

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

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

**COMMENTS OF THE NATIONAL ASSOCIATION  
OF STATE UTILITY CONSUMER ADVOCATES  
ON FURTHER NOTICE OF PROPOSED RULEMAKING**

The National Association of State Utility Consumer Advocates (“NASUCA”) submits these Comments in response to the *Further Notice of Proposed Rulemaking* (“*Further Notice*”) adopted by the Federal Communications Commission (“FCC” or “Commission”) in the above-captioned proceeding on March 24, 2003.<sup>1</sup> Pursuant to the Do-Not-Call Implementation Act (“Implementation Act”),<sup>2</sup> the Commission must issue a final rule in this proceeding within 180 days of March 11, 2003.<sup>3</sup> In issuing its final rule, the Commission is required to “consult and coordinate” with the Federal Trade Commission (“FTC”) in order to “maximize consistency” between the Commission’s telemarketing rules and those recently adopted by the FTC.<sup>4</sup>

The Implementation Act also requires the Commission and the FTC, within 45 days after the Commission’s final rule is issued, to provide a report to Congress which analyzes both agencies’ rules, describes any inconsistencies between the agencies’ rules,

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<sup>1</sup> FCC 03-62, 68 Fed. Reg. 16250 (April 3, 2003).

<sup>2</sup> Pub. L. No. 108-10, 117 Stat. 357 (2003).

<sup>3</sup> *Further Notice*, ¶ 1.

<sup>4</sup> *Id.*, ¶ 5.

including the inconsistencies' effect on consumers and entities accessing the national do-not-call registry ("Registry"), and makes proposals to remedy the inconsistencies.<sup>5</sup>

In these brief Comments, NASUCA recommends that, where possible, agency definitional inconsistencies be reconciled in a manner that assures the maximum scope for consumer protection through the Registry. In some instances, additional Congressional action is needed to fulfill that goal. Specifically, NASUCA urges the Commission to:

- ▶ make the Registry a truly effective consumer protection tool by adopting rules for all entities under the Commission's jurisdiction that prohibit the making of telephone solicitations to residential customers whose numbers appear on the Registry;
- ▶ adopt the FTC's definition of "established business relationship";
- ▶ remove the "established business relationship" exemption from the prohibition on making calls using an artificial or prerecorded voice to residential customers; and
- ▶ consult with the FTC regarding the FTC's inclusion of businesses on company-specific do-not-call lists.

The Commission should also retain its requirement that company-specific do-not-call requests be honored for ten years.

### **Regulations Concerning the Registry**

In creating the Registry, the FTC on December 18, 2002 took an important step in protecting residential telephone customers from the intrusion of unwanted telemarketing calls. However, the impact of the FTC's action is limited, due to the FTC's lack of jurisdiction over several types of businesses (e.g., banks, insurance companies, common carriers) that aggressively telemarket and over intrastate telephone calls. In order to

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<sup>5</sup> Implementation Act, § 4.

make the Registry more effective, the Commission should adopt a rule prohibiting the making of telephone solicitations, with the limited exceptions adopted by the FTC, to residential telephone numbers that appear on the Registry.

As NASUCA noted in its Comments (at 3), the Commission's jurisdiction under the Telephone Consumer Protection Act of 1991 ("TCPA")<sup>6</sup> extends to *all* telephone solicitations, including intrastate calls and telephone solicitations made by entities not under the FTC's jurisdiction. By prohibiting telephone solicitations to residential numbers that appear on the Registry, the Commission would substantially increase the effectiveness of the Registry and would eliminate any doubt about application of rules governing the Registry to entities beyond the FTC's jurisdiction.<sup>7</sup>

In order provide maximum effectiveness of the Registry's consumer protections, the Commission and the FTC must reconcile differences in some of the definitions used by the agencies. The FTC has crafted three exemptions from its prohibition on making telemarketing calls to telephone numbers on the Registry. FTC Rule 310.4(b)(1)(iii)(B) allows telemarketers to call persons who have given the telemarketers express written permission, and allows calls to persons who have an established business relationship with the seller on whose behalf the telemarketer is calling. FTC Rule 310.6(a) exempts calls made to induce charitable contributions, i.e., any donation or gift of money or any other thing of value.<sup>8</sup> These exemptions are not statutory; rather, the FTC fashioned them based on the record of its proceedings.<sup>9</sup>

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<sup>6</sup> Pub. L. No. 102-243, 105 Stat. 2394, codified at 47 U.S.C. § 227.

<sup>7</sup> The Commission should not, however, preempt state laws that provide greater consumer protections. See 47 U.S.C. § 227(e)(1).

<sup>8</sup> 16 C.F.R. § 310.2(f).

<sup>9</sup> See 68 Fed. Reg. 4633-34, 4654.

The TCPA, on the other hand, contains specific exemptions in its definition of “telephone solicitation”:

the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message (A) to any person with the person’s prior express invitation or permission, (B) to any person with whom the caller has an established business relationship, or (C) by a tax exempt nonprofit organization.<sup>10</sup>

The Commission adopted this definition as 47 C.F.R. § 64.1200(f)(3). The three enumerated types of calls would be exempt from the “list of telephone numbers of residential subscribers who object to receiving telephone solicitations” which the TCPA authorizes the Commission to establish.<sup>11</sup> Some of the TCPA’s exemptions are inconsistent with the FTC’s exemptions.

The first exemption under the TCPA is similar to the “express permission” exemption adopted by the FTC. Thus, no change is necessary to the Commission’s rule that included the TCPA exemption.

Regarding the second exemption, the TCPA does not define “established business relationship.” The Commission has adopted a definition for “established business relationship” in 47 C.F.R. § 64.1200(f)(4):

a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.

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<sup>10</sup> 47 U.S.C. § 227(a)(3).

<sup>11</sup> 47 U.S.C. § 227(c)(3).

This definition is substantially different from the FTC’s definition of “established business relationship,” which places a time limit (18 months for purchases and financial transactions; three months for inquiries or applications) on the relationship.<sup>12</sup>

For consistency, the Commission should adopt the FTC’s definition of “established business relationship” for application of the Registry. The Commission should also consider eliminating the established business relationship exemption from its prohibition on calls using an artificial or prerecorded voice to residential customers.<sup>13</sup> Although NASUCA’s Reply Comments had urged the Commission to adopt the FTC definition of “established business relationship” without the language concerning inquiries and applications,<sup>14</sup> that does not appear to be feasible under the Congressional directives of the Implementation Act.

Nevertheless, consumers should not be subjected, even for a short time, to recorded telephone calls for a wide range of a company’s products or services simply because they may have inquired about one product or service.<sup>15</sup> An equitable solution would be to eliminate the “established business relationship” exemption of 47 C.F.R. § 64.1200(c)(3). This Commission action would provide consumers relief while still allowing companies to make live follow-up calls.

The Commission’s exemption for tax-exempt nonprofit organizations – in 47 C.F.R. § 64.1200(f)(3)(iii) – is also broader than the FTC’s exemption. The FTC exempts only solicitations for charitable donations by such organizations; the

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<sup>12</sup> 16 C.F.R. § 310.2(n).

<sup>13</sup> 47 C.F.R. §§ 64.1200(a)(2); 64.1200(c).

<sup>14</sup> NASUCA Reply Comments at 5-7.

<sup>15</sup> See *id.*

Commission's regulation exempts *all* calls made by tax-exempt organizations. Thus, a charity that is selling products or services would also be exempt under the Commission's rules. This is inconsistent with the FTC's definition. The Commission's exemption, however, comes directly from the TCPA; thus amending it requires Congressional action.

### **Regulations Concerning Company-Specific Do-Not-Call Lists**

The only other inconsistency between the Commission's rules and the FTC's rules deals with company-specific do-not-call lists rather than the Registry. Under the FTC's rules, it is an abusive telemarketing practice to call any *person* when that person has asked to be placed on the caller's company-specific do-not-call list.<sup>16</sup> The FTC's definition of "person" includes business entities as well as residential customers.<sup>17</sup> The Commission, however, requires telephone solicitors to honor do-not-call requests only from residential customers.<sup>18</sup>

The Implementation Act's directives are broad, and may encompass the resolution of inconsistencies beyond regulations concerning the Registry. The TCPA, however, addresses only the privacy rights of residential customers, and therefore restricts the Commission's power to extend the company-specific list requirements to business entities.<sup>19</sup> Thus, if in fact Congress has directed the Commission and the FTC to resolve this inconsistency, additional Congressional action may be warranted.

In addition, the FTC has placed no recordkeeping requirement on the company-specific do-not-call list mentioned in its rules. The FTC also has not specifically deferred

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<sup>16</sup> 16 C.F.R. § 310.4(b)(1)(iii)(A).

<sup>17</sup> 16 C.F.R. § 310.2(v).

<sup>18</sup> 47 C.F.R. § 64.1200(e)(2)(iii).

<sup>19</sup> See 47 U.S.C. § 227(c)(1)(A).

to the Commission's ten-year requirement found in 47 C.F.R. § 64.1200(e)(2)(v). Thus, it may be argued that the FTC would require numbers to remain on company-specific lists in perpetuity. On the other hand, it may be argued that the FTC deferred to telemarketers' internal recordkeeping policies. This is an area requiring consultation between the Commission and the FTC. NASUCA urges both agencies to adopt the Commission's current ten-year requirement found in 47 C.F.R. § 64.1200(e)(2)(iii).

### **Conclusion**

By taking the actions noted herein, the Commission and the FTC will be able to resolve inconsistencies in the agencies' telemarketing rules.

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