

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 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 Consumer Law Center, on behalf of its Low-Income Clients**

These comments are submitted by the National Consumer Law Center, Inc. (“NCLC”), on behalf of its low-income clients.<sup>1</sup> They are in response to the January 22, 2010 Notice of Proposed Rulemaking issued by the Federal Communications Commission with respect to the Telephone Consumer Protection Act of 1991 (47 U.S.C. § 227); FCC Regulations (47 C.F.R. §§ 64.1200, *et seq.*).

NCLC commends the FCC for its proposed amendments to harmonize the Telephone Consumer Protection Act (“TCPA”) with the FTC’s amended Telemarketing Sales Rule (“TSR”). This harmonization is consistent with the Congressional directive in the Do Not Call Improvement Act of 2007 to “maximize consistency” of the FCC’s TCPA rules with the FTC’s TSR, the FCC’s and FTC’s past practice of consistent and complementary regulatory schemes in this area, and the agencies’ December 2003

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<sup>1</sup> The **National Consumer Law Center, Inc. (NCLC)** is a non-profit Massachusetts corporation, founded in 1969, specializing in low-income consumer issues, with an emphasis on consumer credit and affordable access to utility service. On a daily basis, NCLC provides legal and technical consulting and assistance on consumer law issues to legal services, government, and private attorneys representing low-income consumers across the country. NCLC publishes a series of sixteen practice treatises and annual supplements on consumer credit laws, access to utility service as well as bimonthly newsletters on a range of topics related to consumer credit issues and low-income consumers. NCLC attorneys have written and advocated extensively on all aspects of consumer law affecting low income people, conducted training for tens of thousands of legal services and private attorneys on the law and litigation strategies to deal predatory lending and other consumer law problems, and provided extensive oral and written testimony to numerous Congressional committees on these topics. NCLC’s attorneys have been closely involved with the enactment of the all federal laws affecting consumer credit since the 1970s, and regularly provide comprehensive comments to the federal agencies on the regulations under these laws.

Memorandum of Understanding on the avoidance of unnecessary duplication of enforcement efforts. As the majority of entities that use prerecorded telemarketing calls are subject to both the FTC and FCC's telemarketing regulations and thus must comply with the FTC's more restrictive standards, it is confusing to consumers to keep track of how to protect their privacy and avoid objectionable calls where there is a subset of entities that operate solely under different FCC rules.

NCLC supports the FCC's proposed amendments to its TCPA rule. In particular, NCLC supports the FCC's proposal to conform its rule with the TSR by:

- Prohibiting the use of prerecorded messages unless the caller has obtained the consumer's prior express consent in writing (using any medium or format permitted by the E-SIGN Act), to receive such messages and irrespective of any established business relationship between the caller and the called party;
- Requiring that prerecorded calls delivered to residential subscribers include an automated, interactive mechanism by which a consumer may "opt out" of receiving future prerecorded messages from the seller or telemarketer; and
- Adopting a "per campaign" standard for measuring the "call abandonment rate" to avoid the targeting of certain customers with a disproportionate share of abandoned calls.

These amendments TSR will empower consumers to avoid unwanted and intrusive prerecorded calls from entities that are solely under the FCC's jurisdiction. These proposed amendments are consistent with the directive of the TCPA to the FCC that it adopt rules "to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object." (47 U.S.C. §227 (c)(1)).

NCLC provides comments below on several of the proposed changes to the TCPA that are of particular importance to our low-income clients.

## **1. Prohibiting Prerecorded Message Calls (“Robocalls”) Unless the Consumer Provides Prior Express Written Consent**

The most important provisions of the FCC’s proposed amendment to its rule are the provisions regarding robocalls. The FCC is proposing to amend two sections of the rule in similar ways.

First, § 64.1200(a)(1) prohibits calls using an automatic dialing system *or* an artificial or prerecorded voice to certain types of *telephone numbers*, such as 911 numbers, hospital patient rooms, cell phones, and any telephone service for which the consumer is charged for the call. This rule applies to all calls other than emergency calls, whether for commercial purposes or any other purpose.

Second, § 64.1200(a)(2) prohibits making calls using *an artificial or recorded voice* for certain *purposes*. Calls are allowed for emergency purposes; for non-commercial purposes; for commercial purposes if the call does not include or introduce an unsolicited advertisement or constitute a telephone solicitation; and on behalf of tax-exempt non-profit organizations.

For both of these prohibitions, there is an additional exception in the current rule (and the statute, 47 U.S.C. § 227(b)) for calls made with the “prior express consent of the called party.” At issue here is the scope of that exception. We strongly support the FCC’s proposal to tighten that exception so that consent is informed, truly express, voluntary, and verifiable.

An important reason to adopt the rule is to promote the equal treatment of entities under the TSR and TCPA. The proposed requirement of explicit, voluntary, written consent only affects entities that are not covered by the TSR, as it is already in effect for entities covered by the TSR. NCLC strongly supports the FCC’s proposed amendments

to 64.1200(a)(1) and 64.1200(a)(2) to require prior explicit written consent to receive artificial or prerecorded message calls consistent with the amended TSR.

The FTC has compiled an extensive record that consumers find prerecorded voice calls to be extremely objectionable. Consumers deplore automated calls and consider them intrusive.<sup>2</sup> In its amendment to the TSR in 2008, the FTC concluded that “the reasonable consumer would consider interactive prerecorded telemarketing messages to be coercive or abusive of such consumer’s right to privacy. The mere ringing of the telephone to initiate such a call may be disruptive; the intrusion of such a call on a consumer’s right to privacy may be exacerbated immeasurably when there is no human being on the other end of the line.”<sup>3</sup> Robocalls by an entities governed solely by the TCPA are no less intrusive and annoying.

This record amply rebuts any notion that having a business relationship with a caller, or listing a telephone number on an application, amounts to express consent to receive prerecorded voice calls. The FCC’s proposed amendments would protect consumers by allowing prerecorded voice calls only if the consumer gives affirmative written consent, explicitly and specifically agreeing to receive such calls.

The strong and overwhelming objection to robocalls by consumers as evidenced in the extensive FTC record that led to the FTC’s pro-consumer amendments to the TSR provide ample support for the FCC’s proposal to protect consumers’ right to privacy by defining “prior express consent” as prior written consent. The ability of entities to obtain written consent via any of the electronic means authorized by E-SIGN should mitigate the burden of this writing requirement as emails, web forms, telephone key presses, etc., can satisfy the writing requirement. Requiring written consent should facilitate enforcement of the TCPA as there will be an electronic or paper record of the consent.

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<sup>2</sup> See 73 Fed.Reg. 51164 – 51204 (Aug. 29, 2008).

<sup>3</sup> Id at 51180.

## 2. Ending the Exemption for Prerecorded Telemarketing Calls to Established Business Relationship Customers

NCLC strongly supports the FCC’s proposed rejection of the position that an established business relationship may be deemed to constitute express invitation or permission to receive unsolicited robocalls. At one point, the FTC followed a policy of forbearing from bringing enforcement actions on sellers and telemarketers who delivered robocalls to consumers with an existing business relationship. In finding that a safe harbor is no longer supported by the record, the FTC noted that “[t]he entire record in this proceeding is clear that an overwhelming number of consumers hate prerecorded calls, and consider them a gross invasion of their privacy at home.”<sup>4</sup> In balancing the desire of the majority of consumers to protect their privacy from robocalls versus the small number of consumers that may want to receive such calls, the FTC shifted away from allowing entities with an established business relationship to place robocalls. Instead, it limited the placement robocalls to situations where the consumer has provided express written consent.

The FCC now has the opportunity to extend this privacy protection and control to the entities that fall outside of the FTC’s TSR jurisdiction, but are under the FCC’s TCPA. The reasons that prompted the FTC to do so apply equally to the FCC.

The FCC has discretion to allow robocalls in limited situations,

“subject to such conditions as the Commission may prescribe--

- (i) calls that are not made for a commercial purpose; and
- (ii) such classes or categories of calls made for commercial purposes as the Commission determines –
  - (I) **will not adversely affect the privacy rights that this section is intended to protect; and**

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<sup>4</sup> Id at 51177.

- (II) do not include the transmission of any unsolicited advertisement; (47 U.S.C. §227(b)(2)(B) (emphasis added)

In addition to the tens of thousands of consumer complaints and objections to robocalls made to the FTC, the FTC relied on evidence in the record that the self-interest of the entities making robocalls could not be relied upon to prevent abuse, and there were costs to the consumers from robocalls including risks to the health and safety of consumers.

At the heart of the issue is equity and fairness for consumers. The average consumer will not know or care that there are two federal agencies that regulate robocalls. What they will care about is whether they get robocalls at all. If the FCC failed to harmonize the TCPA to match the TSR, it would lead to consumer confusion as to why the calls are still occurring and why there are different processes to protect themselves from these calls. Two different sets of policies and regulations for robocalls will lead to consumer irritation and frustration as well.

For the same reasons, we favor including an exception identical to the FTC's for prerecorded health care messages made by HIPAA entities. When it crafted its exception, the FTC took into account its extensive record regarding consumers' concerns and objections. We agree with the FTC's balancing of these concerns. Adopting an exception identical to the FTC's also promotes the important goal of harmonizing the FTC and FCC rules.

### **3. Adopting the Pro-Consumer Opt-Out Proposal**

The FTC strengthened consumer protections by making it easier for consumers to remove their consent to receive robocalls by requiring an automotive interactive opt-out mechanism that allows the consumer through voice or a press of a key to opt out of receipt of calls and be put on the entity's specific do-not-call list. At the time the

consumer opts out, the call automatically terminates. This ability to opt-out remains throughout the call. For calls left on voicemail, there must be a toll-free number provided that automatically connects the consumer to the interactive opt-out menu. Under the proposed rule, these protections would apply to robocalls made for telemarketing purposes.

The FCC's current opt out is far less useful or protective of a consumer's privacy as it only requires that the consumer be provided with a phone number that the consumer can call during regular business hours to be put on an entity-specific do-not-call list. The record in the FTC TSR proceeding provided evidence that consumers did not trust calling the telemarketers because they felt they would be tricked into buying something. The FCC should also require that entities must provide an interactive automotive opt-out with similar protections as the FTC rule. As with the FTC TSR, the TCPA should also require that robocall voicemails include the interactive opt-out (available at all times via a toll-free number). This mechanism would facilitate consumers' control over receipt of robocalls and thus protect their right to privacy.

It is also important that the TCPA mirror the TSR's requirement that the disclosure of the opt-out occur at the start of the call. The FTC received many comments that consumers hang up when they realize a call is a telemarketing call or use their voice mail as a form of caller ID. If the FCC does not modify its existing rule which allows the notice of the opt-out provision to occur during or after the message, consumers may miss the disclosure as they will terminate the call before they hear the message.

#### **4. Debt Collectors Should Not Receive Any Special Carve Outs to the FCC's Efforts to Harmonize the TCPA with the FTC's TSR**

Consumers complain about debt collectors to the FTC more than any other industry, and the number of complaints about debt collectors increases each year. The chart below shows the increase in consumer complaints each year. Complaints about

third party collectors increased from about 12,000 in 1999 to nearly 90,000 last year. Many of those complaints had to do with abusive phone calls from debt collectors.

NCLC is aware that this docket is being flooded with form comments by debt collection employees seeking an exception for their employers. NCLC urges the FCC not to give the debt collection industry special privileges. The industry can and should adapt to the new telephone technologies by taking more responsibility rather than less.

Congress has recognized the consumer's right to privacy in many provisions of the Fair Debt Collection Practices Act. The consumer has the right to terminate a debt collector's communications altogether. 15 U.S.C. § 1692c(c). In the Ninth Circuit, at least, the consumer can give consent to future communications to one responsible debt collector, while refusing it to a second, unresponsive debt collector. *Clark v. Capital Credit and Collections Services, Inc.*, 460 F.3d 1162 (9<sup>th</sup> Cir. 2006). Debt collectors do not have a right to leave voice mail messages with consumers who may share their voice mail with their children, roommates, or relatives. *Edwards v. Niagara Credit Solutions, Inc.*, 584 F.3d 1350 (11th Cir. 2009) ("It was not reasonable for [defendant] to violate § 1692e(11) of the FDCPA with every message it left in order to avoid the possibility that some of those messages might lead to a violation of § 1692c(b)."). The FTC has recommended that Congress address the rising complaints against debt collectors by amendments strengthening its protections. NCLC supports those recommendations and believes that any special treatment of the debt collection should be determined in Congress as part of this process.

The main effect on debt collectors of the rules at issue in this proceeding relates to § 64.1200(a)(1). The FCC's proposed revision would require informed, truly express, voluntary, and verifiable consent to receive artificial voice or auto-dialed calls on a cell phone or a service which the called party is charged for the call. This rule applies to all calls except emergency calls--even those that are not commercial or do not include a telemarketing pitch--so would apply to debt collection calls.



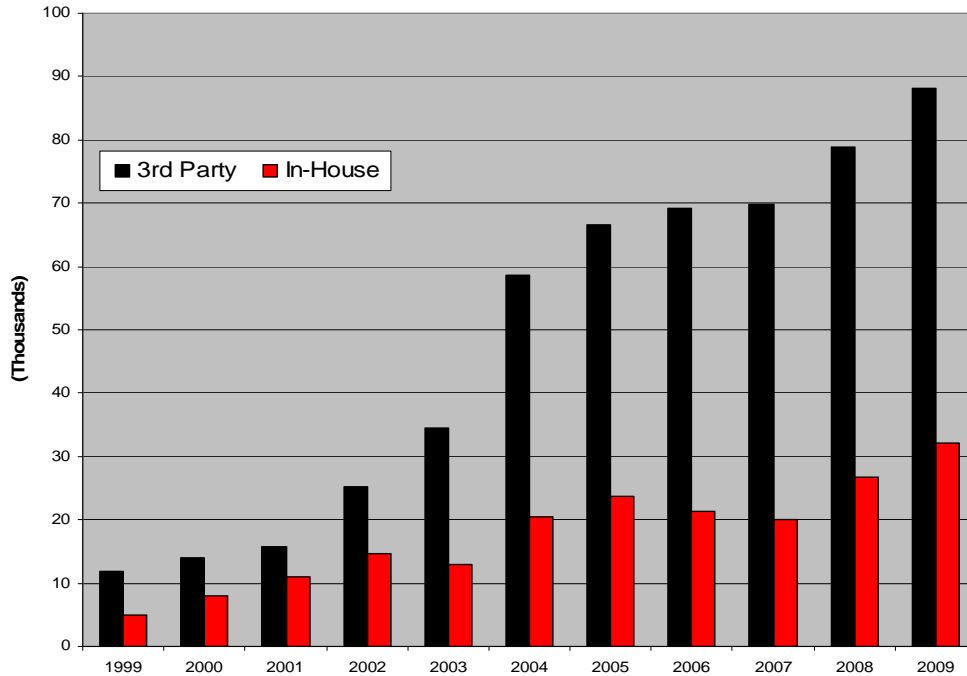
It is of critical importance to adhere to the statutory requirement of prior express consent before a debt collector can place a prerecorded or autodialed call to a cell phone. First, autodialed and prerecorded calls are intrusive even when they are made for more benign purposes: the record compiled by the FTC shows that consumers abhor these calls even when the purpose of the call is merely to sell goods or services. The intrusiveness is multiplied tenfold if the call is for debt collection purposes. The huge volume of complaints about debt collection calls makes it clear just how intrusive, abusive, and objectionable consumers find debt collection calls.

Second, the intrusiveness of a call is magnified tremendously if the call is made to a cell phone. Since cell phones are portable, people have them with them when driving, shopping, visiting family members in nursing homes or hospitals, picking up or caring for children, and in all sorts of other circumstances where privacy and avoidance of intrusion is particularly important.

Third, many consumers—particularly low-income consumers—have pre-paid cell phones where they are charged by the minute for each call received. Indeed, some new Lifeline telephone service offerings provide telephone access by giving the consumer a cell phone with a small number of prepaid minutes per month. To allow robocalls or artificial voice calls—particularly from debt collectors, who are likely to call over and over again—is particularly abusive to these consumers.

Finally, debt collection calls to cell phones create safety risks. Many consumers have their cell phones with them while driving, operating equipment, caring for children, or performing other tasks that have some risk of danger. The very purpose of a debt collection call is to make the consumer upset, and the number of complaints the FTC receives about debt collection calls demonstrates how successful debt collectors are in achieving this goal. Driving while distracted is already a serious problem with ordinary cell phone calls. To allow unwanted, purposefully upsetting debt collection calls to cell phones, which many people will receive while driving or engaging in other activities that require their calm attention, would create a risk to public safety.

### Consumer Complaints About Collections Reported to FTC



Source: FTC Annual Reports on the FDCPA, 2000-2010  
<http://www.ftc.gov/reports/index.shtm>

### Conclusion

NCLC commends the FCC for undertaking this rulemaking to protect consumer privacy and give consumers more control over whether they want to receive robocalls. These changes will harmonize the FTC's TSR and the FCC's TCPA and this will minimize consumer confusion and frustration with these intrusive calls to the home phone, voicemail and cell phones.