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Federal Communications Commission  
Office of the Secretary

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of Rules and Regulations  
Implementing the Telephone Consumer  
Protection Act of 1991

CG Docket No. 02-278

**COMMENTS OF ROBERT BIGGERSTAFF**

Please accept these comments as timely filed in the Notice of Proposed Rulemaking ("NPRM") in this docket, adopted January 20, 2010 (FCC 10-18).

**INTRODUCTION**

There is a dangerous misconception held by many people that the Telephone Consumer Protection Act ("TCPA") only deals with "telemarketing" calls. While telemarketing calls are singled out by some specific portions of the TCPA, other portions of the TCPA apply to all autodialed or recorded message calls ("robocalls") regardless of whether or not the calls are telemarketing or solicitation calls.

There is also a misconception regarding the Commission's authority with regard to the TCPA. An administrative agency's regulations are limited to gap filling and implementing the plain language of the statute. "Congress develops the statutory framework and directs the agency to flesh out the operational details."<sup>1</sup> Rulemaking authority is not a blank check authorizing an agency to rewrite a statute, regardless of the salutary benefits or policies advanced by such a rewrite. Exemptions sought by some commenters, and some discussed by the Commission, are

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<sup>1</sup> *Atchison, Topeka and Santa Fe Ry. Co. v. Pena*, 44 F.3d 437, 441-42 (7th Cir. 1994), *aff'd* 516 U.S. 152 (1996).

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barred by the plain language of the statute as the Commission has recognized.<sup>2</sup>

**I. The TCPA's rules regarding identification are not optional and permit no exemptions.**

The NPRM makes a dangerous misstatement that “the TCPA’s restrictions on prerecorded messages do not apply to calls initiated for emergency purposes.” NPRM ¶ 3. The TCPA and Commission’s rules currently in force are generally bifurcated between two classes of calls – solicitations and non-solicitations. While there are *more* restrictions on solicitation calls, there are technical requirements and other restrictions that apply to *all* robocalls – including those made for emergency purposes – regardless of purpose or content.<sup>3</sup> The Commission must carefully measure its words in its commentary in the matter, so as to not create confusion.

Specifically, the TCPA and Commission’s rules provide *no* exemptions for the requirement that all robocalls release the called party’s line within five seconds.<sup>4</sup> Similarly, all prerecorded messages must identify the caller by both name and a telephone number.<sup>5</sup> These provisions apply in full force even to the classes of calls that the Commission exempted from *some* provisions of the TCPA.<sup>6</sup> Even political robocalls must comply with the identification requirements that require both a valid name and telephone number<sup>7</sup> and with the prohibition on

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<sup>2</sup> See NPRM, ¶ 39.

<sup>3</sup> *Id.* These include technical and identification requirements. Both solicitation robocalls and non-solicitation robocalls (but not emergency calls) are subject as well as prohibitions on calls to hospitals, cell phones, and pagers, as proscribed by 47 U.S.C. § 227(b)(1)(A)(I)-(iii). As discussed *infra*, the Commission is without authority to adopt exemptions to the calls proscribed by 47 U.S.C. § 227(b)(1)(A)(I)-(iii).

<sup>4</sup> 47 U.S.C. § 227(d)(3)(B).

<sup>5</sup> 47 U.S.C. § 227(d)(3)(A).

<sup>6</sup> See NPRM at n.63.

<sup>7</sup> *Oklahoma v. Pope*, 2007 TCPA Rep. 1531, 2007 WL 837248 (W.D. Ok., Mar. 15, 2007) remanded on other grounds, judgment granted to plaintiff.

calls to emergency lines, hospital rooms, and cell phones.

This requirement makes sense. No one, even someone making a non-solicitation message, should be making automated robocalls without disclosing who they are, or without providing a way for the caller to be contacted by phone. Computers controlling robocalls make errors. Sometimes, they run amok.<sup>8</sup> They can even be used for harassment.<sup>9</sup> There is no justification whatsoever for letting a computer make *anonymous* robocalls, and Congress expressly forbid such calls in the plain language of the TCPA.

The Commission has multiple purposes. It is in large part a technical standards and implementation agency. Many of the Commission's rules dealing with technical implementation and standards apply regardless of the content of the communications. A transmitter that broadcast above its allotted power or on an unassigned frequency is violating rules that apply to all users of such equipment. Station identification requirements in the Commission's rules are similarly broad. The same paradigm applies to the use of autodialers and recorded messages to cell phones. It is essentially a content-neutral technical standard and thus should continue to apply to all users of that technology.

**II. Ensure that any requirements for an opt-out mechanism does not unintentionally increase illegal calls.**

The Commission must make clear in its language adopting a requirement for an "opt-out" mechanism in robocalls, that simply having such a mechanism does not make the calls permissible. A robocall is only permissible if signed, written consent for that call is given to the advertiser by the recipient of the call, *and* the proper identification and opt-out mechanism is

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<sup>8</sup> See *Irvine v. Akron Beacon Journal*, 770 N.E.2d 1105, ¶¶10-14 (Ohio App. 2002) (autodialer that repeatedly dialed the same number multiple times due to a programming error).

<sup>9</sup> *Id.*

present. An opt-out mechanism alone is not sufficient. Neither is express written consent sufficient if proper identification and opt-out mechanism is not present. It is important the Commission make crystal clear that *all* requirements must be met, such as the Commission did with respect to junk faxes.<sup>10</sup>

**III. The Commission should indeed alter its 1992 determination that an EBR may be “deemed” to constitute express permission .**

Basic statutory interpretation is dispositive of this question raised by the Commission.<sup>11</sup>

First, Congress knew how to include both express permission as an exemption, along with an EBR exemption. It did so for live telemarketing calls. *Compare* 47 U.S.C. § 227(a)(4) with § 227(a)(5).

One foundational rule of statutory construction is that “[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”<sup>12</sup> Another is that when Congress includes two different terms in a statute, they mean *different* things.<sup>13</sup> These foundations of statutory construction are dispositive that any conclusion by the Commission that an EBR is “equal” to or somehow implies “express invitation or

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<sup>10</sup> See, e.g., *Third Order On Reconsideration*, 21 FCC Rcd 3787 ¶24 (2006) (“We emphasize that including an opt-out notice on a facsimile advertisement alone is not sufficient to permit the transmission of the fax; an EBR with the recipient must also exist.”); *Id.*, at ¶13 (noting in the context of junk faxes “an EBR alone does not entitle a sender to fax an advertisement to an individual consumer or business. The telephone facsimile number must also be provided voluntarily by the recipient”).

<sup>11</sup> NPRM, ¶28.

<sup>12</sup> *Rodriguez v. United States*, 480 U.S. 522, 525 (1987). “The enumeration of specific exclusions from the operation of a statute is an indication that the statute should apply to all cases not specifically excluded.” *Central States SE and SW Areas Pension Fund v. Belmont Trucking Co.*, 788 F.2d 428, 433 (7th Cir. 1986) (quoting *In re Cash Currency Exchange*, 762 F.2d 542, 552 (7th Cir. 1985)) (construing exclusions stated in 11 U.S.C. § 102(3) to be exhaustive).

<sup>13</sup> *United States v. Ill. Cent. R. Co.*, 303 U.S. 239, 243 (1938).

permission” is not permissible and usurps Congressional intent. Furthermore, “deemed” is a synonym of “imply” – both of which are antonyms of “express.” Because the TCPA requires “express” consent, it is impossible for consent to be “implied.” This is reinforced by the well accepted definition of “express” as:

Clear; definite; explicit; plain; direct; unmistakable; not dubious or ambiguous.  
Declared in terms; set forth in words. Directly and distinctly stated. Made known distinctly and explicitly, and not left to inference.

*Minneapolis Steel & Machinery Co. v. Federal Surety Co.*, 34 F.2d 270, 274 (8th Cir. 1929).

Second, the limits on the authority of the Commission to exempt calls made for a commercial purpose, has two mandatory prongs that must both be satisfied before the Commission can recognize an exemption. Those two provisions are that the call (I) will not adversely affect the privacy rights that this section is intended to protect; and (II) do[es] not include the transmission of any unsolicited advertisement.<sup>14</sup> The latter of the two clauses poses an *absolute bar* to the Commission adopting any exemption where a robocall includes any “unsolicited advertisement.” The Commission implicitly confirmed this interpretation.<sup>15</sup>

Third, legislative history of the provision allowing the Commission to adopt limited exemptions for certain robocalls, is inconsistent with the Commission’s prior 1992 determination, and militates strongly in favor of the discussion presented *supra*. As originally written, the TCPA banned *all* robocalls except for emergency purposes. Late in the game, an amendment was made to permit some exemptions to be adopted, based on a concern from Rep. Barton of Texas, that regarded a personal message-forwarding system called “MessagePhone”<sup>16</sup>

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<sup>14</sup> 47 U.S.C. § 227(b)(2)(B)(ii).

<sup>15</sup> NPRM, ¶ 39.

<sup>16</sup> 137 Cong. Rec. H11307 (daily ed., Nov. 26, 1991).

Senator Hollings, author of the TCPA, explained an important limit on the amendment permitting the Commission to adopt limited exemptions:

In considering whether to exempt certain calls, however, the bill states that the FCC may not exempt telephone solicitations. These calls are certainly commercial calls and the evidence before the Congress leaves no doubt that these types of calls are an invasion of privacy and a nuisance.<sup>17</sup>

Simply put: *if a robocall is a solicitation call, then it can not be exempted by the Commission.*

This inescapable command also applies to the ill-advised conclusion of the Commission that robocalls made by or on behalf of a tax-exempt nonprofit are exempted from the calling restrictions on robocalls. If a charity is calling for donations, then that is a non-commercial call and is not a sales call. However, when a purported charity (or more likely, a telemarketer that is being permitted to use the charity's name in exchange for a small portion of the sales) is making robocalls to sell magazines, auto warranties, or offering services such as to come and tow away your car, then this is a commercial calls that includes a telephone solicitation, and not eligible for an exemption by the Commission. This common-sense distinction between calls for donations and calls selling goods and services in the stream of commerce, has been adopted by the courts.<sup>18</sup>

**IV. There is no statutory authority for an exemption for “healthcare-related” robocalls.**

The same discussion regarding whether the 1992 conclusion by the Commission *vis-à-vis* an EBR exemption for robocalls, equally applies to any proposed exemption for “healthcare-related” robocalls. The Commission lacks statutory authority to exempt “healthcare-related” robocalls if they contain “material advertising the commercial availability or quality of any

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<sup>17</sup> 137 Cong. Rec. S18784 (daily ed., Nov. 27, 1991).

<sup>18</sup> See, e.g., *Abramson v. Aegis Ins. Agency Inc.*, 2005 TCPA Rep. 1414, 2005 WL 5972917 (Pa. C.P. Nov 21, 2005)

property, goods or services.”<sup>19</sup>

Furthermore, such an exemption would be subject to rampant abuse. I have personally received many illegal robocalls – an average of 250 such calls in each of the last four years.<sup>20</sup> Many times, these calls were for various healthcare-related goods or services, such as diabetic supplies, chiropractic care, and nutritional supplements. Many of these callers claimed (when complaints were made under the TCPA) that the calls were exempted as an “emergency purpose” because “your health is always an emergency.” Were an actual “healthcare” exemption enacted, it would provide *carte blanche* to robocallers for all sorts of schemes tenuously related to “healthcare.”

In fact, due to the exemption adopted by the FTC, I am aware of at least one pharmacy which has already made waves of prerecorded telemarketing calls pushing flu vaccines – calls that are of course illegal under the TCPA.

Obviously all healthcare-related robocalls will not be prohibited by the Commission’s rules. Calls to a customer to warn of contamination of a prescription or vaccination the customer received are obviously permitted as emergency calls (although they must still contain proper identification and opt-out, and must not include a solicitation). Robocalls by a doctor’s office or pharmacy who obtained express written permission are permitted (so long as proper identification and opt-out provisions are included). And the universal solution is always available: the calls can simply be made with a live human being.

### CONCLUSION

In conclusion, I ask the Commission to make the following findings and regulatory

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<sup>19</sup> 47 U.S.C. § 227(a)(5).

<sup>20</sup> This is not an exaggeration. I maintain records of all such calls, and these records show I received 219 such calls in 2009, 255 in 2007, 304 in 2008, and 215 in 2009.

changes:

- Adopt the signed, written permission rule adopted by the FTC for robocalls to residential lines and cell phones.
- Adopt the opt-out provision requirement adopted by the FTC for robocalls to residential lines and cell phones, and include that requirement on calls to business lines as well.
- Adopt the provision that express consent to received prerecorded calls can not be made a condition of service or as a condition of any commercial transaction, and that express consent obtained by such a condition, regardless of when it was obtained, is void *ab initio*.
- Expressly declare the existing rules provide that the line-seizure and identification requirements of the Commission's rules, are mandatory for all robocalls regardless of content or purpose of the call, and regardless of whether the calls is delivered to a residential telephone line or to a business.
- Expressly declare the existing rules require proper identification in all prerecorded calls, regardless of purpose and regardless of whether the calls is delivered to a residential telephone line, cell phone, or to a business.
- Adopt a change to the Commission's rules, so that *both* the name and telephone number of the caller must be stated clearly at the beginning of all prerecorded messages.
- Amend the 1992 conclusion that an EBR is deemed to equate to express invitation or permission so that an EBR no longer constitutes an exception to the general prohibition on prerecorded calls to residences.
- Expressly recognize the existing TCPA provides that a bright-line test exists in the TCPA itself, so that no robocall that contains an "unsolicited advertisement" is or can be exempted by the Commission from the general prohibition in 47 U.S.C. § 227(b)(1)(B).
- Expressly recognize that the Commission lacks statutory authority to create any exemptions to autodialed or prerecorded calls made to cell phones as provided in 47 U.S.C. § 227(B)(1)(A)(iii).
- Expressly distinguish that robocalls by or on behalf of a tax-exempt nonprofit entity requesting donations are exempted from 47 U.S.C. § 227(b)(1)(B), but any such calls that contain an "unsolicited advertisement" are not and can not be exempted by the Commission from 47 U.S.C. § 227(b)(1)(B).

- Decline to adopt an exemption for “healthcare-related” robocalls as 1) not within the Commission’s power to the extent that such a call includes an advertisement and 2) unwise based on the history of abuse by robocallers attempting to exploit such loopholes.
- Adopt a rule expressly prohibiting false claims to a consumer or to the Commission that a robocall was made with express invitation or permission.

Submitted, this the 19<sup>th</sup> day of May 2010.

\_\_\_\_\_/s/\_\_\_\_\_  
Robert Biggerstaff