

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

In the Matter of)
Rules and Regulations Implementing the)
Telephone Consumer Protection Act of 1991)
National Automobile Dealers Association Petition)
for Declaratory Ruling)
CG Docket No. 02-278

DECLARATORY RULING

Adopted: June 14, 2005

Released: June 15, 2005

By the Acting Chief, Consumer & Governmental Affairs Bureau:

I. INTRODUCTION

1. In this Declaratory Ruling, we clarify that the Commission’s rules that prohibit the initiation of telephone solicitations to residential telephone subscribers registered on the national do-not-call list do not extend to calls made for the limited purpose of informing consumers of recalls due to a product safety or defect concern and scheduling appointments to correct such problems at no cost to the consumer. We believe this clarification will ensure that consumers continue to receive important product safety information without unduly infringing upon the consumer privacy protections afforded by the national do-not-call list.

II. BACKGROUND

A. Telephone Consumer Protection Act of 1991

2. On December 20, 1991, Congress enacted the Telephone Consumer Protection Act (TCPA), as codified in section 227 of the Communications Act of 1934, as amended (the Act), in an effort to address a growing number of telephone marketing calls and certain telemarketing practices Congress found to be an invasion of consumer privacy and even a risk to public safety. In relevant part, the TCPA required the Commission to “initiate a rulemaking proceeding concerning the need to protect residential telephone subscribers’ privacy rights” and specifically authorized the Commission to consider “the establishment and operation of a single national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations.” Section 227(a)(3) of the Act

1 See 47 C.F.R. § 64.1200(c)(2).

2 Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991), codified at 47 U.S.C. § 227. The TCPA amends Title II of the Communications Act of 1934, 47 U.S.C. § 201 et seq.

3 47 U.S.C. § 227(c)(1).

4 47 U.S.C. § 227(c)(3).

defines a “telephone solicitation” as “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...”⁵ In 1992, the Commission adopted rules implementing the TCPA, opting at that time to require that entities making telephone solicitations institute procedures for maintaining company-specific do-not-call lists rather than establishing a national do-not-call list.⁶

3. On March 11, 2003, the Do-Not-Call Implementation Act was signed into law, requiring the Commission to issue a final rule in its ongoing TCPA proceeding within 180 days of enactment, and to consult and coordinate with the Federal Trade Commission (FTC) to “maximize consistency” with the rules promulgated by the FTC.⁷ On July 3, 2003, the Commission revised the TCPA rules and adopted new rules to provide consumers with several options for avoiding unwanted telephone solicitations.⁸ In particular, the Commission established a national do-not-call registry that would be jointly administered by the FTC and this Commission. The national registry, which went into effect on October 1, 2003, prohibits, with limited exceptions, the making of any telephone solicitation to a residential subscriber that has registered his or her telephone number on the national do-not-call registry.⁹ To date approximately 88 million residential telephone numbers have been registered on the national do-not-call registry.

B. National Automobile Dealer Association Petition

4. On March 28, 2005, the National Automobile Dealers Association (NADA) filed a request for clarification that the national do-not-call rules do not prohibit an automobile or truck dealership from calling consumers at phone numbers registered on the national registry for the purpose of: (i) informing consumers that their vehicles are subject to recall due to a safety, emissions or other defect or problem, and (ii) scheduling appointments with consumers at the dealership’s service facility to correct the noted problem.¹⁰ NADA contends that calls regarding product recalls do not fall within the TCPA’s definition of “telephone solicitation” since consumers are neither requested nor required to purchase the services necessary to repair defects or problems addressed by a recall.¹¹ NADA argues that clarifying this issue will help advance the important public policy objectives of increasing consumer awareness of, and response to, recalls involving products sold by franchised automobile and truck dealers.¹² NADA notes that because there are potential civil and administrative penalties involved in violations of the TCPA, any

⁵ 47 U.S.C. § 227(a)(3).

⁶ *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 7 FCC Rcd 8752 (1992) (*1992 TCPA Order*); *see also* 47 C.F.R. § 64.1200.

⁷ Do-Not-Call Implementation Act, Pub. L. No. 108-10, 117 Stat. 557 (2003), *codified at* 15 U.S.C. § 6101.

⁸ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014 (2003) (*2003 TCPA Order*).

⁹ 47 C.F.R. § 64.1200(c)(2). *See also Mainstream Marketing Services, Inc. v. Federal Trade Comm’n*, 358 F.3d 1228 (10th Cir. 2004) (upholding the constitutionality of the national do-not-call registry), *cert. denied*, 2004 WL 2050134 (U.S. Oct. 4, 2004) (No. 03-1552).

¹⁰ National Automobile Dealers Association, Petition for Declaratory Ruling dated March 28, 2005 (NADA Petition). NADA represents approximately 20,000 franchised automobile and truck dealers.

¹¹ NADA Petition at 1-2. NADA notes that the FTC recently designated product recall messages as “transactional or relationship” rather than commercial pursuant to proceedings under the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (*citing* Definitions and Implementation Under the CAN-SPAM Act; Final Rule, 70 Fed. Reg. 3110, 3117 (Jan. 19, 2005)).

¹² NADA Petition at 1.

ambiguity on this point may significantly reduce telephone notifications to consumers about vehicle or equipment recalls and undermine the efforts of vehicle manufacturers, parts manufacturers, the National Highway Traffic Safety Administration and the Environmental Protection Agency to maximize the effectiveness of such recalls.¹³

III. DISCUSSION

5. We clarify that telephone calls to residential subscribers for the limited purpose of informing consumers of recalls due to a product safety or defect concern and scheduling appointments to correct such problem at no cost to the consumer are not prohibited under the Commission's rules even if the recipients' telephone numbers are registered on the national do-not-call list.¹⁴ Section 64.1200(c)(2) of the Commission's rules provides that "[n]o person or entity shall initiate any *telephone solicitation*, as defined in [section 64.1200(f)(9)] of this section" to "[a] residential telephone subscriber who has registered his or her telephone number on the national do-not-call registry of persons who do not wish to receive telephone solicitations. . .".¹⁵ We agree with NADA that calls made to consumers for the purpose of informing them of product recalls are not "telephone solicitations" because such calls are not made for the "purpose of encouraging the purchase or rental of, or investment in, property, goods, or services...".¹⁶ As a result, these rules do not prohibit such calls to consumers that have registered their telephone numbers on the national do-not-call list.

6. We believe this clarification will ensure that consumers are made aware of potential safety concerns involving products that they have purchased and have an opportunity to correct those defects in a timely manner. There are approximately 88 million residential telephone numbers currently on the national do-not-call list. This represents a significant number of consumers that may be put at risk by delays in receiving important product safety information. We note that although the NADA limits its request for clarification to product recalls relating to the automobile and trucking industry, the rationale underlying the clarification discussed above extends to any product-related recall.

7. Although we clarify that product recalls are not telephone solicitations subject to the restrictions of the national do-not-call list, we caution that our clarification is limited to those situations in which the telephone call is made for the purpose of informing consumers of the product recall and scheduling appointments to have the defect repaired or replaced at no cost to the consumer. To the extent that such calls also include offers encouraging the purchase of other goods or services, the call will be deemed a prohibited telephone solicitation. This limitation is necessary to ensure that the consumer privacy protections afforded by the national do-not-call list are not circumvented.

¹³ NADA Petition at 1-2. *See also* Letter from Jacqueline Glassman, Chief Counsel, U.S. Department of Transportation, National Highway Traffic Safety Administration to Marlene H. Dortch, FCC dated April 29, 2005 (indicating "that a limited exemption to the National Do-Not-Call rules to permit dealers to call and inform a vehicle owner of the existence of a recall and to schedule an appointment to have that vehicle remedied would enhance motor vehicle safety by improving consumer response rate to manufacturer recall notices.").

¹⁴ The TCPA and our rules limit registrations on the national do-not-call list only to residential telephone subscribers. Thus, the national do-not-call rules create no impediment to calls made to business subscribers. *See* 47 U.S.C. § 227(c)(3); 47 C.F.R. § 64.1200(c)(2).

¹⁵ 47 C.F.R. § 64.1200(c)(2) (emphasis added).

¹⁶ *See* 47 C.F.R. § 64.1200(f)(9) (incorporating the statutory definition of telephone solicitation in section 227(a)(3) of the Act). *See also* CAN-SPAM Act, Section 3(2)(B) and 3(17)(A), *codified* at 15 U.S.C. §§ 7702(2)(B) and 7702(17)(A). The CAN-SPAM Act states that "commercial" messages do not include "transactional or relationship" messages, such as messages regarding product recall information.

IV. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED that, pursuant to Sections 1-4, 227, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 227, and 303(r); and Section 64.1200 of the Commission's Rules, 47 C.F.R. § 64.1200, this *Declaratory Ruling* in CG Docket No. 02-278 IS ADOPTED as set forth herein.

9. IT IS FURTHER ORDERED, that the Petition for Declaratory Ruling filed by the National Automobile Dealers Association IS GRANTED to the extent stated herein.

FEDERAL COMMUNICATIONS COMMISSION

Monica S. Desai
Acting Chief
Consumer & Governmental Affairs Bureau