



May 21, 2010

Commission's Secretary  
Office of the Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Room TW-A325  
Washington, DC 20554.

RE: Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991  
CG Docket No. 02-278

Dear Sir/Madam:

The National Association of Mutual Insurance Companies ("NAMIC") is pleased to offer comments on proposed rules seeking to harmonize the Federal Communication Commission ("Commission") rules under the Telephone Consumer Protection Act ("TCPA") with the Federal Trade Commission's ("FTC") recently amended Telemarketing Sales Rule ("TSR").<sup>1</sup>

NAMIC is the largest full-service national trade association serving the property/casualty insurance industry with more than 1,400 member companies that underwrite more than 40 percent of the property/casualty insurance premium in the United States. NAMIC members are small farm mutual companies, state and regional insurance companies,

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<sup>1</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278; January 22, 2010 ("NPRM").

risk retention groups, national writers, reinsurance companies, and international insurance giants.

NAMIC appreciates the opportunity to offer comments on the proposed application of a prior written consent standard to automated pre-recorded non-marketing calls to wireless phone numbers provided by customers with which the business has an existing customer relationship.

## **Background**

The TCPA imposes restrictions on the use of the telephone network for unsolicited advertising by telephone and facsimile and regulates the use of automated telephone equipment.<sup>2</sup> The Commission is authorized to permit calls which are not made for a commercial purpose and commercial calls that do not adversely affect the privacy rights of the called party and do not transmit an unsolicited advertisement. The Commission under this authority has generally excluded calls to individuals with which the business entity has an established business relationship.

The FTC has authority under the Telemarketing Consumer Fraud and Abuse Prevention Act to adopt rules prohibiting deceptive and abusive telemarketing acts or practices, including “unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer’s right to privacy.”<sup>3</sup> The body of regulations adopted by the FTC to implement the Telemarketing Act is known as the Telemarketing Sales Rule.<sup>4</sup>

Coordination between the FTC and the FCC on the do-not-call registry was mandated by Congress in 2003 through the Do-Not-Call Implementation Act (DNCIA).<sup>5</sup> To harmonize the two sets of rules the Commission is seeking comment on whether it should revise sections 64.1200(a)(1) and 64.1200(a)(2) of the FCC’s rules to provide that, for all calls, prior express written consent to receive prerecorded telemarketing messages must be obtained in writing.<sup>6</sup>

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<sup>2</sup> The Telephone Consumer Protection Act of 1991 (47 U.S.C. § 227); FCC Regulations (47 C.F.R. §§ 64.1200, *et seq.*)

<sup>3</sup> 15 U.S.C. §§ 6101– 08 (Telemarketing and Consumer Fraud and Abuse Prevention Act).

<sup>4</sup> 16 C.F.R. § 310.1, *et seq.* (FTC implementing regulations).

<sup>5</sup> Do-Not-Call Implementation Act, Public Law No. 108-10, 117 Stat. 557 (2003), *codified at* 15 U.S.C. § 6101.

<sup>6</sup> 47 C.F.R. § 64.1200(a)(1) (prohibiting any non-emergency telephone call, other than with the *prior express consent of the called party*, using an automatic telephone dialing system or an artificial or

The Commission has concluded that if it has the legal authority to require prior written consent, then the standard should also apply to calls governed by section 227(b)(1)(A), including calls placed to cellular phone services. The Commission specifically requests comment on its tentative conclusion with respect to mobile lines.

The legislative history of the TCPA is clear that lawmakers did not intend to unduly interfere with ongoing business relationships. In light of Congress' concern about impeding commerce and infringing on business transactions, the FCC properly concluded that calls to an individual with which an entity has an established business relationship and calls that are commercial but do not contain an advertisement would be exempted from advance consent requirements.<sup>7</sup> In making this decision the Commission observed that communications with established business consumers do not adversely affect the customer's privacy interests. The Commission further concluded that requiring actual consent to prerecorded messages where an established business relationship exists could significantly impede communications between businesses and their customers.<sup>8</sup> NAMIC fully agrees with the Commission's conclusions and believes that the rationale of the determinations remains as valid today as when first asserted by the Commission.

The stated purpose of the NPRM is the harmonization of the rules of the TCPA and the TSR. The TSR is applicable only to telemarketing sales calls; therefore, the Commission's proposed expansion to pre-recorded non-marketing calls is not necessary to bring the two standards into line and we believe is beyond the scope of the congressionally directed coordination with respect to the do-not-call registry.

### **Prior Express Written Consent**

The NPRM proposes to require prior express written approval for communications to cell phones and mobile devices. The Commission has previously determined that this prior express consent requirement was deemed to be satisfied by the consumer providing the cell phone number to the business entity in the first place. If the Commission adopts the proposed rule, business entities, including insurers, would be required to obtain prior express written consent for telemarketing calls to residential

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prerecorded voice to an emergency telephone line, a health care facility, or a number assigned to a cellular telephone service); 47 C.F.R. § 64.1200(a)(2) (prohibiting any non-emergency telephone call to any residential line using an artificial or prerecorded voice to deliver a message without the *prior express consent of the called party* or unless otherwise exempted).

<sup>7</sup> 47 U.S.C. § 227(b)(1)(B), (2)(B); 47 C.F.R. § 64.1200(a)(2)(i)-(v)

<sup>8</sup> *Id.* (citing H.Rep., 102-317, 102d Cong., 1<sup>st</sup> Session (Nov. 15, 1991), at 13).

lines or wired lines. More importantly, these businesses would be required to obtain this written consent for most calls to cell phones

Satisfying a prior express written consent requirement will not, in actuality, be as easy to accomplish as the Commission opines. Notwithstanding the new age of electronic and digital signatures a requirement for written consent would present significant logistical problems and create conflicts between businesses and their consumers.

Under the NPRM business would generally be prohibited from obtaining the written express consent at the time of purchase or the beginning of a customer relationship. Businesses would specifically be prohibited from conditioning a business transaction on receipt of the written consent. Other problems are presented by the level of detail required in regard to such written consent. If the requirement were imposed retroactively business would face the costly, time consuming and intrusive responsibility for contacting consumers or face the untenable position of foregoing essential consumer communications. Even if imposed prospectively, business would incur significant costs and delays as a result of required modifications to forms, business processes and computer systems. Even if business are able to overcome the significant hurdles to requesting written consent, it is highly likely that consumers will either ignore the request for written consent and/or specifically refuse to provide the same because of almost an automatic assumption that it will open-up the door to the dreaded telemarketing calls. Such a requirement would unduly interfere with ongoing business relationships and failure to obtain the required express written consent would hurt the quality of service provided to insurance consumers.

### **Interference with Ongoing Business Relationships**

Ongoing interactions and customer communications are essential to the provision of high quality financial products and services in a 21<sup>st</sup> century economy. Insurers communicate with their policyholders to convey important and time sensitive information. From reminder notices about potential policy lapses, to safety warnings, to claims processing information, the nation's policyholders demand timely and accurate information from their carriers. The use of auto dialers and prerecorded messages and/or text messages enables these businesses to provide this information in a fast, convenient, and cost-effective manner.

For example, a friendly reminder call that an automobile policy is about to lapse for non-payment of premium providing the consumer the opportunity to take timely corrective action could help consumers avoid severe state penalties for driving without the required insurance coverage. Likewise, prerecorded autodialed messages can communicate important safety and claims procedures information to policyholders in times of severe storms which could help consumers prevent loss and expedite claims processing. They also enable routine account or claim information, such as upcoming payment due dates, estimated repair schedules or appointment times to be communicated to the consumer on a real time basis, enhancing the overall customer experience. Prerecorded messages and autodial systems also enable insurers to respond to customer initiated inquiries.

A persuasive example of needed and wanted informational calls that would be negatively impacted by the proposed revisions is calls that must be made after a catastrophic situation. In the case of natural or other catastrophic events, communications between insurers and policyholders are essential. Such calls would probably not meet the criteria to fall under the "emergency" call exception, but they are nevertheless extremely important and time sensitive. These pre-recorded calls provide information such as: acknowledging receipt of a claim; claim numbers and contact information; claims adjuster and additional insurance assistance; acknowledgement that a claim is in process; and timetables for claims processing. Often times following a natural disaster or other catastrophic event cell phones are the only available form of communication as land lines are down, power is out and entire buildings are destroyed or uninhabitable. The problem is further compounded by the fact that sometimes these types of calls have to be made to an entire town affected by a catastrophe. Requiring insurers to verify prior express written consent for each individual prior to placing the autodialed prerecorded message would needlessly delay essential communications with policyholders at the very time they need assistance most.

In addition to the customer convenience benefits, the use of prerecorded autodialed messages play an important role in compliance with legally mandated consumer notifications. The Gramm Leach Bliley Act, HITECH and 45 state breach laws require financial institutions to establish response and customer notification programs following events in which unauthorized access to customer information has taken place. Autodialed and prerecorded messages may be the fastest and most efficient

way of notifying customers. It is imperative that insurers continue to be permitted to communicate such vital information in the most practical and effective manner.

Each of these functions is integral to the insurance customer relationship with his or her carrier. Any attempt to impose restrictions or create unnecessary roadblocks to these essential functions on a timely and efficient basis would unduly interfere with the ongoing business relationship. In addition, automated calling and prerecorded messages provide substantial cost savings. Elimination of this option could raise operating costs, which are likely to be passed on to consumers in higher premiums or reduced customer service. As such, NAMIC opposes the expansion of authority to these non-marketing communications.

### **Cellular Phones and Mobile Devices**

The use of cell phones and other mobile devices has become commonplace in modern American society. They are integrated into the everyday lives of American consumers and afford individuals a convenient way to manage their business, as well as personal, relationships. For many Americans, cell phones have become their primary means of communication as they abandon wired services in favor of the flexibility and mobility of cellular technology. Imposing an artificial and unnecessary barrier on their use in business communications would be to deny the reality of modern communication channels.

Insurers make every effort to collect accurate and assessable contact information for policyholders. In many instances the phone number provided by a customer is associated with a wireless, rather than a wired, service. Prior express written consent requirements would complicate communications and unduly burden carriers and present difficulties for consumers. Whether applied retroactively or prospectively, institutions would face costly and time consuming endeavors to obtain the necessary written consent.

The Commission has historically reasoned that a customer's decision to provide a wireless contact number to a business constitutes consent to receive calls from that business at that number. This logic remains sound and there is no public policy reason to revisit this issue. Consumers providing a cellular number have made the decision that the benefits outweigh the costs and that the use of mobile technology is an effective business communication tool. Forcing insurers and other businesses to determine whether a particular number is associated with a wired or wireless number is time

consuming, expensive and often out-of-date. Additional problems could be encountered if consumers forward a wired number to a wireless device.

While consumers may appropriately regard unsolicited sales calls from business with which they do not have a relationship as intrusive and annoying, consumers have a legitimate expectation that their insurers will monitor their account and contact them with important information about their account. These same customers expect that their insurer will utilize their self-provided contact information to effectuate these communications. It is inconsistent to believe that customers would provide a contact number for a cellular phone and then object when their carrier uses that information to help service their account. The Commission's rationale that providing the number constitutes consent to use the number is logical and rationale, and provides an easily understood and accepted standard.

### **Conclusion**

Our nation's property/casualty industry is fully committed to respecting policyholder and claimant privacy. Our member companies believe the proposed rule changes, particularly the expansion of prior written express consent requirements to automated non-marketing calls to cellular numbers, exceed the scope of the harmonization directive. We further believe that such restrictions would unduly interfere with our business relationships and disadvantage America's insurance consumers, imposing higher costs and reducing our ability to serve our policyholder needs. We urge the Commission to abandon an express prior written consent threshold and reaffirm the existing business relationship standard and recognize the legitimate difference between marketing and non-marketing communications.