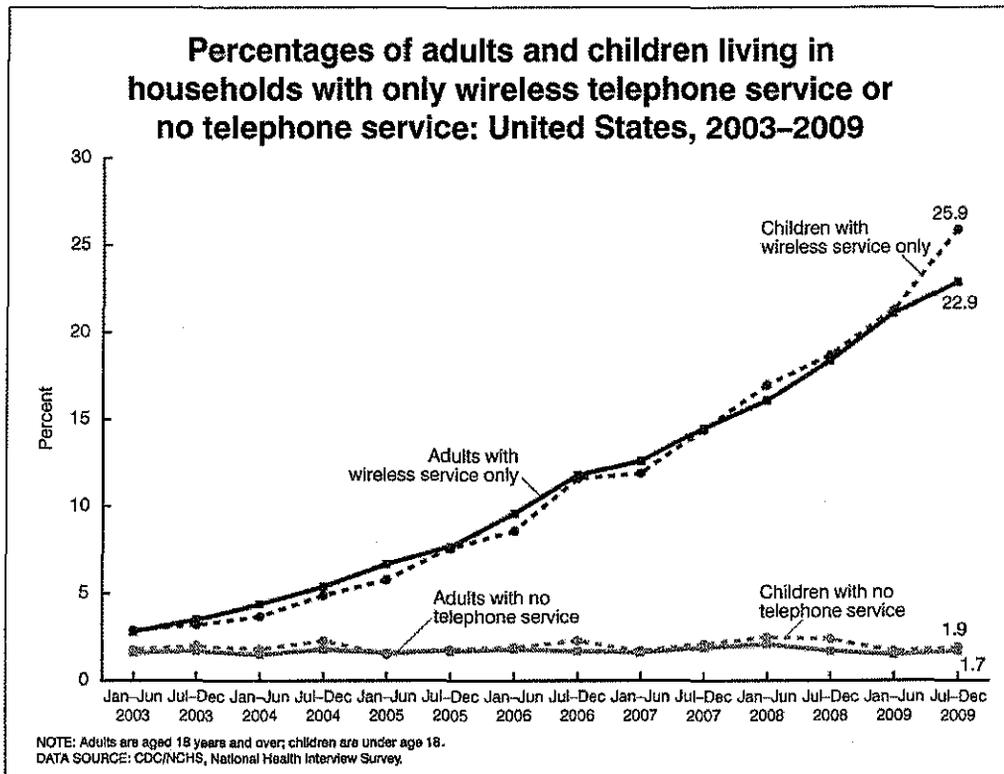
- 24.5% of all U.S. households utilized only cell phones and had no landlines;
- 22.9% of all adults living in the U.S. utilized only cell phones and had no landlines;
- 25.9% of all children in the U.S. lived in households that utilized only cell phones and had no landlines;
- 62.9% of adults living with unrelated adult roommates in the U.S. lived in households that utilized only cell phones and had no landlines;
- 43.1% of adults renting homes in the U.S. utilized only cell phones and had no landlines;
- 37.8% of individuals between 18 and 24 years utilized only cell phones;
- 48.6% of individuals between 25 and 29 years old utilized only cell phones;
- 37.2% of individuals between 30 and 34 years old utilized only cell phones.¹¹

The proliferation of cell phones is not waning, but has been steadily increasing: The number of individuals in the U.S. who only use cell phones increased 8.7% per year over the past two years.¹² The chart below demonstrates the rate of growth of consumers who use cell phones exclusively from January 2006 – December 2009.¹³ It makes clear that consumers trade-in their landlines for cell phones at historic rates.

¹¹ Stephen J. Blumberg, Ph.D. & Julian V. Lake, *Early Release of Estimates from National Health Interview Survey, July – December 2009*, *2-3 (Center for Disease Control, May 12, 2010).

¹² *Id.* at *2.

¹³ *Id.* at *1.



B. The Commission’s Current Restrictions on Calls to Cell Phones.

Currently, the Commission’s rules authorize calls to cell phones in only two (2) circumstances: for emergency purposes and with the recipient’s *prior express consent*.¹⁴ The Commission should maintain the current standard, as there is no compelling need nor is there any record referenced by the Commission suggesting that it should be modified. Instead, it appears that the Commission’s desire to modify the standard is based solely upon convenience.¹⁵

As previously described, consumers are migrating from landlines to cell phones at incredible rates. As this trend continues, businesses must be able to contact their customers by telephone for a variety of purposes irrespective of the apparatus consumers utilize to receive the calls. In fact, for the same reasons the financial services company described earlier for having to

¹⁴ See 47 U.S.C. § 227(b)(1); 47 C.F.R. § 64.1200(a)(1).

¹⁵ Because the two provisions include an identically worded exception for calls made with the “prior express consent of the called party,” we tentatively conclude that any written consent requirement adopted by the Commission should apply to both provisions. 75 Fed. Reg. at 13474.

transmit non-solicitous prerecorded messages, that company must be able to contact consumers on their cell phones to alert them of fraud. Furthermore, consumers expect to receive calls from ATA members on their cell phones. The Commission should consider situations where: i) airlines contact consumers to notify them of flight delays and cancellations; ii) cable companies notify consumers that technicians are on their way to consumers' homes; iii) cell phone carriers notify consumers they are reaching their monthly allotment of plan minutes; and iv) school boards notify parents that schools will close early. ATA submits that consumers expect – and, in fact, want – to receive these types of calls on their cell phones when they provide their numbers to entities with whom they have a relationship.

ATA members engaged in public opinion polling and research voice significant concerns regarding their prospective inability to contact individuals by telephone for scientific polling and research purposes. As cell phone use proliferates, research firms will be unable to contact an enormous block of individuals for polling purposes, thereby significantly reducing the accuracy of data samples and the reliability of opinion polls. This will have significant detrimental effects on businesses as they seek to determine market conditions for the introduction of products and services, and the maintenance of existing products and services.

C. Express Consent Standard

As consumers provide their cell phone numbers to companies with whom they do business, they evidence their express consent to receive calls on their cell phones from those companies. The Commission recently expressly endorsed this rationale:

Because we find that autodialed and prerecorded message calls to wireless numbers provided by the called party in connection with an existing debt are made with the “prior express consent” of the called party, we clarify that such calls are permissible. We conclude 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. In the *1992 TCPA Order*, the Commission determined 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.” The legislative history in the TCPA provides support for this interpretation. Specifically, the House report on what ultimately became Section 227 states that:

[t]he restriction on calls to emergency lines, pagers, and the like does not apply when the called party has provided the telephone number of such a line to the caller for use in normal business communications.¹⁶

The Commission concluded correctly that the provision of a cell phone number to a creditor during the course of a business relationship constitutes the consumer’s express consent to be called. The record reflects no compelling argument to indicate that the Commission reached an incorrect conclusion in its 2007 ruling. Furthermore, the rationale upon which the Commission relied to reach its conclusion applies equally to calls of all call varieties and not exclusively to debt collection calls – When a consumer voluntarily provides a telephone number to an entity during the course of a business relationship, the consumer expressly consents to be called at that number by that entity. In short, consumers expect to be called at telephone numbers provided and expressly consent to be called at those numbers by doing so.

As consumers continue to rely exclusively on cell phones, they continue to expect to receive various call-types on those phones. The imposition of a written consent standard will preclude businesses from contacting their customers, and prevent consumers from receiving calls that they expect. Not only does ATA urge the Commission not to impose a written consent requirement as a prerequisite to calling consumers on their cell phones, it urges the Commission to carry its rationale in the ACA Declaratory Ruling to its logical conclusion once and for all by

¹⁶ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Request of ACA International for Clarification and Declaratory Ruling*, CG Docket No. 02-278, FCC No. 07-232, Declaratory Ruling, para. 9 (2008) (“ACA Declaratory Ruling”).

declaring that consumers who provide their cell phone numbers to entities in the course of their business relationships expressly consent to be called by them on their cell phones – regardless of the underlying purpose of the calls.

D. Existing Privacy Protections.

As cell phone use continues to expand, consumers continue to expect and, in fact embrace, calls to their cell phones without adversely impacting their privacy rights. Both the TSR and the Commission's existing rules provide consumers with adequate privacy protections with respect to telemarketing calls to cell phones. Consumers may register their cell phone numbers on the national Do-Not-Call Registry, thereby receiving significant privacy protections.¹⁷

Moreover, for those consumers that desire to choose their privacy options on a case-by-case basis, they may place their cell phone numbers on the entity-specific do-not-call lists that are mandated by the TSR and the Commission's rules.¹⁸

Finally, and perhaps most elementary, consumers may simply choose from which companies they welcome calls on their cell phones by choosing to which companies they publish those numbers as a point of contact: Consumers who do not wish to receive telephone calls of any variety from entities need not provide their numbers to those entities. Similarly, consumers may remove their cell numbers as points of contact from companies' records to revoke their consent.

¹⁷ Can I register my cell phone on the National Do Not Call Registry? Yes, you may place your personal cell phone number on the National Do Not Call Registry. The registry has accepted cell phone numbers since it opened for registrations in June 2003. There is no deadline to register a home or cell phone number on the Registry.

You may have received an email telling you that your cell phone is about to be assaulted by telemarketing calls as a result of a new cell phone number database; however, that is not the case. FCC regulations prohibit telemarketers from using automated dialers to call cell phone numbers. Automated dialers are standard in the industry, so most telemarketers don't call consumers on their cell phones without their consent. <http://www.ftc.gov/bcp/edu/pubs/consumer/alerts/alt107.shtm>, paragraph 10.

¹⁸ See 16 C.F.R. § 310.4(b)(iii); 47 C.F.R. § 64.1200(d)

IV. CONCLUSION

While ATA does not object to modifications to the restrictions on the transmission of prerecorded messages, such modifications should only make the TCPA rules consistent with the TSR. ATA members and the industry in general utilize prerecorded messages in a variety of non-sales contexts. These messages are a cost-efficient method of transmitting vital information to consumers, are expected by consumers, and often promote governmental interest and policy.

The Commission should not implement restrictions on calls to cell phones that require the consumers' prior written consent. Governmental data reflects that cell phone use is expanding rapidly at the expense of landlines. Existing regulations and privacy protections guard consumers from receiving unwanted telephone calls on their cell phones. Moreover, consumers that rely on their cell phones provide these numbers as a principal point of contact and, as the Commission previously ruled, are deemed to provide their express consent to be called on them.

Respectfully submitted,

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