

without protection. The protections provided by HIPAA safeguard privacy concerns.¹⁹³ Under the second prong of the TCPA exemption provision, which requires that such calls not include an unsolicited advertisement,¹⁹⁴ we find the calls at issue here are intended to communicate health care-related information rather than to offer property, goods, or services and conclude that such calls are not unsolicited advertisements.¹⁹⁵ Therefore, such calls would satisfy the TCPA standard for an exemption as provided in the Act and our implementing rules.

64. Third, a commenter anticipates abuse of the HIPAA marketing definition and suggests that robocalling a neighborhood to alert persons that the calling entity will provide immunizations would be allowed under HIPAA.¹⁹⁶ HHS enforcement measures of HIPAA discourage abuse because these measures include civil and criminal penalties.¹⁹⁷ Lastly, one commenter that opposes the HIPAA exemption questions the Commission's authority to adopt such an exemption.¹⁹⁸ Because we conclude that prerecorded, health care-related calls, subject to HIPAA, to residential lines do not constitute an unsolicited advertisement and will not adversely affect the privacy rights that the Act was intended to protect, the Act allows the Commission to establish an exemption for such calls, and we do so today.¹⁹⁹

65. In sum, based on the record and the HIPAA requirements, we agree with the FTC approach under the TSR and are persuaded that the HIPAA privacy regulations are rigorous and reflect a statutory mission to protect privacy rights. HHS enforcement measures of HIPAA discourage abuse because these measures include civil and criminal penalties.²⁰⁰ We therefore adopt an exemption from our TCPA rules for prerecorded health care-related calls to residential lines that are subject to HIPAA. In those instances where the prerecorded health care-related call is not covered by HIPAA, as determined by HHS, restrictions imposed by the TCPA and our implementing rules will apply as the facts warrant.

D. Implementation

66. Finally, we address the timing and cost of implementing the rules we adopt in this Order.²⁰¹ We seek to ensure that the consumer protection measures we adopt are timely implemented so that consumers can realize the benefits, while allowing a reasonable time for affected parties to implement

(...continued from previous page)

refills and immunization reminders and that these communications promote health and streamline health care administration).

¹⁹³ As noted herein, HIPAA requires the consumer's written consent for protected information to be used for marketing and provides civil and criminal penalties for HIPAA violations. *See supra* para. 61.

¹⁹⁴ 47 U.S.C. § 227(b)(2)(B)(ii)(II).

¹⁹⁵ 2003 TCPA Order, 18 FCC Rcd at 14098-99, para. 142 (explaining that if the call is intended to offer property, goods, or services for sale, either during the call or in the future (such as in response to a message that provides a toll-free number) that call is an advertisement). Because these health care-related calls' intent and purpose concern consumers' health, not the purchase of a good or service, as required by the definition of advertisement, we believe that these calls are not advertisements. *Id.* For these same reasons, we believe that these calls are not telephone solicitations. *Id.* at 14098, para. 141 (explaining that the Commission agrees that application of the prerecorded message rule turns, not on the caller's characterization of the call, but on the purpose of the message).

¹⁹⁶ Roylance Reply Comments at 14-15.

¹⁹⁷ *See* 42 USCA §§ 1320d-5, 1320d-6; *see supra* nn. 183-84.

¹⁹⁸ Shields Comments at 1.

¹⁹⁹ *See supra* para. 63.

²⁰⁰ *See* 42 USCA §§ 1320d-5, 1320d-6; *see supra* nn. 183-84.

²⁰¹ *See* 2010 TCPA NPRM, 25 FCC Rcd at 1520, para. 48.

necessary changes in a way that makes sense for their business models. Each of our implementation periods is consistent with the implementation periods adopted by the FTC.²⁰² Specifically, we establish a twelve-month period for implementation of the requirement that prior express consent be in writing for telemarketers employing autodialed or prerecorded calls or messages. This twelve-month period will commence upon publication of OMB approval of our written consent rules in the Federal Register. In connection with the implementation of the written consent requirement for telemarketing robocalls, we will phase out the established business relationship exemption over the same twelve month period that follows publication of OMB approval of our written consent rule in the Federal Register. To reiterate, we allow telemarketers twelve months from publication of OMB approval of our written consent rules to cease utilization of the established business relationship as evidence of consumer consent to receive prerecorded telemarketing calls. Second, we establish a 90-day implementation period for the automated, interactive opt-out mechanism for telemarketing calls, again commencing upon publication of OMB approval of our opt-out rules in the Federal Register. Finally, we establish a 30-day implementation period for the revised abandoned call rule, also commencing upon publication of OMB approval of our abandoned calls rule in the Federal Register.

67. Based on our review of the record and the considerations noted above, we adopt implementation timetable as described herein. Although industry commenters focused their remarks on the time that would be needed for implementing a prior express written consent requirement for non-telemarketing calls,²⁰³ they did not address implementation where the proposed consent requirement was limited to telemarketing calls. We find that establishing a twelve month implementation period for the written consent requirement is appropriate because, as noted in the FTC proceeding, it will take time for businesses to redesign web sites, revise telemarketing scripts, and prepare and print new credit card and loyalty program applications and response cards to obtain consent from new customers, as well as to use up existing supplies of these materials and create new record-keeping systems and procedures to store and access the new consents they obtain.

68. One commenter in this proceeding supports the use of consent obtained under the Commission's existing rules to authorize continued autodialed or prerecorded calls for a limited period of time.²⁰⁴ Because allowing telemarketers to rely on such consent pending the effective date of our new written consent requirement would ease the operational and technical transition for autodialed or prerecorded voice telemarketing calls, we find that it would serve the public interest to permit continued use of existing consents for an interim period. For example, in cases where a telemarketer has not obtained prior written consent under our existing rules, we will allow such telemarketer to make autodialed or prerecorded voice telemarketing calls until the effective date of our written consent requirement, so long as it has obtained another form of prior express consent. Once our written consent rules become effective, however, an entity will no longer be able to rely on non-written forms of express consent to make autodialed or prerecorded voice telemarketing calls, and thus could be liable for making such calls absent prior written consent.

69. With respect to the 90-day implementation period for the automated, interactive opt-out mechanism for telemarketing calls, there is no indication in our record that implementing the proposed opt-out mechanism would be especially burdensome or pose extraordinary technical issues. Moreover, the FTC observed in its proceeding, that industry comments uniformly represent that interactive technology is affordable and widely available.²⁰⁵ In addition, we believe that the implementation

²⁰² 2008 TSR, 73 Fed. Reg. at 51166.

²⁰³ See, e.g., Citigroup Comments at 5; Cross-Industry Group Reply Comments at 6-7; JPMorgan Reply Comments at 8-9; Wells Fargo Comments at 18-19.

²⁰⁴ Biggerstaff Reply Comments at 11.

²⁰⁵ 2008 TSR, 73 Fed. Reg. at 51185.

circumstances associated with our revised abandonment rate measurement rules merit a 30-day allotment of time for compliance. None of the commenters on the proposed abandoned call rule requested any delay to give affected entities sufficient time to comply. Having received no input regarding the implementation period needed to implement the abandoned call rule, we believe the appropriate time for implementation of this revised rule is also 30 days after publication of OMB approval of this rule in the Federal Register.

70. In the *2010 TCPA NPRM*, we asked for comment on the incremental costs of implementing our proposals to require written consent.²⁰⁶ With one exception (elimination of the EBR, which we address above), industry commenters do not substantially oppose the proposals we adopt today.²⁰⁷ As described above, neither telemarketers nor sellers oppose the written consent requirement for telemarketing robocalls – we would have expected such opposition if compliance costs were material. Many, perhaps the vast majority, of telemarketers already have processes in place to comply with this requirement. Hence, with the exception of the limited group of entities that are outside the FTC’s jurisdiction, we expect that many telemarketers affected by our changes today have already incurred the cost of implementing a written consent requirement, have already given up reliance on the EBR as a basis for making robocalls without prior express consent, have implemented an automated opt-out mechanism, and are calculating the call abandonment rate on a per-campaign basis. Because there is little record opposition to these changes, other than elimination of the EBR, and because many affected entities should already have processes in place to comply with the changes and of the availability of electronic means to obtain written consent, we find no reason to conclude that the consumer benefits that will result from these changes are outweighed by the associated costs.

71. Finally, to the extent that there are compliance costs resulting from our action, we find that the implementation periods we adopt here – 30 days from publication of OMB approval for the abandoned call rule, 90 days from publication of OMB approval for the automated, interactive opt-out requirement, and one year from publication of OMB approval for the written consent requirement and phase-out of the EBR exemption – should allow covered entities time to find cost-efficient ways to comply with these changes, to the extent they have not already made such changes to comply with the FTC’s rules.

IV. PROCEDURAL MATTERS

A. Regulatory Flexibility Act Analysis

72. Pursuant to the Regulatory Flexibility Act of 1980,²⁰⁸ as amended, the Commission’s Final Regulatory Flexibility Analysis in this Order is attached as Appendix C.

²⁰⁶ See *2010 TCPA NPRM*, 25 FCC Rcd at 1511, para 23 (“We seek information and data on the specific compliance costs and burdens associated with various written consent options under the E-SIGN Act and on the extent to which sellers and telemarketers are already utilizing these methods for obtaining consumer consent, either pursuant to the FTC’s amended Telemarketing Sales Rule or pursuant to Commission rules when a called party’s number is listed on the national do-not-call registry. Finally, to the extent that the Commission currently requires sellers and telemarketers placing prerecorded telemarketing calls to be prepared to provide ‘clear and convincing evidence’ of the receipt of prior express consent from the called party, even when consent has been obtained orally, we seek comment on the extent to which our adoption of a written consent requirement would add to the compliance burden associated with this existing requirement.”).

²⁰⁷ See *supra* para. 40.

²⁰⁸ See 5 U.S.C. § 604.

B. Paperwork Reduction Act Analysis

73. This Order contains modified information collections subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. It will be submitted to the Office of Management and Budget (OMB) for review under § 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the modified information collections contained in this proceeding.

C. Late-Filled Comments

74. We note that there were comments filed late in this proceeding. In the interest of having as complete and accurate a record as possible, and because we would be free to consider the substance of those filings as part of the record in this proceeding in any event,²⁰⁹ we will accept late-filed comments and waive the requirements of 47 C.F.R. § 1.46(b), and have considered them in this Order.

D. Materials in Accessible Formats

75. To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an email to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at (202) 418-0531 (voice), (202) 418-7365 (TTY). This Report and Order can also be downloaded in Text and ASCII formats at: <http://www.fcc.gov/cgb/policy/telemarketing.html>.

V. ORDERING CLAUSES

76. Accordingly, IT IS ORDERED, pursuant to the authority contained in Sections 1-4, 222, 227, and 303(r) of the Communications Act of 1934, as amended; 47 U.S.C. §§ 151-154, 222, 227, and the Do-Not-Call Implementation Act, Pub. L. No. 108-10, 117 Stat. 557, that the Report and Order in CG Docket No. 02-278 IS ADOPTED, and that Part 64 of the Commission's rules, 47 C.F.R. Part 64.1200, is amended as set forth in Appendix A. The requirements of this Report and Order shall become effective as specified in paragraphs 66-71 herein. The rules containing information collections, which require approval by OMB under the PRA, shall become effective after the Commission publishes a notice in the *Federal Register* announcing such approval and the relevant effective dates.

77. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION



Marlene H. Dortch
Secretary

²⁰⁹ See 47 C.F.R. § 1.1206 (discussing *ex parte* filings in permit-but-disclose proceedings).

APPENDIX A

Final Rules

Part 64 of the Code of Federal Regulations is amended as follows:

PART 64 – Subpart L – Restrictions on Telemarketing, Telephone Solicitation, and Facsimile Advertising

1. The authority citation for part 64 is amended to read as follows:

Authority: 47 U.S.C. 154, 254(k); §§ 403(b)(2)(B), (C), Public Law 104-104, 110 Stat. 56. Interpret or apply 47 U.S.C. §§ 201, 218, 222, 225, 226, 227, 228, and 254(k) unless otherwise noted.

2. Section 64.1200(a) is amended by redesignating paragraphs (a)(2) through (a)(7) as paragraphs (a)(3) through (a)(8), and by revising paragraph (a)(1), adding a new paragraph (a)(2), and revising redesignated paragraphs (a)(3), (a)(4), and (a)(7) to read as follows:

(a) * * *

(1) Except as provided in paragraph (a)(2), initiate any telephone call (other than a call made for emergency purposes or is made with the prior express consent of the called party) using an automatic telephone dialing system or an artificial or prerecorded voice;

* * *

(2) Initiate, or cause to be initiated, any telephone call that includes or introduces an advertisement or constitutes telemarketing, using an automatic telephone dialing system or an artificial or prerecorded voice, to any of the lines or telephone numbers described in paragraphs (a)(1)(i)-(iii) of this section, other than a call made with the prior express written consent of the called party or the prior express consent of the called party when the call is made by or on behalf of a tax-exempt nonprofit organization, or a call that delivers a “health care” message made by, or on behalf of, a “covered entity” or its “business associate,” as those terms are defined in the HIPAA Privacy Rule, 45 C.F.R. § 160.103.

(3) Initiate any telephone call to any residential line using an artificial or prerecorded voice to deliver a message without the prior express written consent of the called party, unless the call;

(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 advertisement or constitute telemarketing;

(iv) Is made by or on behalf of a tax-exempt nonprofit organization; or

(v) Delivers a “health care” message made by, or on behalf of, a “covered entity” or its “business associate,” as those terms are defined in the HIPAA Privacy Rule, 45 C.F.R. § 160.103.

(4) * * *

(iii) * * *

(B) The notice states that the recipient may make a request to the sender of the advertisement not to send any future advertisements to a telephone facsimile machine or machines and that failure to comply, within 30 days, with such a request meeting the requirements under paragraph (a)(4)(v) of this section is unlawful;

(C) The notice sets forth the requirements for an opt-out request under paragraph (a)(4)(v) of this section;

* * * * *

(iv) A facsimile advertisement that is sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice that complies with the requirements in paragraph (a)(4)(iii) of this section.

* * * * *

(vi) A sender that receives a request not to send future unsolicited advertisements that complies with paragraph (a)(4)(v) of this section must honor that request within the shortest reasonable time from the date of such request, not to exceed 30 days, and is prohibited from sending unsolicited advertisements to the recipient unless the recipient subsequently provides prior express invitation or permission to the sender. The recipient's opt-out request terminates the established business relationship exemption for purposes of sending future unsolicited advertisements. If such requests are recorded or maintained by a party other than the sender on whose behalf the unsolicited advertisement is sent, the sender will be liable for any failures to honor the opt-out request.

(vii) A facsimile broadcaster will be liable for violations of paragraph (a)(4) of this section, including the inclusion of opt-out notices on unsolicited advertisements, if it demonstrates a high degree of involvement in, or actual notice of, the unlawful activity and fails to take steps to prevent such facsimile transmissions.

* * * * *

(7) Abandon more than three percent of all telemarketing calls that are answered live by a person, as measured over a 30-day period for a single calling campaign. If a single calling campaign exceeds a 30-day period, the abandonment rate shall be calculated separately for each successive 30-day period or portion thereof that such calling campaign continues. A call is "abandoned" if it is not connected to a live sales representative within two (2) seconds of the called person's completed greeting.

(i) Whenever a live sales representative is not available to speak with the person answering the call, within two (2) seconds after the called person's completed greeting, the telemarketer or the seller must provide:

(A) A prerecorded identification and opt-out message that is limited to disclosing that the call was for "telemarketing purposes" and states the name of the business, entity, or individual on whose behalf the call was placed, and a telephone number for such business, entity, or individual that permits the called person to make a do-not-call request during regular business hours for the duration of the telemarketing campaign; provided, that, such telephone number may not be a 900 number or any other number for which charges exceed local or long distance transmission charges, and

(B) An automated, interactive voice- and/or key press-activated opt-out mechanism that enables the called person to make a do-not-call request prior to terminating the call, including brief explanatory instructions on how to use such mechanism. When the called person elects to opt-out using such mechanism, the mechanism must automatically record the called person's number to the seller's do-not-call list and immediately terminate the call.

(ii) A call for telemarketing purposes that delivers an artificial or prerecorded voice message to a residential telephone line or to any of the lines or telephone numbers described in paragraphs (a)(1)(i)-(iii) of this section after the subscriber to such line has granted prior express written consent for the call to be made shall not be considered an abandoned call if the message begins within two (2) seconds of the called person's completed greeting.

(iii) The seller or telemarketer must maintain records establishing compliance with paragraph (a)(7) of this section.

(iv) Calls made by or on behalf of tax-exempt nonprofit organizations are not covered by paragraph (a)(7) of this section.

* * * * *

3. Section 64.1200(b) is revised to read as follows:

(b) All artificial or prerecorded voice telephone messages shall:

- (1) At the beginning of the message, state clearly the identity of the business, individual, or other entity that is responsible for initiating the call. If a business is responsible for initiating the call, the name under which the entity is registered to conduct business with the State Corporation Commission (or comparable regulatory authority) must be stated;
- (2) During or after the message, state clearly the telephone number (other than that of the autodialer or prerecorded message player that placed the call) of such business, other entity, or individual. The telephone number provided may not be a 900 number or any other number for which charges exceed local or long distance transmission charges. For telemarketing messages to residential telephone subscribers, such telephone number must permit any individual to make a do-not-call request during regular business hours for the duration of the telemarketing campaign; and
- (3) In every case where the artificial or prerecorded voice telephone message includes or introduces an advertisement or constitutes telemarketing and is delivered to a residential telephone line or any of the lines or telephone numbers described in paragraphs (a)(1)(i)-(iii), provide an automated, interactive voice- and/or key press-activated opt-out mechanism for the called person to make a do-not-call request, including brief explanatory instructions on how to use such mechanism, within two (2) seconds of providing the identification information required in paragraph (b)(1) of this section. When the called person elects to opt out using such mechanism, the mechanism, must automatically record the called person's number to the seller's do-not-call list and immediately terminate the call. When the artificial or prerecorded voice telephone message is left on an answering machine or a voice mail service, such message must also provide a toll free number that enables the called person to call back at a later time and connect directly to the automated, interactive voice- and/or key press-activated opt-out mechanism and automatically record the called person's number to the seller's do-not-call list.

4. Section 64.1200(c) is amended by revising the introductory text to read as follows:

(c) No person or entity shall initiate any telephone solicitation to:

* * * * *

5. Section 64.1200(f) is amended by redesignating paragraphs (f)(7) through (f)(14) as paragraphs (f)(9) through (f)(16), redesignating paragraphs (f)(1) through (f)(6) as paragraphs (f)(2) through (f)(7), adding a new paragraphs (f)(1) and (f)(8), and revising redesignated paragraphs (f)(3), (f)(6), and (f)(10) to read as follows:

(f) * * *

(1) The term *advertisement* means any material advertising the commercial availability or quality of any property, goods, or services.

* * * * *

(3) The term *clear and conspicuous* means a notice that would be apparent to the reasonable consumer, separate and distinguishable from the advertising copy or other disclosures. With respect to facsimiles and for purposes of paragraph (a)(4)(iii)(A) of this section, the notice must be placed at either the top or bottom of the facsimile.

* * * * *

(6) The term *established business relationship* for purposes of paragraph (a)(4) of this section on the sending of facsimile advertisements means a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a business or residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the business or residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.

* * * * *

(8) The term *prior express written consent* means an agreement, in writing, bearing the signature of the person called that clearly authorizes the seller to deliver or cause to be delivered to the person called advertisements or telemarketing messages using an automatic telephone dialing system or an artificial or prerecorded voice, and the telephone number to which the signatory authorizes such advertisements or telemarketing messages to be delivered.

(i) The written agreement shall include a clear and conspicuous disclosure informing the person signing that:

(A) By executing the agreement, such person authorizes the seller to deliver or cause to be delivered to the signatory telemarketing calls using an automatic telephone dialing system or an artificial or prerecorded voice; and

(B) The person is not required to sign the agreement (directly or indirectly), or agree to enter into such an agreement as a condition of purchasing any property, goods, or services.

(ii) The term "signature" shall include an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.

* * * * *

(10) The term *sender* for purposes of paragraph (a)(4) of this section means the person or entity on whose behalf a facsimile unsolicited advertisement is sent or whose goods or services are advertised or promoted in the unsolicited advertisement.

* * * * *

APPENDIX B

Comments Filed

Due to the significant number of comments filed by individual consumers in this proceeding, we have listed below only those comments received from industry, consumer advocacy groups, and governmental entities. All individual consumer comments, including those cited in the Report and Order, are available for inspection on the Commission's Electronic Comment Filing System (ECFS).

ACA International	ACA
Adepra Limited	Adepra
Alliance for Telecommunications Industry Solutions	ATIS
America's Health Insurance Plans	AHIP
American Council of Life Insurers	ACLI
American Financial Services Association	AFSA
American Teleservices Association	ATA
Arbitron, Inc.	Arbitron
Bank of America	BofA
Bill Me Later, Inc.	BML
Career College Association	CCA
The CGE Group	CBE
Citigroup, Inc.	Citi
Consumer Litigation Group	CLG
DirecTV, Inc.	DirecTV
Discover Bank	Discover
DMAA: The Care Continuum Alliance	DMAA
Financial Services Roundtable, American Bankers Association and the Consumers Bankers Association	Financial Services
FreeEats.Com, Inc.	FreeEats
Independent Bankers Association of Texas	IBA
International Bank of Commerce	IBC
JPMorgan Chase & Co.	JPMorgan
KGB USA, Inc.	KGB
Marketing Research Association	MRA
MarketLink	MarketLink
MDS Communications, Inc.	MDS
Medco Health Solutions, Inc.	Medco
Michigan Public Service Commission	MPSC
Mobile Marketing Association	MMA
Mortgage Bankers Association	MBA
National Association of Chain Drug Stores	NACDS
National Association of Mutual Insurance Companies	NAMIC
National Association of State Utility Consumer Advocates	NASUCA
National Consumer Law Center	NCLC
National Council of Higher Education Loan Programs and Education Finance Council	NCHELP
National Retail Federation	NRF
National School Boards Association	NSBA
Newspaper Association of America	NAA
Ohio Department of Education	Ohio
Online Lenders Alliance	OLA
PayPal, Inc.	PayPal
Portfolio Recovery Associates	PRA

Protocol Global Solutions	PGS
SCANA Corporation	SCANA
Silverlink Communications, Inc.	Silverlink
SmartReply, Inc.	SmartReply
Soundbite Communications	Soundbite
Sprint Nextel Corporation	Sprint
Student Loan Servicing Alliance	SLSA
Sunrise Credit Services	Sunrise
USAA	USAA
U.S. Department of Treasury – Financial Management Service	Treasury
United States Telecom Association	USTA
Visa, Inc.	Visa
Walgreen Company	Walgreen
Wells Fargo	Wells Fargo
West Corporation	West
World Financial Capital Bank	WFCB
World Financial Network National Bank	WFNNB

Reply Comments Filed

ACA International	ACA
Air Transport Association	Air Transport
Alarm Industry Communications Committee	AICC
American Teleservices Association	ATA
Arbitron, Inc.	Arbitron
CallAssistant	CallAssistant
Cargo Airline Association	Cargo
Cross-Industry Group – Trade Associations	CIG
CTIA – The Wireless Association	CTIA
Federal Reserve System	Federal Reserve
Financial Services Roundtable	Financial Services
JPMorgan Chase & Co.	JPMorgan
MetroPCS Communications, Inc.	MetroPCS
National Association of State Utility Consumer Advocates	NASUCA
National Cable & Telecommunications Association	NCTA
Portfolio Recovery Associates	PRA
Preferred Women’s Healthcare	PWC
Qwest Communications International, Inc.	Qwest
Soundbite Communications	Soundbite
T-Mobile USA, Inc.	T-Mobile

APPENDIX C

Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),¹ an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rulemaking (*2010 TCPA NPRM*) released by the Federal Communications Commission (Commission) on January 22, 2010.² The Commission sought written public comments on the proposals contained in the *2010 TCPA NPRM*, including comments on the IRFA. None of the comments filed in this proceeding were specifically identified as comments addressing the IRFA; however, comments that address the impact of the proposed rules and policies on small entities are discussed below. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.³

A. Need for, and Objectives of, the Order

2. The Do Not Call Implementation Act (DNCIA) provides that “the Federal Communications Commission shall consult and coordinate with the Federal Trade Commission to maximize consistency with the rule promulgated by the Federal Trade Commission.”⁴ We note that the Federal Trade Commission amended its Telemarketing Sales Rule (TSR) in 2008 to require, among other things, that telemarketers secure the consumer’s express written agreement to receive prerecorded telemarketing messages, provide an automated, interactive opt-out mechanism, terminate its safe harbor provision allowing prerecorded telemarketing calls to consumers with whom the telemarketer enjoyed an established business relationship, and limit abandoned calls on a 30-day, per campaign period.⁵ This Commission has determined to harmonize its rules with the FTC’s TSR to protect consumers from unwanted autodialed or prerecorded telemarketing calls, also known as “robocalls.” Despite establishing a National Do-Not-Call Registry and adopting other consumer protection rules, the Commission observes that consumers continue to receive unwanted robocalls. The continued receipt of unwanted robocalls demonstrates a need for the actions taken in this Order. Abuses in telemarketing have motivated the Commission to the objective of bringing an end to consumers receiving unwanted robocalls, encountering difficult or ineffective opt-out procedures, and receiving dead-air calls. In adopting these rules today, the Commission fulfills another objective in this Order by acting upon Congress’s directive in the DNCIA.

3. In this Report and Order (Order), the Commission adopts measures under the Telephone Consumer Protection Act (TCPA) to help consumers protect their privacy from unwanted telemarketing calls.⁶ Specifically, to summarize the rules adopted, we revise our rules to require prior express written consent for all autodialed or prerecorded telemarketing calls to wireless numbers and residential lines and to eliminate the established business relationship exemption for autodialed or prerecorded calls to

¹ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (*SBREFA*), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

² *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Notice of Proposed Rulemaking, 25 FCC Rcd 15012 (2010) (*2010 TCPA NPRM*).

³ See 5 U.S.C. § 604.

⁴ Do-Not-Call Implementation Act, Public Law No. 108-10, 117 Stat. 557 (2003), *codified at* 15 U.S.C. § 6101 (stating in Section 3, in relevant part, that the Federal Communications Commission shall consult and coordinate with the Federal Trade Commission to maximize consistency with the rule promulgated by the Federal Trade Commission. (16 C.F.R. § 310.4(b)).

⁵ *Telemarketing Sales Rule*, Final Rule Amendments, 73 Fed. Reg. 51164 (2008) (*2008 TSR*).

⁶ See 47 U.S.C. § 227; 47 C.F.R. 64.1200.

residential lines⁷ while providing more flexibility for purely informational calls. We revise our rules to require an automated, interactive opt-out feature at the outset of any autodialed or artificial or prerecorded telemarketing Call that could be answered by the consumer in person and is available throughout the duration of the autodialed or prerecorded telemarketing call.⁸ In addition, if the called party elects to opt out, the calling party's mechanism must automatically add the consumer's number to the seller's do-not-call list and immediately disconnect the call.⁹ The revised rules will also require provision of a toll-free number that enables the consumer to call back and connect directly to an autodialed opt-out mechanism if the telemarketing call could be answered by an answering machine or voicemail service.¹⁰ Next, the Order revises the Commission's abandoned call rule whereby measurement of abandoned calls will occur over a 30-day period for the duration of a single calling campaign to discourage certain targeted calling campaigns.¹¹ A campaign consists of the offer of the same good or service for the same seller.¹²

4. Finally, for health care-related entities governed by the Health Insurance Portability and Accountability Act of 1996 (HIPAA), the Commission establishes an exemption from its TCPA rules. The Commission adopts these new rules to further protect consumers from unwanted autodialed or prerecorded telemarketing calls, also known as "robocalls," and establish consistency with the Federal Trade Commission's Telemarketing Sales Rule (TSR), as required by statute.

5. We believe the rules the Commission adopts in the Order strike an appropriate balance between maximizing consumer privacy protections and avoiding imposing undue burdens on telemarketers. This Order avoids imposing undue burdens of (1) requiring written consent for informational calls, (2) requiring handwritten consent agreements and handwritten signatures to fulfill the written consent requirement for telemarketing calls, and (3) requiring immediate implementation of the rules adopted herein on large and small telemarketers. For example, a community bank will not have to secure prior express written consent to provide a fraud alert notification to its customer's wireless number. In this instance, prior express oral consent to receive notifications satisfies our rules. Similarly, while we adopt a prior express written consent requirement for prerecorded or autodialed telemarketing calls, we also allow documentation and signature requirements recognized by the Electronic Signatures in Global and National Commerce Act (E-SIGN Act) satisfies our rules and avoids the undue burden associated with generating hardcopy documentation to evidence written consent.¹³ In 2000, Congress enacted the E-SIGN Act to "facilitate the use of electronic records and signatures in interstate or foreign commerce" by granting legal effect, validity, and enforceability to electronic signatures, contracts, or other records relating to transactions in or affecting interstate or foreign commerce.¹⁴ Finally, we ease the burden on telemarketers by deferring the effective date of the rules adopted. By adopting the rules in this

⁷ We note that this exemption only applied to prerecorded telemarketing calls to residential lines.

⁸ See *supra* para. 47.

⁹ *Id.*

¹⁰ *Id.*

¹¹ See *supra* para. 53.

¹² See *supra* para. 56. So long as a telemarketer is offering the same good or service for the same seller, we will regard the offer as part of a single campaign, irrespective of whether telemarketing scripts used to convey the offer use or contain different wording. *Id.*

¹³ See Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001 (2000).

¹⁴ See 15 U.S.C. § 7001 (preamble). The E-SIGN Act defines an "electronic signature" as "an electronic sound, symbol, or process attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record." 15 U.S.C. § 7006(5). It further defines an "electronic record" as "a contract or other record created, generated, sent, communicated, received, or stored by electronic means." 15 U.S.C. § 7006(4).

Order, the Commission maximizes the consistency between its rules and the FTC's TSR, as contemplated in the DNCIA.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

6. There were no comments filed in direct response to the IRFA. Some commenters, however, raised issues and questions about the impact the proposed rules and policies would have on small entities.

7. Prior Express Written Consent Requirement. Commenters expressed a variety of concerns regarding adoption of a prior express written consent requirement for autodialed or prerecorded non-telemarketing calls. American Financial Services Association (AFSA), Bank of American (BofA) and Cross-Industry Group are concerned that requiring written consent to authorize autodialed or prerecorded calls delivering account or loan application or modification information and other informational calls would be too costly for small financial institutions.¹⁵ AFSA argues that the Commission should limit the prior express written consent requirement to telemarketing calls only, or alternatively that account and loan modification calls be exempt from the prior express written consent requirement.¹⁶ Bank of America appears to object to a prior express written consent requirement for account-servicing and loan application calls made to wireless numbers.¹⁷ It cautions that such a requirement would be disadvantageous to individual and small business customers seeking credit approval if Bank of America is unable to communicate with them on their wireless numbers to secure needed information.¹⁸ Cross-Industry Group opposes written consent for autodialed or prerecorded, non-telemarketing calls to wireless services because requiring written consent unnecessarily impedes efficient communication between businesses and consumers.¹⁹ The Commission limits its prior express written consent requirement to telemarketing calls; therefore, the actions we take impose no new burdens on entities placing autodialed or prerecorded non-telemarketing calls, including home loan modification calls placed pursuant to the American Recovery and Reinvestment Act.²⁰

8. We reiterate that the Commission requires prior express written consent for autodialed or prerecorded telemarketing call only. Prior express consent is not required for purely informational calls, *i.e.* non-telemarketing. As stated earlier, several commenters expressed concerns about the consent requirement for autodialed or prerecorded non-telemarketing calls. Below you will find a summary of those concerns.

9. Research organizations expressed a concern opposing written consent for autodialed or prerecorded calls that deliver research or survey messages. For instance, Marketing Research Association (MRA) states that small businesses conducting research studies that include cell phone users in their samples would face increased costs if a written consent standard is adopted.²¹ The Commission does not require prior express written consent for autodialed or prerecorded informational, non-telemarketing calls.

10. Similarly, charitable organizations contend that they would be negatively impacted if they had to secure prior express written consent for fundraising calls using autodialed or prerecorded

¹⁵ AFSA Comments at 6-8.

¹⁶ *Id.* at 10.

¹⁷ BofA Comments at 6-8.

¹⁸ *Id.* at 7.

¹⁹ Cross-Industry Reply Comments at 6-9.

²⁰ *See supra* paras. 20, 27-31.

²¹ MRA Comments at 4.

messages. MDS Communications, Inc. asserts that a prior express written consent requirement for calls to cell phones using autodialed or prerecorded messages will have a material, detrimental effect on non-profit organizations that utilize telephone fundraising.²² Again, the Commission does not require prior express written consent for autodialed or prerecorded informational, non-telemarketing calls.

11. Likewise, Portfolio Recovery Associates (PRA) predicts that numerous entities, including school boards, non-profit organizations, political candidates, debt collectors, small businesses, and large established companies would be unnecessarily and adversely affected if the written consent requirement is applied to all autodialed and prerecorded calls to mobile telephones, including purely informational calls.²³ The Commission's actions do not require prior express written consent for informational, non-telemarketing calls.

12. The last comment to address potential burdens on small businesses arising from the consent rules concerns electronic documentation obtained pursuant to the E-SIGN Act. Mark Schwartz states that it is incorrect for the Commission to reason that the burden of requiring a small business to obtain an existing customer's written or electronic consent to send intrastate prerecorded sales calls to that customer is lessened by the E-SIGN Act. He argues that the E-SIGN Act (1) was written for interstate and foreign commerce only and (2) burdens small businesses with determining which technological methods are compliant with the E-SIGN Act.²⁴ Congress enacted the E-SIGN Act to "facilitate the use of electronic records and signatures in interstate or foreign commerce" by granting legal effect, validity, and enforceability to electronic signatures, contracts, or other records relating to transactions in or affecting interstate or foreign commerce. The Commission believes that by allowing E-SIGN measures to secure written consent, it relieves all businesses, including small businesses, from the burden of securing paper documents from consumers to evidence prior express written consent. Although the E-SIGN Act may be directed to interstate and foreign commerce, the Commission concludes that the measures to affect an electronic signature described in the E-SIGN Act should be allowed here because these measures would significantly facilitate our written consent requirement.²⁵ With regard to any uncertainty concerning what satisfies the prior express consent requirement, the Commission concludes that consent obtained in compliance with the E-SIGN Act will satisfy the requirements of our revised rule, including permission obtained via an email, website form, text message, telephone keypress, or voice recording.²⁶

13. Abandoned Calls. Predictive dialers initiate phone calls while telemarketers are talking to other consumers and these dialers frequently disconnect those calls when a telemarketer is unavailable to take the next call. In attempting to "predict" the average time it takes for a consumer to answer the phone and when a telemarketer will be free to take the next call, predictive dialers may either "hang-up" on consumers or keep the consumer on hold until connecting the call to a sales representative, resulting in what has been referred to as "dead air." Dead-air calls are abandoned calls. The Commission's existing rules limit the percentage of abandoned calls that a telemarketer may incur to three percent (3%) over a thirty day period.

14. Newspaper Association of America (NAA) states that the "per campaign" limitation adopted in this Order has a negative impact on smaller businesses, including newspapers. A campaign consists of the offer of the same good or service for the same seller.²⁷ NAA believes that small

²² MDS Comments at 2, 5.

²³ PRA Comments at 4; PRA Reply Comments at 1-2.

²⁴ Schwartz Comments at 2.

²⁵ See *supra* para. 34.

²⁶ *Id.*

²⁷ See *supra* para. 56.

community newspapers would be hampered the most because their telemarketing calling list is less than 5,000.²⁸ It contends that when calling a small list the algorithm used by predictive dialers is not as precise and results in more abandoned calls.²⁹ NAA favors the existing abandoned call rule.³⁰ NAA's concern is not significant because the FTC has already implemented this same abandoned call requirement and the burden, if any, is significantly mitigated by the FTC's action.

C. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply

15. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the rules adopted herein.³¹ The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."³² In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.³³ Under the Small Business Act, a "small business concern" is one that: 1) is independently owned and operated; 2) is not dominant in its field of operation; and 3) satisfies any additional criteria established by the Small Business Administration (SBA).³⁴

16. The Commission's rules on telephone solicitation and the use of autodialers and artificial or prerecorded messages apply to a wide range of entities, including all entities that call residential telephone lines and/or telephone numbers assigned to wireless numbers to advertise.³⁵ In the IRFA, the Commission concluded that determining the precise number of small entities that will be subject to the rules is not readily feasible and invited comment on such number.³⁶ None of the commenting parties provided the requested information. Based on the absence of available data in this proceeding, the Commission, like the FTC, believes that determining the precise number of small entities to which the rules adopted herein will apply is not currently feasible.

17. Because our action affects the myriad of businesses throughout the nation that use telemarketing to advertise, we offer these following categories of businesses which we believe will be impacted by rules we adopt in this Report and Order. For example the types of business impacted by our rules include, but are not limited to, commercial banks, mortgage brokers, pharmacies, freight airlines,

²⁸ NAA Comments at 16-17.

²⁹ *Id.*

³⁰ *Id.* at 17.

³¹ 5 U.S.C. § 604(a)(3).

³² 5 U.S.C. § 601(6). Generally, the Small Business Administration, Office of Advocacy, defines a small business as an independent business having fewer than 500 employees. See <http://www.sba.gov/sites/default/files/sbfaq.pdf>.

³³ 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comments, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

³⁴ 15 U.S.C. § 632.

³⁵ 47 C.F.R. § 64.1200.

³⁶ 2010 *TCPA NPRM*, 25 FCC Rcd 1501, 1529, App. B, para. 9. In its TSR Final Rule, the FTC also concludes that a precise estimate of the number of small entities that would be subject to the prerecorded call amendment is not currently feasible. 73 FR at 51202.

and utility companies that elect to use automated or prerecorded telemarketing calls or health care-related calls.

18. **Commercial Banks.** SBA defines a commercial bank as a small business if its total assets do not exceed \$175 million. This industry comprises establishments primarily engaged in accepting demand and other deposits and making commercial, industrial, and consumer loans. Commercial banks and branches of foreign banks are included in this industry. U.S. Census data for 2007 indicate that, in this industry, there were 6,490 commercial banks that operated for the entire year. Of these, 6,490, 6135 operated with annual receipts of \$100,000,000 or less; 189 operated with annual receipts of \$100,000,000 to \$249,999,999; and 166 operated with annual receipts of more than \$250,000,000. Based on this data, it is impossible to state precisely how many commercial banks operated with annual receipts of \$175 million or less, but since the data do specifically indicate that 6,135 of 6,490 banks operated with less than \$100,000,000 in annual receipts, we conclude that substantial majority of commercial banks are small under the SBA standard.³⁷

19. **Mortgage Brokers.** SBA defines a mortgage broker as a small business if its annual receipts do not exceed \$7 million.³⁸ Census data for 2007 indicate that in 2007, 17,702 mortgage broker firms operated for the entire year. Of these, 17,363 operated with annual receipts of \$5 million or less; 177 operated with annual receipts of between \$5 million and 9,999,999; and 132 operated with annual receipts of \$10 million or more.³⁹ While the exact number that operated with annual receipts of \$7 million or less cannot be stated precisely, the available data clearly show that a substantial majority of brokerage firms were small by the SBA standard.

20. **Pharmacies and Drug Stores.** Likewise, pharmacies and drug stores which do not exceed \$25.5 million in annual receipts are considered small businesses.⁴⁰ U.S. Census data show that 17,217 firms operated in this category during that entire years. Of these 7,217 firms, 14,136 received annual receipts of \$5million or less; 2,311 received annual receipts of between \$ 5million and \$9,999,999; and 770 received annual receipts of \$10 million or more.⁴¹ Based on this data, we cannot state precisely how many businesses earned \$7.0 million or less in annual receipts. We conclude, however, that a substantial majority of businesses in this category are small under the SBA standard.

21. **Freight Airlines.** This U.S. industry comprises establishments primarily engaged in providing air transportation of cargo without transporting passengers over regular routes and on regular schedules. Establishments in this industry operate flights even if partially loaded. Establishments primarily engaged in providing scheduled air transportation of mail on a contract basis are included in this industry. For freight airlines, the SBA developed a small business size standard for such companies stating that those companies having 1500 or fewer employees are small.⁴² U.S. Census data for 2007 indicate that there were 221 businesses in this category that operated for the entire year. Of these 221,

³⁷ 13 C.F.R. § 121.201, NAICS code 522110; *see also*

http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_52SSSZ4&prodType=table.

³⁸ 13 C.F.R. § 121.201, NAICS code 52231.

³⁹ *See*

http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_52SSSZ4&prodType=table.

⁴⁰ 13 C.F.R. § 121.201, NAICS code 44611.

⁴¹ *See*

http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_44SSSZ4&prodType=table.

⁴² 13 C.F.R. § 121.201, NAICS codes 481112 and 481212.

220 operated with 999 employees or less, and one(1) operated with more than 1000 employees.⁴³ Based on this data, we conclude that a substantial majority of the freight airlines in this category are small under the SBA standard.

22. **Utility Companies.** The SBA also developed a small business size standard for utility companies.⁴⁴ For electric utility companies, the small business size standard is any electric utility that it is primarily engaged in the generation, transmission, and/or distribution of electric energy for sale and its total electric output for the preceding fiscal year did not exceed 4 million megawatt hours.⁴⁵ U.S. Census does not provide megawatt hours information and does not provide a specific number of small utility companies.

23. **Telemarketing Bureaus and Other Contact Centers.** This U.S. industry comprises establishments primarily engaged in operating call centers that initiate or receive communications for others—via telephone, facsimile, email, or other communication modes—for purposes such as (1) promoting clients products or services, (2) taking orders for clients, (3) soliciting contributions for a client; and (4) providing information or assistance regarding a client's products or services. These establishments do not own the product or provide the services they are representing on behalf of clients. The SBA has determined that “Telemarketing Bureaus and other Contact Centers” with \$7 million or less in annual receipts qualify as small businesses.⁴⁶ U.S. Census data for 2007 indicate that 2,100 businesses in this category operated throughout that year. Of those 2,100 businesses, 1,764 operated with annual receipts of less than \$5 million; 145 operated with annual receipts between \$5 million and \$9,999,999; and 191 operated with annual receipts of \$10 million or more.⁴⁷ Based on this data, it is not possible to state precisely how many business in this category operated with annual receipts of \$7 million or less. We conclude, however, that a substantial majority of businesses in this category are small under the SBA standard.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

24. The rules adopted herein establish recordkeeping requirements for a large variety of businesses, including small business entities. First, the seller must secure a written agreement between itself and the consumer showing that the consumer agrees to receive autodialed or prerecorded telemarketing calls from the seller. The Commission allows the seller the flexibility to determine the type of written agreement that it will secure from the consumer. The Commission does not require a particular form or format for this written agreement or its retention. The E-SIGN Act also provides additional flexibility in obtaining electronic consent producing minimal additional recordkeeping efforts. To the extent that the calling parties rely on an established business relationship, we note that the Commission previously stated that telemarketers that claim their prerecorded messages are delivered pursuant to an established business relationship must be prepared to provide clear and convincing evidence of the

⁴³ See

http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_48SSSZ5&prodType=table

⁴⁴ 13 C.F.R. § 121.201, NAICS codes 221111, 221112, 221113, 221119, 221121, 221122, 221210, 221310, 221320, and 221330.

⁴⁵ 13 C.F.R. § 121.201, NAICS codes 221111, 221112, 221113, 221119, 221121, and 221122.

⁴⁶ 13 C.F.R. § 121.201, NAICS code 561422.

⁴⁷ See

http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_56SSSZ4&prodType=table.

existence of such a relationship. Because of these factors, any additional recording keeping costs should be minimal.⁴⁸

25. Second, telemarketers and sellers, including small business entities, that initiate telemarketing calls using autodialed or prerecorded messages, must provide an automated, interactive opt-out feature at the outset of such a call. This rule obligates telemarketers and sellers to retain records of providing this feature and to retain records of consumers opting out of receiving these autodialed or prerecorded telemarketing messages. Such records should demonstrate the telemarketer's and seller's compliance with the provision and utilization of the automated, interactive opt-out feature. The Commission allows the telemarketers and sellers the flexibility to determine how to implement the mechanism. The Commission does not require a particular form or format evidencing this mechanism or its implementation.

26. Thirdly, the Commission revises its abandoned call requirement. There is no additional recordkeeping burden for this revision because the Commission's rules already require that the seller or telemarketer maintain records establishing compliance with the abandoned call rules.⁴⁹

E. Steps Taken to Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered

27. The RFA requires an agency to describe any significant alternatives that it has considered in developing its approach, which may include the following four alternatives (among others): "(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities."⁵⁰ As indicated above, various groups will be subject to our new rules, and some of these entities are classified as small entities.

28. Prior Express Written Consent Requirement. At the outset, we note that the adopted rules differ from the proposed rules. In the proposed rules, the Commission considered adopting prior express written consent for all autodialed or prerecorded calls.⁵¹ Here, the Commission adopts prior express written consent for autodialed or prerecorded telemarketing calls only.⁵² Limiting the written consent requirement to telemarketing calls significantly reduces the compliance burden for all entities, including small entities. In adopting the written consent requirement for autodialed or prerecorded calls made only for telemarketing, the Commission also concluded that consent obtained pursuant to the E-SIGN Act will satisfy the requirement of our revised rule, including permission obtained via an email, website form, text message, telephone keypress, or voice recording.⁵³ Accepting consent pursuant to the E-SIGN Act relieves all businesses, including small entities, from the economic impact of generating and retaining a paper document to evidence their compliance.

29. Elimination of Established Business Relationship Exemption. In this Order, we amend our rules to eliminate the established business relationship (EBR) exemption for prerecorded

⁴⁸ 2003 TCPA Order, 18 FCC Rcd at 14079-80, para. 113.

⁴⁹ 47 C.F.R. § 64.1200(a)(6).

⁵⁰ 5 U.S.C. § 603(c)(1)-(c)(4).

⁵¹ Robocalls NPRM, 25 FCC Rcd at 1508-1511, paras. 17-23.

⁵² See *supra* para. 20.

⁵³ See *supra* para. 34.

telemarketing calls.⁵⁴ Eliminating the established business relationship exemption will be a burden to the calling telemarketer because the calling party will not be able to rely on the EBR as its form of prior express consent. That burden is mitigated because the prior express written consent requirement can be fulfilled using electronic measures including those described in the E-SIGN Act. Securing written consent using electronic measures relieves the calling parties from the task of securing handwritten documentation and handwritten signatures.⁵⁵ This reasoning applies equally to small entities. Moreover, with the increasing use of cell phones, the burden of eliminating the established business relationship exemption on telemarketers is further diminished because the EBR never applied to robocalls to cell phones.⁵⁶ In addition, because the FTC's TSR already imposes a prior express written consent requirement for telemarketing calls and does not recognize an EBR, many entities have already implemented steps to fulfill this requirement, thereby reducing the burden associated with the rule the Commission adopts in this Order.

30. Opt-Out Mechanism. The opt-out provisions in this Order do not impose significant economic impact on small businesses. We did not receive any comments stating that this rule would cause a significant economic impact on small businesses.

31. Abandoned Call. One business concern, the Newspaper Association of America, suggests that the abandoned call rule adopted will present an adverse economic impact on small businesses. We disagree. Neither NAA nor its membership will be burdened by the abandoned call rule adopted in this Order because these entities are already subject to the FTC's abandoned call provision in the TSR. The abandoned call provision adopted in this Order is identical to the FTC's TSR abandoned call provision. This Order also rejects an alternate proposal to measure the abandoned calls on a per-campaign, per day basis. Measuring the abandoned call rate on a per-campaign, per-day basis, instead of a per-campaign, 30-day basis, would pose a significant economic burden on all businesses, including small businesses.

32. We identified alternatives to the rules adopted in this Order, but we reject these alternatives because they are more costly to small businesses.

33. **REPORT TO CONGRESS:** The Commission will send a copy of the Order, including this FRFA, in report to be sent to Congress pursuant to the Congressional Review Act.⁵⁷ In addition, the Commission will send a copy of the Order, including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the Order and FRFA (or summaries thereof) will also be published in the Federal Register.⁵⁸

⁵⁴ See *supra* para. 35.

⁵⁵ See *supra* para. 34.

⁵⁶ See *supra* nn. 102, 125.

⁵⁷ See 5 U.S.C. § 801(a)(1)(A).

⁵⁸ See 5 U.S.C. § 604(b).

**STATEMENT OF
CHAIRMAN JULIUS GENACHOWSKI**

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

Today, we take action to further empower consumers to avoid unwanted “robocalls.”

For decades, Congress and the Commission have recognized that consumers should have control over the telemarketing calls that come to their homes and mobile devices, and be able to stop the ones that they don’t want to receive. The Commission and the FTC have long had rules to put consumers in control. But despite these clear ground rules, too many telemarketers, aided by autodialers and prerecorded messages, have continued to call consumers who don’t want to hear from them. Consumers by the thousands have complained to us, letting us know that they remain unhappy with having their privacy invaded and their time wasted by these unwanted calls.

Today, we respond to those consumers, providing consumers greater protection from unwanted robocalls. First, before robocalling any consumer, telemarketers will now have to get that consumer’s *written* consent, which may be electronic. Second, telemarketers will no longer be able to robocall a consumer simply because he or she has previously done business with that telemarketer – something our data and the FTC’s record show frustrates many consumers. Now, written consent will be necessary for *all* telemarketing robocalls.

And to ensure that the consumer can easily change his or her mind even when written consent has been given, our new rules give consumers instant control: each and every telemarketing robocall will have to include an automated, interactive opt-out mechanism, so that a consumer can revoke consent by pressing just a few keys during the call. The telemarketer will have to automatically add the consumer to the company’s do-not-call list and immediately disconnect the call. We are also closing a loophole so that every single telemarketing campaign will have to comply with strict limits on the “dead-air” telemarketing calls that are so frustrating to consumers when they interrupt their dinners or other activities to answer the phone, only to hear nothing on the other end.

At the same time that we help consumers avoid unwanted robocalls, we do so in a manner that is minimally burdensome to businesses, including small businesses. Because our rules largely mirror those the FTC applies to telemarketers in its jurisdiction, we have consistent rules applying to all telemarketers, and we avoid confusion for those telemarketers subject to both the Commission’s and the FTC’s rules. In addition, we leave unchanged our rules for robocalls that are informational and that consumers may have come to rely on. Some of these informational robocalls include automated calls that update consumers on airline flights, provide school notifications, or even warn them about fraudulent activity in their bank accounts.

I thank the staff from the Bureaus involved in this item for their diligent efforts, particularly the Consumer and Governmental Affairs Bureau, which worked closely with our Enforcement Bureau, Office of General Counsel, and the Wireline and Wireless Bureaus – and for their great work to empower and protect consumers.

**STATEMENT OF
COMMISSIONER ROBERT M. McDOWELL**

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

Sometimes it seems like there's no escape. The minute you sit down at the family dinner table or settle in to watch your favorite basketball team, the phone rings. And on the other end is not even an offshore telemarketer, but a pre-recorded voice. Today, the FCC is giving American consumers some help to keep a little more peace and serenity in their homes. We are carrying out Congress' intent to ensure that the FCC's rules regarding telemarketing "robocalls" are harmonized with those of the Federal Trade Commission ("FTC"). Such an effort makes good sense because there is no reason for industry and consumers to be confused by an array of inconsistent rules. This effort makes additional good sense because . . . Congress told us to do it!

Our action today enables consumers to: (1) consciously invite these visitors into their homes, if so desired, by requiring telemarketers to obtain written consent from consumers, and (2) ask them to stay away by requiring telemarketers to include a simple and easy to use interactive opt-out function as part of each call. Additionally, we strike a balance between protecting consumers' privacy on the one hand and, on the other hand, making the written consent requirements easy to obtain by electronic means, as contemplated by Congress in 2000 when it enacted the E-SIGN Act.¹

I also recognize that, in an effort to harmonize our rules with the FTC's rules, our Report and Order is appropriately narrow in scope – limited to *telemarketing* robocalls. Our changes today do not affect current requirements regarding informational calls or calls involving charities or political speech.

I am also aware, however, that robocalls trigger debates over many other public policy issues including assisting our public safety colleagues to eliminate robocalls dialed to public safety answering points. As such, I look forward to hearing from all interested parties, especially consumers and public safety, on how we can amend our rules more effectively.

I thank the Chairman, his staff, and the Consumer Bureau staff for their work in this proceeding, and I hope everyone enjoys a quiet night at home tonight.

¹ 15 U.S.C. § 7001, *et seq.*

**STATEMENT OF
COMMISSIONER MIGNON L. CLYBURN**

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

The Order before us today is yet another victory for consumers. Very soon there will be one less chance that they are distracted during dinner. They will also have an enhanced opportunity to watch their favorite prime time shows without unwanted interruptions from telemarketing robocalls. No longer will telemarketers solely be able to rely upon the established business relationship exception. By requiring prior *written* consent, consumers will be making an *affirmative and definitive choice*, whether or not to receive telemarketing robocalls. However, should consumers change their minds and decide that they no longer want to receive even those calls, they will soon be able to easily opt out at any point during a call through the automated functionality we now require.

This Order is also a win for industry. We are ensuring that our rules are as consistent as possible with the FTC's rules; thus, making compliance with the rules for both agencies more straightforward. In addition, we are permitting telemarketers to rely upon electronic signatures, including e-mails, which we expect will make it easier to comply with the prior written consent requirement. We are also clarifying that informational robocalls, such as school closings and prescription refill reminders, are not classified as telemarketing calls for purposes of these rules.

Overall, this is a well balanced Order. Consumers are not as likely to be annoyed by unwanted telemarketing robocalls, and as such, will be more likely to show interest in the goods and services being offered; and those authorized telemarketers may, in turn, find a higher percentage of success from their marketing campaigns.

I wish to thank the Consumer and Governmental Affairs Bureau for its hard work on this Report and Order.