

Congress of the United States
Washington, DC 20515

December 3, 2010

The Honorable Julius Genachowski
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

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Dear Chairman Genachowski:

We are writing to express our concerns with certain changes contemplated by the Federal Communications Commission (FCC) in the Notice of Proposed Rulemaking regarding the Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278 (NPRM). While we share the Commission's overall goal of protecting consumer privacy, the NPRM would undermine consumers' access to important information, the transmittal of which does not impinge upon consumers' privacy expectations.

Congress places a high priority on protecting consumers from unsolicited telemarketing calls. In 1991, Congress enacted the Telephone Consumer Protection Act (TCPA), which restricts certain types of "telephone solicitation," which Congress defined 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." The FCC uses this definition for the term "telemarketing." In 2003, Congress passed the Do-Not-Call Implementation Act (DNCA), which required the Commission to finalize its rules implementing the TCPA, and to "consult and coordinate with the Federal Trade Commission to maximize consistency with the [Telemarketing Sales Rule]."

We appreciate the FCC's efforts to comply with Congress's directive by issuing the NPRM. However, rather than focus exclusively on telemarketing and maximize consistency with the Telemarketing Sales Rule (TSR), the NPRM appears to impose new obligations on *non-telemarketing calls* delivered to mobile devices using automatic telephone dialing systems (autodialers) and prerecorded messages. These new obligations are unnecessary to protect consumers from unsolicited telemarketing calls and would thwart compliance with multiple federal and state laws. In addition, such new obligations would contravene the FCC's previous determination that a customer who provides his or her phone number as contact information evinces consent to be reached at that number.

Most significantly, such new obligations could harm consumers by depriving them of important, timely information such as fraud and data security breach alerts, school closings, and airline itinerary changes. For example, credit card companies use autodialers and prerecorded messages to warn customers about suspicious activity on their accounts. Airlines use such methods to alert travelers that their flights have been cancelled or delayed. Pharmacies notify customers when prescriptions are ready.

Mobile phones are increasingly the primary communications device used by consumers. The Government Accountability Office recently concluded that “nearly 40 percent of households rely primarily on wireless devices.” The NPRM would inexplicably extend to non-telemarketing calls to mobile devices using autodialers and prerecorded messages the prior express written consent requirement that the Federal Trade Commission imposes on telemarketing calls.

Such a requirement would make it more difficult for consumers to receive critical information in a timely manner, even if consumers have provided their mobile phone numbers as the primary means of communications. And it would create a more restrictive regime for non-telemarketing calls to mobile devices than to wireline phones—even though consumers today are replacing wireline phones with mobile devices in unprecedented numbers. As a result, consumers who have “cut the cord” may be unreachable, even during urgent situations.

Several federal agencies have expressed their concerns with the NPRM’s treatment of non-telemarketing calls to mobile devices using autodialers and prerecorded messages, including the Department of Education, the Department of Treasury, and the Federal Reserve. These agencies recognize that important non-telemarketing messages are delivered to mobile devices, and that such communications would be undermined by the approach taken in the NPRM. We share these concerns.

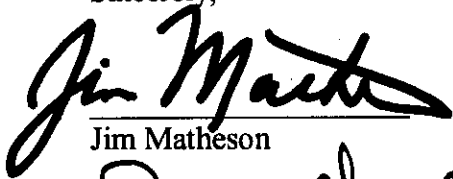
The imposition of a prior express written consent on non-telemarketing calls is beyond the scope of the TSR, and should not be included in the final rules adopted by the FCC in this proceeding. The TSR addresses telemarketing calls; the FCC’s efforts to “maximize consistency” with the TSR does not require the imposition of a prior express written consent requirement for non-telemarketing calls. We therefore urge the Commission to ensure that its final rules in this proceeding permit calls to mobile phone numbers using autodialers and prerecorded messages in the absence of prior express written consent.

In addition, the FCC should clarify that predictive dialers are not subject to regulations that apply to autodialers. The TCPA is clear: an autodialer includes “the capacity... to store or produce telephone numbers to be called, using a random or sequential number generator.” Predictive dialers do not have the capacity to randomly or sequentially generate numbers unless a device’s hardware and software is modified to do so. Thus, unless and until predictive dialers are modified to include such capacity, they should not be subject to rules that apply to autodialers.

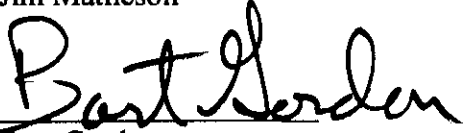
Finally, we are also concerned about the NPRM’s proposed modification of the established business relationship exception with respect to artificial and prerecorded messages. The FCC previously exempted artificial and prerecorded messages when an established business relationship exists because such messages “do not adversely affect residential subscriber privacy interests.” Recorded messages are no less “invited or permitted” as live calls, and there is no statutory justification for eliminating the established business relationship exemption.

Thank you for your consideration of our views in this important proceeding. We look forward to your response, and to working with the FCC to protect consumers from unsolicited telemarketing calls without unduly inhibiting consumers’ access to critical information.

Sincerely,



Jim Matheson



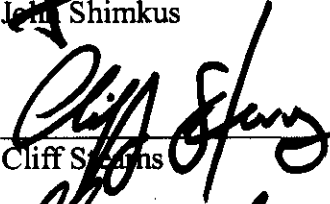
Bart Gordon



Mike Ross



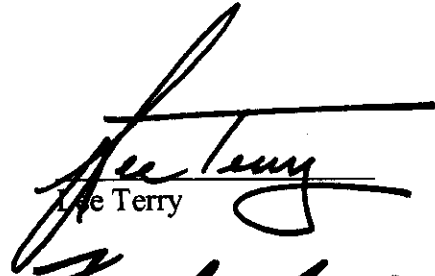
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