

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

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

COMMENTS OF WALGREEN COMPANY

Walgreen Company (“Walgreens”), through its undersigned counsel and pursuant to the Federal Communications Commission’s (the “Commission”) *Notice of Proposed Rulemaking* (“NPRM”), respectfully submits these comments on the Commission’s proposed revisions to its Telephone Consumer Protection Act (“TCPA”) rules.¹ The Commission stated that its NPRM is intended to harmonize the Commission’s TCPA Rules with the Federal Trade Commission’s (“FTC”) recently amended Telemarketing Sales Rule (“TSR”),² but in practice the proposed rule changes would substantially exceed the scope of the FTC’s rule by prohibiting businesses from initiating *any* prerecorded telephone calls to mobile phone users without the express written consent of the called party, even if the call was placed for non-telemarketing purposes. The application of these new rules to non-telemarketing, informational calls to mobile phones would deprive consumers of a valuable service. Accordingly, Walgreens respectfully requests that the Commission amend its proposed rules only with respect to prerecorded *telemarketing* calls. When crafting the final TCPA rules, the Commission should recognize the distinction between informational prerecorded calls and calls placed for telemarketing purposes.

¹ Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket 02-278, *Notice of Proposed Rulemaking*, 25 FCC Rcd 1501 (rel. Jan. 22, 2010).

² 16 C.F.R. § 310; Telemarketing Sales Rules, 73 FR 51164 (rel. Aug. 29, 2008).

I) WALGREENS USES PRERECORDED CALLS TO DELIVER VALUABLE NON-TELEMARKETING INFORMATION TO ITS CUSTOMERS

Since its inception, Walgreens had sought to provide its customers with the most convenient access to healthcare services and consumer goods in America. Through its over 7,000 community based drugstores, Walgreens provides millions of Americans with access to high quality, convenient pharmacy services on daily basis. In order to improve its customers' experience, Walgreens places informational prerecorded calls to customers for reasons ranging from drug recall alerts to prescription refill reminders. As discussed below, these notices provide Walgreens' customers with valuable, relevant, and timely information and are delivered for non-telemarketing purposes.

Walgreens has relied on the Commission's existing, flexible TCPA rules as well as the FTC's rules to communicate important information that provides significant benefits to our customers. Every day, Walgreens customers voluntarily provide to their local Walgreens a preferred phone number as a means to contact them with relevant information regarding their purchases of prescriptions and other goods. For example, Walgreens places prerecorded calls to its pharmacy customers to inform them that their medication is ready to be picked up, that their prescription requires doctor approval, that there are issues with insurance billing of certain prescriptions, or that it is time to refill a prescription. Often, prerecorded calls save customers money, such as when a call informs customers that a less expensive alternative medication is available. In other instances, these calls are placed for the customers' convenience, informing them that photo orders are ready, that an order has been delayed or has experienced a problem, or that a special delivery has arrived at the store. Perhaps most importantly, prerecorded calls serve Walgreens' customers' health and safety interests, such as when a call is placed to inform a customer of a potential drug interaction or to notify a customer of a drug recall.

II) THE PROPOSED RULES WOULD REQUIRE CALLERS TO OBTAIN “PRIOR EXPRESS WRITTEN CONSENT” IN ORDER TO PLACE EVEN NON-TELEMARKETING CALLS TO MOBILE PHONES

As currently written, the Commission’s proposed rules would inhibit companies like Walgreens from placing the kinds of non-telemarketing calls discussed above to mobile phone numbers voluntarily provided by customers, thereby depriving these consumers of access to a range of valuable, potentially life-saving, information.

In the NPRM, the Commission seeks comment on whether sellers and telemarketers should be required “to obtain telephone subscribers’ express written consent... to receive prerecorded *telemarketing* calls even when there exists an established business relationship between the caller and the consumer.”³ However, the plain language of the proposed rule would create an inconsistent standard between the treatment of a prerecorded non-telemarketing call placed to a landline user and an identical call placed to a mobile phone user. This peculiar result derives from the inconsistent use of exceptions in the proposed TCPA rules. The Commission’s rule governing prerecorded calls to landline users contains an exemption to the “prior express written consent” requirement for non-telemarketing messages,⁴ while the proposed rule governing prerecorded calls to mobile phone users contains no equivalent exception.⁵

As a result, the proposed rule will apply unevenly on American consumers dependent entirely upon the type of phone service utilized by each individual consumer. The proposed rule would require that callers obtain prior express written consent from consumers in order to place even non-telemarketing prerecorded calls to mobile phone users, while not requiring the same of calls placed to landline users. By creating two vastly different standards for prerecorded calls,

³ NPRM, 25 FCC Rcd at 1502, para. 2 (emphasis added).

⁴ See 47 C.F.R. § 64.1200(a)(2)(iii),(iv).

⁵ See NPRM, Appendix A, proposed rule 47 C.F.R. § 64.1200(a)(1).

dependent solely on the technology used by the consumer, mobile phone users will likely be deprived of valuable and timely information that they have come to rely upon. As Walgreens' services illustrate, non-telemarketing prerecorded calls provide consumers with a range of legitimately beneficial and valuable information. The Commission should consider whether the imposition of the heightened consent requirement upon mobile phone users would serve an interest that exceeds the clear benefits to consumers that these informational calls provide.⁶

III) THE COMMISSION SHOULD RETAIN THE "EXPRESS CONSENT" STANDARD IN § 64.1200(a)(1) OR ADD AN EXEMPTION FOR CALLS MADE FOR NON-TELEMARKETING PURPOSES AS CONTAINED IN § 64.1200(a)(2)

As noted in the Commission's recent annual report on wireless competition, 90 percent of Americans had a mobile wireless device as of the end of 2008.⁷ The surge in mobile device adoption has led to the ongoing substitution of wireless telephone service for traditional wireline service. Indeed, the Commission has reported that over 21 percent of American homes are now served by wireless telephones only, up from 9.6 percent in 2006.⁸ These clear trends raise questions regarding the Commission's proposed rules.

⁶ It should also be noted that the consequences associated with the proposed rule would be substantial. If the rule is adopted, service providers may choose to suspend their delivery of informational calls to *both* landline and wireless phone numbers since, at present, most companies have no way of knowing if the number provided by the consumer is one or the other. Unless providers developed a reliable method to distinguish landline numbers from wireless numbers, providers likely would suspend delivery of information prerecorded messages in all instances, in order to avoid sending impermissible messages to wireless subscribers.

⁷ Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, *Fourteenth Report*, WT Docket No. 09-66, FCC 10-81 (rel. May 20, 2010) ("Wireless Report"), para 4 .

⁸ Wireless Report, FCC 10-81, para. 339, 340. *See also* Stephen J. Blumberg and Julian V. Luke, *Wireless Substitution: Early Release of Estimates From The Data from the National Health Interview Survey, January – June 2009*, National Center for Health Statistics, Centers for Disease Control, Dec. 16, 2009, available at <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless200912.pdf>.

As consumers continue to replace their wireline telephone service with wireless service, rules that were developed to regulate the wireline industry are becoming less and less relevant to the overall telecommunications industry. However, many of the wireline rules provide a useful prism through which to view wireless regulation. The Commission has the rare opportunity to regulate wireless on a cleaner foundation than that which grew out of the monopoly-era regulation of the legacy wireline system. In regulating wireless telephone services, the Commission should endeavor to learn from its past, borrowing what worked from wireline regulation and discarding less efficient or obsolete rules. This proceeding is just such an instance where the Commission's past regulation offers an appropriate model of striking an effective balance between competing interests.

Under the current version of 47 C.F.R. § 64.1200(a)(1), no person may initiate any telephone call using an prerecorded message to a cellular phone unless the called party has given their "express consent" to the caller or it is an emergency situation.⁹ In the past, the Commission has found that the "express consent" requirement of § 64.1200 is satisfied when a person "knowingly releases their phone number" to a business since, through such an act, individuals "in effect give their invitation or permission to be called at the number which they have given, absent instructions to the contrary."¹⁰ This flexible express consent standard has permitted businesses to use prerecorded messages in order to communicate quickly and effectively with their customers for non-telemarketing purposes for eighteen years, regardless of whether that customer uses mobile or landline phone services. The Commission should reconsider whether to override this time-tested, common-sense approach to consent and impose burdensome,

⁹ 47 C.F.R. § 64.1200(a)(1)(iii).

¹⁰ Report and Order, 7 FCC Rcd 8752, 8769, para. 31.

additional obligations on consumers and businesses that would make it more difficult to deliver beneficial non-telemarketing messages to consenting consumers.

Alternatively, the Commission could add an exemption to the proposed rule 47 C.F.R. § 64.1200(a)(1) for calls made for informational, non-telemarketing purposes, consistent with the exemption present in the current version of 47 C.F.R. § 64.1200(a)(2) regulating calls to residential lines. The language of § 64.1200(a)(2) permits callers to initiate a prerecorded call to a residential line without express consent if the call is “not made for a commercial purpose,”¹¹ “is made for a commercial purpose but does not include or introduce an unsolicited advertisement or constitute a telephone solicitation,”¹² or “is made to any person with whom the caller has an established business relationship at the call is made.”¹³ This approach would require that telemarketers obtain a consumer’s “express written consent” before placing a prerecorded telemarketing call to that consumer’s mobile phone, but would allow mobile phone users to continue to receive informational calls that can be legitimately made to residential lines without such consent.

Either approach would square with the Commission’s past rulemakings on prerecorded messages as well as the FTC’s TSR rule, which is limited exclusively to telemarketing calls. Both approaches would shield consumers from unwanted prerecorded telemarketing calls, absent prior express written consent, but would allow informational calls such as those that Walgreens delivers to its customers, regardless of whether the individual consumer uses mobile or landline phone services. Given that more and more consumers are substituting wireless phones for traditional wireline service, Walgreens’ proposed modifications would ensure that those

¹¹ 47 C.F.R. § 64.1200(a)(2)(ii).

¹² 47 C.F.R. § 64.1200(a)(2)(iii).

¹³ 47 C.F.R. § 64.1200(a)(2)(iv).

households that have “cut the cord” remain able to receive valuable informational calls while providing additional protections from telemarketing calls. Walgreens’ proposals also would resolve the inconsistency between the Commission’s proposed wireless rules and wireline rules, cutting compliance costs for service providers, and ensuring that consumers receive a consistent level of service and protection across technological platforms.

IV) CONCLUSION

As discussed, the Commission’s proposed rules would require callers to obtain a called party’s “prior express written consent” before initiating a prerecorded message to any phone line, regardless of whether the call is informational in nature or is a telemarketing solicitation.¹⁴ Given the Commission’s goal of harmonizing TCPA rules with the FTC’s TSR, Walgreens believes that extending the “robocall” restrictions to *all* prerecorded messages sent to mobile phone users goes too far and should be limited to those calls made for telemarketing purposes. Further, the rule would pose incongruous standards upon callers, depending on whether the called party uses landline or wireless telephone services, an inconsistency that requires Commission attention.¹⁵

The Commission could improve the proposed rule in one of two ways. The Commission could restore the language of proposed rule 64.1200(a)(1) to the “express consent” standard that has worked effectively for nearly twenty years but insert an additional telemarketing provision that is consistent with the FTC’s TSR. In the alternative, the Commission could add an exemption to 47 C.F.R. § 64.1200(a)(1) for calls placed to mobile phone users for informational, non-telemarketing purposes, consistent with the exemption present in the current version of

¹⁴ NPRM, Appendix A, proposed rule 47 C.F.R. § 64.1200(a)(1),(2).

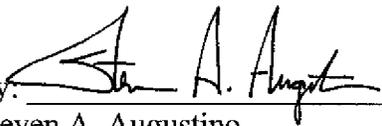
¹⁵ See 47 C.F.R. § 64.1200(a)(2)(iii),(iv).

64.1200(a)(2). Either approach would allow consumers to receive valuable information from companies like Walgreens, independent of consumers' use of mobile or landline phone services.

In light of the foregoing discussion, we urge the Commission to recognize the distinction between prerecorded calls made for informational purposes and those made for telemarketing purposes when crafting the final TCPA rules.

Respectfully submitted,

WALGREEN COMPANY

By: 

Steven A. Augustino
Aaron M. Gregory*
Kelley Drye & Warren LLP
3050 K Street, NW, Suite 400
Washington, DC 20007
(202) 342-8400 (telephone)
saugustino@kelleydrye.com
agregory@kelleydrye.com

Its Attorneys

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* Not admitted to the District of Columbia Bar. Supervised by principals of the firm who are members of the DC bar.