

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)
)
Petition for Clarification and Declaratory)
Ruling filed by)
Mark W. Dobronski)

Comments of
National Consumer Law Center on behalf of its low-income clients
and
Consumer Federation of America
Electronic Privacy Information Center
National Association of Consumer Advocates
National Consumers League
U.S. PIRG

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Comments

Introduction

The **National Consumer Law Center (NCLC)**, on behalf of its low-income clients, and **Consumer Federation of America, Electronic Privacy Information Center, National Association of Consumer Advocates, National Consumers League, and U.S. PIRG**, respectfully files these comments on the Petition for Clarification and Declaratory Ruling filed by Mark Dobronski.¹ The Bureau of Consumer and Governmental Affairs invited comments supporting or opposing the petition on February 22, 2024.²

The petition requests the Federal Communications Commission (FCC or Commission) to “clarify ... the statutory authority by which the Commission adopted its rule Section 64.1601(e) [47 C.F.R. § 64.1601(e)] under the Telephone Consumer Protection Act (“TCPA”).”³ The petition explains that this clarification is necessary to enable affected parties to determine whether there is a private right of action under the TCPA when telemarketers violate this regulation and fail to provide caller identification information.⁴

We strongly support the request made in this petition and request that the Commission declare that the regulation at issue was promulgated in 2003 pursuant to its regulatory authority under 47 U.S.C. § 227(c).⁵ As explained herein, the record in support of this position is fairly clear, and the benefits of such a declaration would be considerable.

¹ *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, Request of Mark W. Dobronski for Clarification and Declaratory Ruling, CG Docket No. 02-278 (Dec. 13, 2023), *available at* <https://www.fcc.gov/ecfs/document/1213517213987/1>.

² Federal Commc’ns Comm’n, Consumer and Governmental Affairs Bureau, Public Notice, Petition for Declaratory Ruling Filed, CG Docket No. 02-278 (Rel. Feb. 22, 2024), *available at* <https://docs.fcc.gov/public/attachments/DA-24-161A1.pdf>.

³ Petition, *supra* note 1, at 2.

⁴ *Id.* at 3-4.

⁵ 47 C.F.R. § 64.1601(e), *adopted by In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 18 F.C.C. Rcd. 14014 ¶ 183 (F.C.C. July 3, 2003), *published at* 68 Fed. Reg. 44,144 (July 25, 2003), *available at* <https://www.govinfo.gov/content/pkg/FR-2003-07-25/pdf/03-18766.pdf>. *Cf.* *Sherman v. Vision Lab Telecomms., Inc.*, 2006 WL 8458286 (D. Mass. Apr. 4, 2006) (FCC rule applies only to phone calls, not to faxes).

The Commission promulgated the requirement for telemarketers to provide caller ID information in its rulemaking implementing the regulations for the Do Not Call Registry in 2003.

There are two requirements for callers to provide caller ID information, namely the Truth in Caller ID Act (TCIA), codified within the TCPA at 47 U.S.C. § 227(e), and the regulation at issue in this proceeding— 47 C.F.R. § 64.1601(e). Section 64.1601(e) explicitly applies only to telemarketers, requiring them to transmit caller identification information and prohibiting them from blocking its transmission.⁶

Section 64.1601(e) was not adopted under the TCIA, which was enacted in 2010. Rather, it was adopted in 2003, years before the TCIA was enacted, as part of the FCC’s promulgation of the nationwide do-not-call rule.⁷

When it adopted section 64.1601(e), the FCC stressed that the caller ID requirements it was creating would help consumers enforce their do-not-call rights: “Caller ID requirements will improve the ability of consumers to identify and enforce do-not-call rights against telemarketers.”⁸

⁶ 47 C.F.R. § 64.1601(e): “Any person or entity that engages in telemarketing, as defined in section 64.1200(f)(10) must transmit caller identification information.” Caller identification information is defined in 47 C.F.R. § 64.1600(d) as “any service or device designed to provide the user of the service or device with the telephone number of, or other information regarding the origination of, a call made using a voice service or a text message sent using a text messaging service.”

⁷ Federal Comm’n’s Comm’n, Final Rule, 68 Fed. Reg. 44,144, 44,179 (July 25, 2003).

47 C.F.R. § 64.1601(e), as adopted at that time, read and continues to read (with the exception that the reference to subsection 64.1200(f)(7) in the first sentence is now subsection 64.1200(f)(10)):

(e) Any person or entity that engages in telemarketing, as defined in section 64.1200(f)(7) must transmit caller identification information.

(1) For purposes of this paragraph, caller identification information must include either CPN or ANI, and, when available by the telemarketer’s carrier, the name of the telemarketer. It shall not be a violation of this paragraph to substitute (for the name and phone number used in, or billed for, making the call) the name of the seller on behalf of which the telemarketing call is placed and the seller’s customer service telephone number. The telephone number so provided must permit any individual to make a do-not-call request during regular business hours.

(2) Any person or entity that engages in telemarketing is prohibited from blocking the transmission of caller identification information.

(3) Tax-exempt nonprofit organizations are not required to comply with this paragraph.

⁸ 68 Fed. Reg. at 44,156 ¶ 65.

It also highlighted the role that caller ID plays in enabling consumers to avoid unwanted calls:

[W]e revise the current Telephone Consumer Protection Act (TCPA) rules and adopt new rules to provide consumers with several options for avoiding unwanted telephone solicitations. Specifically, we establish with the Federal Trade Commission (FTC) a national do-not-call registry for consumers who wish to avoid unwanted telemarketing calls. ... The new rules will also require all companies conducting telemarketing to transmit caller identification (caller ID) information, when available, and prohibit them from blocking such information.⁹

In addition, the FCC's summary of the rule, at both the beginning of the *Federal Register* notice and the published Final Rule, describes it as “adopt[ing] new rules to provide consumers with several options for avoiding unwanted telephone solicitations,” and then lists the prohibition of caller ID blocking as one of the new rules.¹⁰ The FCC's stated reason for adopting this requirement for telemarketing calls was:

Caller ID allows consumers to screen out unwanted calls and to identify companies that they wish to ask not to call again. Knowing the identity of the caller is also helpful to consumers who feel frightened or threatened by hang-up and “dead air” calls.¹¹

Given this context, it is clear that the caller ID requirements in section 64.1601(e) were adopted pursuant to 47 U.S.C. § 227(c) as part of the protections created by the nationwide do-not-call rule. The fact that the rule is titled “Delivery requirements and privacy restrictions,” which parallels the title of subsection 227(c)—“Protection of Subscriber Privacy Rights”—underscores its origin as a provision implementing that section. A private right of action should therefore be available under section 227(c)(5) if a consumer who has registered on the DNC registry receives more than one telemarketing call by or on behalf of the same entity within twelve months that does not include a correct caller ID.¹²

As the petition notes, the courts have not been consistent in their resolution of the issue. Some courts have determined correctly that this provision was issued pursuant to the Commission's authority under section 227(c). In 2017, a court refused to dismiss a private cause of action under § 227(c)(5) for violation of FCC's caller ID regulation.¹³ A more recent decision in state court also

⁹ *Id.* at 44,144 ¶ 1 (emphasis added).

¹⁰ 18 F.C.C. Rcd. 14014, 14017 ¶ 1; 68 Fed. Reg. 44,144 (Summary).

¹¹ 68 Fed. Reg. at 44,166 ¶ 124.

¹² 47 U.S.C. § 227(c)(5).

¹³ *Braver v. Northstar Alarm Servs., L.L.C.*, 2017 WL 11139779 (W.D. Okla. Aug. 25, 2017).

resolved the issue correctly. In *Worsham v. LifeStation, Inc.*,¹⁴ the court noted the FCC’s statement in its 2003 order of how helpful caller ID to protect consumers from unwanted telemarketing calls, and pointed to the specific authority in section 227(c) for the FCC to impose this type of requirement on telemarketers:

Additionally, Caller ID allows a consumer to “make a do-not-call request during regular business hours,” § 64.1601(e)(1), further protecting the subscriber’s privacy right by preventing future calls. Although the FCC’s consideration of what network information must be transmitted via Caller ID is technical, we think it falls within the scope of the technologies that § 227(c)(1)(A) directed the FCC to consider in protecting the privacy rights of consumers. *See* 68 Fed. Reg. at 44,166-67 (evaluating the cost efficiency and availability of different network technologies for network transmission).

Section 227(c) authorizes the FCC to promulgate rules to protect telephone consumers’ privacy rights and create rules that will allow consumers to “avoid receiving telephone solicitations to which they object.” The FCC is directed to do so by “compar[ing] and evaluat[ing] alternative methods and procedures (including ... telephone network technologies ...) for their effectiveness in protecting such privacy rights.” 47 U.S.C. § 227(c)(1)(A). Section 227(d), on the other hand, instructs the FCC to (1) revise its rules for telephone facsimile machines, requiring the use of machines that can mark the faxed pages with identifying information, (2) prescribe rules requiring automatic or prerecorded telemarketing messages to include the identity of the telemarketer at the beginning of the message and its telephone number or address during, or at the end, of the message, and (3) automatically release the called party’s line within five seconds. Importantly, as discussed above, § 227(d) does not purport to regulate live telemarketing calls.

...

Although the question is not free from doubt and the lines between regulations authorized by § 227(c) and (d) (or, perhaps, some combination of both) could be far clearer, for two reasons, we conclude that § 64.1601(e)(1) was promulgated pursuant to § 227(c) and, therefore, that a private right of action exists to enforce its provisions. First, to the extent the express terms of § 64.1601(e)(1) apply to live telemarketing calls, they would exceed the scope of regulation authorized by § 227(d), but not the scope of § 227(c). Second, by requiring the provision of information expressly for the purpose of allowing individuals “to make a do-not-call request,” the regulation serves the purpose of § 227(c) of “protect[ing] subscribers from unrestricted commercial telemarketing calls.” 68 Fed. Reg. at 44,167. We must therefore reverse the award of summary judgment as to Count 4 of the first amended complaint (Count 3 of the third amended complaint).¹⁵

¹⁴ 2021 WL 5358876 (Md. Ct. Spec. App. Nov. 17, 2021).

¹⁵ *Id.* at *16-17.

Other courts have incorrectly determined that the section was promulgated under section 227(d) of the Telephone Consumer Protection Act.¹⁶ For example, a 2016 district court decision holds that section 64.1601(e) was promulgated under section 227(d), which requires the FCC to promulgate technical and procedural standards on several topics and does not include its own private cause of action.¹⁷ We believe that this line of reasoning is flawed. When the FCC promulgated section 64.1601(e) in 2003, it cited section 227(d) only twice, and both references were in a paragraph dealing with caller ID requirements *for junk faxes*.¹⁸ By contrast, it cited section 227(c) thirty-six times.

Moreover, section 64.1601(e) requires caller ID for *all telemarketing calls*, regardless of whether they are live calls hand-dialed by a telemarketer or are calls that include a prerecorded or artificial voice. There is nothing in section 227(d) that provides the FCC with authority to adopt a caller ID rule for telemarketing calls: it relates only to procedural standards for faxes and systems for transmitting *prerecorded* calls, regardless of whether they include telemarketing messages.

Section 64.1601(e) could not have been adopted under section 227(d).

Conclusion

An articulation by the FCC that section 64.1601(e) was issued pursuant to its authority to issue regulations in section 227(c) of the TCPA would remove any doubt about the application of the private right of action under that section. The potential for liability for failures to provide correct caller IDs might then provide sufficient incentives to the telemarketing industry to comply with a regulation that has been on the books for over twenty years—an incentive that is much needed, given the widespread non-compliance with this requirement.

¹⁶ *Dobronski v. Total Ins. Brokers, L.L.C.*, 2021 WL 4338957 (E.D. Mich. May 14, 2021) (Mag.) (rejecting argument that 47 C.F.R. § 64.1601(e) was promulgated under 47 U.S.C. § 227(c); no private cause of action for violation), *adopted by* 2021 WL 4452218 (E.D. Mich. Sept. 29, 2021); *Worsham v. Travel Options, Inc.*, 2016 WL 4592373 (D. Md. Sept. 2, 2016) (concluding that there is no private right of action for violation of requirement to transmit caller ID information), *aff'd*, 678 Fed. Appx. 165 (4th Cir. 2017).

¹⁷ *Worsham v. Travel Options, Inc.*, 2016 WL 4592373 (D. Md. Sept. 1, 2016).

¹⁸ 68 Fed. Reg. at 44,170 ¶ 146 (July 25, 2003).

Respectfully submitted, this the 22nd day of March, 2024.

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