

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)
)
)
)
)
)

ORDER

Adopted: August 25, 2004

Released: September 21, 2004

By the Commission:

I. INTRODUCTION

1. In this Order, we establish a limited safe harbor period from the prohibition on placing automatic telephone dialing system (autodialed) or prerecorded message calls to wireless numbers when such calls are made to numbers that have been recently ported from wireline service to wireless service.¹ We will not find persons liable for placing such autodialed or prerecorded message calls where such calls are made to a wireless number ported from wireline service within the previous 15 days, provided the number is not already on the national do-not-call registry or the caller’s company-specific do-not-call list. In addition, we amend our existing safe harbor rules for telemarketers subject to the national do-not-call registry to require such telemarketers to access the do-not-call list no more than 31 days prior to making a telemarketing call. This requirement will become effective on January 1, 2005. We believe the rule amendments adopted herein ensure that callers have a reasonable opportunity to comply with our rules while continuing to protect consumer privacy interests.

II. BACKGROUND

A. The Telephone Consumer Protection Act of 1991

2. On December 20, 1991, Congress enacted the Telephone Consumer Protection Act (TCPA) in an effort to address a growing number of telephone marketing calls and certain telemarketing practices thought to be an invasion of consumer privacy and even a risk to public safety.² In 1992, the

¹ An automatic telephone dialing system is defined as “equipment which has the capacity (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.” See 47 U.S.C. § 227(a)(1). This includes “predictive dialers” that dial numbers and, when certain computer software is attached, assist telemarketers in predicting when a sales agent will be available to take the next call.

² Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991) *codified at* 47 U.S.C. § 227.

Commission adopted rules implementing the requirements of the TCPA.³ The TCPA specifically prohibits calls using an autodialer or artificial or prerecorded message “to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged.”⁴ In addition, the TCPA required the Commission to “initiate a rulemaking proceeding concerning the need to protect residential telephone subscribers’ privacy rights” and to consider several methods to accommodate telephone subscribers who do not wish to receive unsolicited advertisements.⁵

B. 2003 TCPA Order

3. In July 2003, the Commission released a Report and Order revising the TCPA rules to respond to changes in the telemarketing marketplace over the last decade.⁶ In relevant part, the Commission reaffirmed that the TCPA prohibits, with limited exceptions, any call using an automatic telephone dialing system or an artificial or prerecorded message to any wireless telephone number.⁷ The Commission acknowledged that, beginning November 24, 2003, local number portability (LNP) would permit subscribers to port numbers previously used for wireline service to commercial mobile radio service (CMRS) providers, and that telemarketers would need to take the steps necessary to ensure continued compliance with the TCPA.⁸ The Commission concluded, however, that LNP did not make it impossible for telemarketers to comply with the TCPA.⁹ In so doing, the Commission noted that its LNP decisions dated back to 1996, with the Commission granting a number of extensions of the effective date for porting to and from CMRS carriers, providing the industry and other interested parties with extensive advanced notice of the impending implementation of wireless LNP.¹⁰ The Commission declined to mandate a specific solution that will enable telemarketers to identify wireless numbers in a number portability environment concluding that telemarketers could make use of the tools available in the marketplace to ensure continued compliance with the TCPA. Similarly, the Commission rejected a proposal to create a “good faith” exception for inadvertent autodialed or prerecorded calls to wireless numbers finding there are adequate solutions in the marketplace to enable persons initiating such calls to identify wireless numbers.¹¹

4. In addition, the Commission established, in conjunction with the Federal Trade Commission (FTC), a national do-not-call registry for consumers who wish to avoid unwanted telemarketing calls.¹² Consistent with the actions of the FTC, the Commission concluded that a seller or an entity telemarketing on behalf of the seller will not be liable for violating the national do-not-call rules

³ 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.

⁴ 47 U.S.C. § 227(b)(1)(A)(iii).

⁵ 47 U.S.C. § 227(c)(1-4).

⁶ See *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*).

⁷ *2003 TCPA Order*, 18 FCC Rcd at 14115, para. 165. This prohibition excludes calls “made for emergency purposes or made with the prior express consent of the called party.” 47 U.S.C. § 227(b)(1)(A).

⁸ *2003 TCPA Order*, 18 FCC Rcd at 14117, para. 170.

⁹ *2003 TCPA Order*, 18 FCC Rcd at 14117, para. 170.

¹⁰ *2003 TCPA Order*, 18 FCC Rcd at 14111 and 14116, paras. 161, 168.

¹¹ *2003 TCPA Order*, 18 FCC Rcd at 14117-18, para. 172.

¹² *2003 TCPA Order*, 18 FCC Rcd at 14034-35, para. 28. The United States Court of Appeals for the Tenth Circuit recently upheld the constitutionality of the national do-not-call registry. See *Mainstream Marketing Systems, Inc. v. Federal Trade Commission*, 358 F.3d 1228 (10th Cir. February 17, 2004).

if it can demonstrate that it has made a good faith effort to comply with the national do-not-call rules and follows certain procedures, including accessing the national do-not-call database no more than three months prior to the date of the call.¹³ In so doing, the Commission acknowledged that a three month safe harbor period for telemarketers may prove too long to benefit some consumers.¹⁴ The Commission indicated that it would carefully monitor the impact of this requirement and consider a shorter time frame in the future.

C. Further Notice of Proposed Rulemaking

5. On March 19, 2004, the Commission released a Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking seeking comment on two issues relating to the TCPA.¹⁵ Specifically, the Commission sought comment on whether to adopt a limited safe harbor period during which a telemarketer will not be liable for violating the rule prohibiting autodialed and prerecorded message calls to wireless numbers for calls made to numbers that have been recently ported from wireline to wireless service. The Commission noted that once a number is ported to a wireless service, a telemarketer may not have access to that information immediately in order to avoid calling the new wireless number.¹⁶ The Commission also noted that several parties had raised concerns regarding how to comply with the TCPA once intermodal LNP became effective on November 24, 2003.¹⁷ In addition, the Direct Marketing Association (DMA) and Newspaper Association of America (NAA) submitted a Petition for Declaratory Ruling asking the Commission to adopt a safe harbor for calls made to any wireless number regardless of whether the number was recently ported to wireless service.¹⁸ Under the DMA's proposal, if a marketer subscribes to a wireless suppression service and uses a version of the data that is no more than 30 days old, the marketer will not be liable under the TCPA for erroneous calls to wireless numbers.¹⁹

6. The Commission also sought comment on whether to amend our existing safe harbor provision for telemarketers that are required to comply with the national do-not-call registry to remain consistent with any amendment made by the FTC to its safe harbor rule.²⁰ The Commission noted that the Consolidated Appropriations Act of 2004 (Appropriations Act) mandated that "not later than 60 days after the date of enactment of this Act, the Federal Trade Commission shall amend the Telemarketing Sales Rule to require telemarketers subject to the Telemarketing Sales Rule to obtain from the Federal Trade Commission the list of telephone numbers on the 'do-not-call' registry once a month."²¹

¹³ 47 C.F.R. § 64.1200(c)(2)(i)(D).

¹⁴ *2003 TCPA Order*, 18 FCC Rcd at 14040, para. 38.

¹⁵ *Rules and Regulations Implementing the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003; Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 04-53, CG Docket No. 02-278, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 19 FCC Rcd 5056 (2004) (*2004 TCPA Further Notice*).

¹⁶ *2004 TCPA Further Notice* at para. 46.

¹⁷ *2004 TCPA Further Notice* at para. 45 (*citing* Letter from Jerry Cerasale, Direct Marketing Association, to K. Dane Snowden, FCC, December 2, 2003; Letter from Anita Wallgren on behalf of the Tribune Company to Marlene H. Dortch, FCC, November 10, 2003).

¹⁸ *See* Petition for Declaratory Ruling, Direct Marketing Association and Newspaper Association of America, filed January 29, 2004 (*DMA Petition*).

¹⁹ *DMA Petition* at 4.

²⁰ *2004 Further Notice* at para. 52.

²¹ *2004 Further Notice* at para. 51.

III. DISCUSSION

A. Safe Harbor for Calls to Wireless Numbers

7. We establish a limited safe harbor period in which persons will not be liable for placing autodialed or artificial or prerecorded message calls to numbers recently ported from wireline to wireless service. The majority of commenters in this proceeding support the adoption of such a safe harbor. Of the comments filed in this proceeding, most were from businesses that support a safe harbor period of 30 days or more.²² One consumer commenter opposes any safe harbor period,²³ and the National Association of State Utility Consumer Advocates (NASUCA) indicates that any safe harbor should be as limited as possible to minimize harm to consumers.²⁴ As discussed in greater detail below, we conclude that callers will not be considered in violation of 47 C.F.R. § 64.1200(a)(1)(iii) for autodialed or artificial or prerecorded message calls placed to a wireless number that has been ported from a wireline service within the previous 15 days, provided the number is not already on the national do-not-call registry or caller's company-specific do-not-call list. The 15-day safe harbor period will run from the time the port has been completed and the number appears in Neustar's "Intermodal Ported TN Identification Service" as a wireless number.²⁵ We believe this safe harbor will provide a reasonable opportunity for persons, including small businesses, to identify numbers that have been ported from wireline to wireless service and, therefore, allow callers to comply with our rules.²⁶

8. Given the limited duration of this safe harbor period and the fact that consumers may continue to avail themselves of the national and company-specific do-not-call lists, we do not believe that this action will unduly infringe consumer privacy interests, which is consistent with congressional intent. We emphasize that the safe harbor provision created herein in no way obviates the need for telemarketers to abide by any of the Commission's other telemarketing rules including honoring the requirements of the national and company-specific do-not-call lists.²⁷ In addition, we agree with Verizon that this safe harbor provision will not excuse any willful violation of the ban on using autodialers or prerecorded messages to call wireless numbers.²⁸ Thus, even within the 15-day safe harbor period, persons will be considered in violation of this prohibition if they knowingly place an autodialed or prerecorded message call to a wireless number absent an emergency or the prior express consent of the called party. We also note that this safe harbor will extend only to voice calls, not to text messages, which are sent specifically to numbers associated with wireless devices.

9. We note that one commenter contends that the Commission lacks the statutory authority to adopt a safe harbor.²⁹ However, the record is clear that it is impossible for telemarketers to identify immediately those numbers that have been ported from a wireline service to a wireless service provider.³⁰ Commenters maintain that, absent a limited safe harbor period, telemarketers simply cannot comply with

²² See, e.g., ATA Comments at 4-6; AT&T Comments at 7-9; BellSouth Comments at 2; DMA Comments at 2; SBC Comments at 2.

²³ See Shields Comments at 2.

²⁴ See NASUCA Comments at

²⁵ See Neustar Comments at 2-3. For an overview of Neustar's service, see <http://www.tcpacompliance.com/>.

²⁶ See, e.g., NeuStar Comments at 2; Call Compliance Comments at 1-3.

²⁷ See NASUCA Comments at 4.

²⁸ Verizon Reply Comments at 2.

²⁹ Shields comments at 2 (maintaining that only Congress can create such an exemption).

³⁰ See, e.g., AT&T Reply Comments at 2.

the statute.³¹ The safe harbor is not an “exemption” from the requirements on calls to wireless numbers; it is instead a time period necessary to allow callers to come into compliance with the rules. Otherwise, the statute would “demand the impossible.”³² Even if telemarketers had immediate access to such information (which they do not), several commenters note that some period of time still is necessary to update marketing lists to suppress calls to recently ported wireless numbers.³³ Therefore, we believe this limited safe harbor period is necessary to allow callers to comply with this statutory provision.

10. We decline to adopt a safe harbor period that extends beyond 15 days as suggested by several commenters.³⁴ Although we acknowledge that a 30 or 31-day period would be consistent with the requirements to update additions to the national and company specific lists, and therefore create some administrative efficiencies,³⁵ we believe such considerations are offset by the potential costs and privacy concerns to wireless subscribers that may be charged for receiving telephone solicitations during this extended period.³⁶ We agree with NASUCA that the duration of any such safe harbor period should be limited to the extent that it is technologically reasonable for marketers to obtain the appropriate data to comply with our rules.³⁷ The information provided in this proceeding indicates that a 15-day safe harbor period is a sufficient period of time to ensure that this information will be both available to the industry and can be disseminated to callers in order to comply with our rules.³⁸ For example, Neustar recently made available a service that will provide data on numbers ported from wireline to wireless service on a daily basis.³⁹ In addition, although not publicly available, Call Compliance describes a system that it contends will block telephone calls to wireless numbers, including those that have just been ported from wireline to wireless service.⁴⁰

11. We also decline to extend our safe harbor provision to any call made erroneously or inadvertently to a wireless number regardless of whether that number has been recently ported from wireline service as suggested by the DMA.⁴¹ We note that the Commission considered and declined to adopt a similar proposal in the *2003 TCPA Order*.⁴² We believe that adoption of this proposal is overly broad, unnecessary, and contrary to the intent of Congress. As explained, the safe harbor we adopt here is

³¹ See, e.g., ATA Comments at 3-4; Nextel Reply Comments at 2.

³² See ATA Reply Comments at 3-4 (citing *McNeil v. Time Ins. Co.*, 205 F.3d 179, 187 (5th Cir. 2000) (“It is a flawed and unreasonable construction of any statute to read it in a manner that demands the impossible”)).

³³ See, e.g., Cingular Comments at 3-4; MCI Comments at 9-10; ATA Reply Comments at 4-5.

³⁴ See, e.g., AT&T Comments at 8-9 (suggesting 30 days); BellSouth Comments at 2 (30 days); Cingular Comments at 4 (31 days).

³⁵ See, e.g., ATA Comments at 4-5 (will allow companies to merge scrubbing efforts conducted for WLNP purposes with those for DNC purposes). Data compiled by Neustar and released by the Commission reveal that, since November 24, 2003, there have been 217,000 wireline-to-wireless ports, in comparison to approximately 60 million numbers placed in the national do-not-call registry database. See *Number Portability: Implementation & Progress*, A Report by the Commission’s Wireless Telecommunications Bureau, Wireline Competition Bureau, and Consumer & Governmental Affairs Bureau, May 13, 2004.

³⁶ See, e.g., NASUCA Comments at 3 (wireless customers generally must pay for the minutes used by calls they receive); Shields Comments at 2; Verizon Reply Comments at 2-3.

³⁷ NASUCA at 3.

³⁸ See *supra* n.23.

³⁹ Neustar Comments at 2. See also <http://www.tcpacompliance.com/>.

⁴⁰ Call Compliance Comments at 1-3.

⁴¹ See *DMA Petition* at 4.

⁴² *2003 TCPA Order*, 18 FCC Rcd at 14117-18, para. 172.

for a limited purpose.⁴³ Conversely, the DMA's proposal would establish a safe harbor provision for autodialed or prerecorded calls to any wireless number in a manner equivalent to the safe harbor adopted in the context of the national do-not-call rules.⁴⁴ As the Commission noted in the *2003 TCPA Order*, Congress found that automated or prerecorded telephone calls are a greater nuisance and invasion of privacy than live solicitation calls.⁴⁵ In section 227(b)(1)(A), Congress enacted a strict prohibition on such calls to emergency numbers, health care facilities, and wireless numbers absent the prior express consent of the called party.⁴⁶ Such calls were determined by Congress to threaten public safety and inappropriately shift marketing costs from sellers to consumers.⁴⁷ The Commission has noted that wireless customers are often charged for incoming calls.⁴⁸ Coupled with the fact that autodialers can dial thousands of numbers in a short period of time, such calls can be particularly costly to wireless subscribers.

12. We believe the limited safe harbor provision that we have adopted herein will substantially alleviate the concerns expressed by the DMA and NAA regarding calls made to wireless numbers. Those concerns derive largely from the recent implementation of intermodal LNP and not from difficulties in otherwise complying with the TCPA's restrictions on autodialed or prerecorded message calls to wireless numbers. In the *2003 TCPA Order* released just a few months prior to the implementation of LNP, the record in that proceeding indicated that telemarketing to wireless phones was not a significant problem due to the successful efforts of industry to comply with our rules.⁴⁹ For example, the DMA has created the "Wireless Telephone Suppression Service" that provides a list of approximately 280 million numbers that are currently used or have been set aside for CMRS carriers.⁵⁰ We have no reason to believe that the circumstances regarding calls to wireless numbers have otherwise changed since the Commission reviewed this issue in 2003. To the extent that intermodal LNP has been introduced, we believe the steps taken herein are sufficient to allow callers to comply with our rules while maintaining the privacy interests and cost protections afforded to wireless consumers by the TCPA. We therefore deny requests for a more expansive safe harbor from the prohibition on autodialed or prerecorded messages to wireless numbers than that adopted herein.

13. Finally, we decline to establish a sunset date for this safe harbor provision. We agree with several commenters that the issues associated with real-time access to numbers ported from wireline to wireless service will be ongoing for the foreseeable future.⁵¹ We anticipate, however, that technologies will continue to improve over time to make such information more readily available and, therefore we may revisit this issue at a later date.

B. National Do-Not-Call Registry

14. Consistent with the recent decision of the FTC, we amend our existing safe harbor rule

⁴³ See *supra* para. 10.

⁴⁴ See 47 C.F.R. § 64.1200(c)(2)(i).

⁴⁵ *2003 TCPA Order*, 18 FCC Rcd at 14115, para. 165.

⁴⁶ See 47 U.S.C. § 227(b)(1)(A).

⁴⁷ See S. Rep. No. 102-178 at 5 reprinted in 1991 U.S.C.C.A.N. 1968, 1972-73 (1991) ("The Committee believes that Federal legislation is necessary to protect the public from automated telephone calls. These calls can be an invasion of privacy, an impediment to interstate commerce, and a disruption to essential public safety services.").

⁴⁸ *2003 TCPA Order*, 18 FCC Rcd at 14115, para. 165.

⁴⁹ *2003 TCPA Order*, 18 FCC Rcd at 14117, para. 171.

⁵⁰ *2003 TCPA Order*, 18 FCC Rcd at 14113, para. 163.

⁵¹ See, e.g., BellSouth Comments at 4; Cingular Comments at 4; SBC Comments at 3.

for telemarketers that must comply with the national do-not-call registry to require such telemarketers to access the national do-not-call list and purge registered numbers from their call lists no more than 31 days prior to making a telemarketing call.⁵² Although commenters were divided on this issue, several support this conclusion.⁵³ We believe that this amendment will benefit consumer privacy interests by reducing from three months to 31 days the maximum period in which telemarketers must update their database of numbers registered on the national do-not-call list in order to qualify for the safe harbor protections. We also conclude that this action is consistent with the intent of Congress. As noted above, in the Appropriations Act, Congress directed the FTC to amend its corresponding safe harbor rule in a similar manner. Although the Appropriations Act does not specifically require this Commission to take action, the Do-Not-Call Implementation Act directs the Commission to consult and coordinate with the FTC to “maximize consistency” with the rules promulgated by the FTC.⁵⁴ As the Commission noted in the *2004 Further Notice*, absent action to amend our safe harbor rule as it applies to the national database, many telemarketers will face inconsistent standards because the FTC’s jurisdiction extends only to certain entities, while our jurisdiction extends to all telemarketers.⁵⁵ This would result in substantial confusion for consumers and potentially hinder state and federal regulatory efforts to monitor and enforce the national do-not-call rules.

15. We decline to establish a “grace period” advocated by a few commenters that would require telemarketers to obtain the information from the national do-not-call list every 30 or 31 days, but would not require them to stop calling consumers for some additional period of time.⁵⁶ In so concluding, we agree with the FTC’s determination that there is no support for this suggested approach in the Appropriations Act.⁵⁷ In fact, the legislative history suggests that the sole purpose of shortening the requirement to purge the do-not-call list is to reduce, to one month, the amount of time consumers must wait to see a reduction in unwanted telephone solicitations.⁵⁸ Although the Appropriations Act does not specifically require action by this Commission, for all the reasons discussed above, we believe that our actions should be consistent with those of the FTC and the intent of Congress.

16. We recognize that more frequent updates of the national registry may impose some additional administrative burdens on businesses, including small businesses. We believe, however, that the enhanced consumer privacy protections created by this requirement, taken in conjunction with the regulatory benefits to state and federal governments in establishing consistent requirements on all telemarketers, outweigh any such administrative burdens. We also note that the national do-not-call registry includes a feature whereby businesses that have already downloaded the entire database may thereafter request only a list of changes to their previous list (newly added and removed numbers), rather

⁵² See *Telemarketing Sales Rule*, Final Rule, Federal Trade Commission, 69 Fed. Reg. 16368 (March 29, 2004) (*FTC Order*).

⁵³ See, e.g. ACLI Comments at 1; BellSouth Comments at 4; Cingular Comments at 4; NASUCA Comments at 4-5; Sprint Comments at 3; AT&T Reply Comments at 6.

⁵⁴ Do-Not-Call Implementation Act, Pub. L. No. 108-10, 117 Stat. 557 (2003).

⁵⁵ *2004 Further Notice* at para. 52.

⁵⁶ See, e.g. Countrywide Comments at 4 (suggesting an additional 31 days after updating the list to purge the numbers); MCI Comments at 4 (suggesting 45 day period after obtaining the list to stop calling).

⁵⁷ *FTC Order*, 69 Fed. Reg. at 16370.

⁵⁸ U.S. House of Representatives, 108th Cong., 1st Sess. Conference Report to Accompany H.R. 2637, Report No. 108-401 (November 25, 2003) at 641 (“To improve responsiveness to an individual’s decision to enroll in the Do-Not-Call program, the conference report includes bill language requiring telemarketers who are subject to the Telemarketing Sales Rule to obtain from the Federal Trade Commission the list of telephone numbers on the Do-Not-Call Registry once a month.”).

than downloading the entire database of approximately 60 million numbers every 31 days.⁵⁹ This option should substantially alleviate any burdens imposed on businesses that may result from more frequent update requirements. In addition, at the request of National Automobile Dealers Association (NADA), we clarify that small sellers or telemarketers that register and pay the annual fee to use the national do-not-call database are not required to either conduct an initial or subsequent download of the entire database if they use only the single number lookup feature to screen their outgoing telephone solicitations.⁶⁰ The FTC reached a similar conclusion noting that this decision constitutes no change from the existing rule.⁶¹

17. We agree with several commenters that it may take some time for telemarketers and small businesses to implement procedures to access the national registry on a more frequent basis than previously required under our rules.⁶² In addition, the FTC has indicated that some additional time is required to enable the FTC and the vendor that operates the national do-not-call registry to implement modifications to the registry systems anticipated by the increase in usage resulting from this rule amendment.⁶³ Therefore, consistent with the FTC's determination, we establish January 1, 2005, as the effective date of this rule amendment. We emphasize that nothing we do herein otherwise effects the safe harbor requirements, as set forth in 47 C.F.R. § 64.1200(c)(2)(i), for violations of the national do-not-call rules.⁶⁴

IV. PROCEDURAL MATTERS

A. Final Regulatory Flexibility Analysis

18. Pursuant to the Regulatory Flexibility Act of 1980, as amended (RFA),⁶⁵ the Commission's Final Regulatory Flexibility Analysis is attached as Appendix B.

B. Paperwork Reduction Act Analysis

19. This document contains modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. It will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the modified information collection requirements contained in this proceeding. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4), we have assessed the effects of amending the safe harbor provisions for the national do-not-call registry to require telemarketers to access the registry every 31 days, and find that there may be an increased administrative burden on businesses with fewer than 25 employees. However, since this action is consistent with the Federal Trade Commission's recent rule, we believe small businesses subject to the jurisdiction of both agencies will also benefit from

⁵⁹ *See FTC Order*, 69 Fed. Reg. at 16372.

⁶⁰ NADA Comments at 4-5.

⁶¹ *FTC Order*, 69 Fed. Reg. at 16372.

⁶² *See, e.g.*, ATA Comments at 9-10; AT&T Comments at 11; NADA Comments at 5.

⁶³ *FTC Order*, 69 Fed. Reg. at 16371. The FTC notes that the national database is currently updated and available for access by telemarketers on a daily basis. *Id.* at 16368.

⁶⁴ Thus, while sellers and telemarketers are not required to conduct a physical download of the entire registry to be in compliance with the rules, they must nevertheless maintain and record a list of telephone numbers obtained using the single number lookup feature that the seller may not contact and document the process, in order to benefit from the safe harbor provision. *See* NADA Comments at 4-5.

⁶⁵ *See* 5 U.S.C. §§ 601 *et seq.*

consistent requirements. In addition, the national do-not-call registry allows telemarketers that have already downloaded the entire database to request only those changes to their previous list, which should substantially alleviate any burdens imposed on businesses with fewer than 25 employees to update their call lists on a more frequent basis.

C. Congressional Review Act

20. The Commission will send a copy of this *Order* in a report to be sent to Congress and the General Accounting Office pursuant to the Congressional Review Act, see 5 U.S.C. 801(a)(1)(A).

D. Materials in Accessible Formats

21. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at (202) 418-0530 (voice) or (202) 418-0432 (TTY). This Order can also be downloaded in Word and Portable Document Format (PDF) at <http://www.fcc.gov/cgb/policy/telemarketing.html>.

V. ORDERING CLAUSES

22. Accordingly, IT IS ORDERED that, pursuant to the authority contained in 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 47 C.F.R. § 64.1200 of the Commission's rules, and the Do-Not-Call Implementation Act, Pub. L. No. 108-10, 117 Stat. 557, this Order in CG Docket No. 02-278 IS ADOPTED, and Part 64 of the Commission's rules, 47 C.F.R. § 64.1200 is amended as set forth in Appendix A. As discussed herein, the amended rule at 47 C.F.R. § 64.1200(c)(2)(i)(D) will become effective January 1, 2005.

23. IT IS FURTHER ORDERED that the Petition for Declaratory Ruling filed by the Direct Marketing Association and Newspaper Association of America on January 29, 2004, is DENIED to the extent discussed herein.

24. IT IS FURTHER ORDERED that the Commission's Consumer & Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

Appendix A**Final Rules**

Part 64 of the Code of Federal Regulations is amended as follows:

PART 64 – MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

1. Authority: 47 U.S.C. § 227.

* * * * *

2. Section 64.1200(a)(iv) is added as follows:

(iv) A person will not be liable for violating the prohibition in paragraph (a)(1)(iii) when the call is placed to a wireless number that has been ported from wireline service and such call is (A) a voice call; (B) not knowingly made to a wireless number; and (C) made within 15 days of the porting of the number from wireline to wireless service, provided the number is not already on the national do-not-call registry or caller's company-specific do-not-call list.

* * * * *

3. Section 64.1200(c)(2)(i)(D) is revised to read as follows:

(D) Accessing the national do-not-call database. It uses a process to prevent telephone solicitations to any telephone number on any list established pursuant to the do-not-call rules, employing a version of the national do-not-call registry obtained from the administrator of the registry no more than 31 days prior to the date any call is made, and maintains records documenting this process; and

* * * * *

4. Section 64.1200 is revised to read as follows:

Note to paragraph (c)(2)(i)(D):

The requirement in paragraph 64.1200(c)(2)(i)(D) for persons or entities to employ a version of the national do-not-call registry obtained from the administrator no more than 31 days prior to the date any call is made is effective January 1, 2005. Until January 1, 2005, persons or entities must continue to employ a version of the registry obtained from the administrator of the registry no more than three months prior to the date any call is made.

Appendix B

Final Regulatory Flexibility Analysis

25. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),⁶⁶ an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking⁶⁷ (2004 Further Notice) released by the Federal Communications Commission (Commission) on March 19, 2004. The Commission sought written public comments on the proposals contained in the 2004 Further Notice, including comments on the IRFA. None of the comments filed in this proceeding were specifically identified as comments addressing the IRFA; however, comments that address the impact of the proposed rules and policies on small entities are discussed below. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.⁶⁸

A. Need for, and Objectives of, the Order

26. The Telephone Consumer Protection Act (TCPA)⁶⁹ was enacted to address certain telemarketing practices, including calls to wireless telephone numbers, which Congress found to be an invasion of consumer privacy and even a risk to public safety.⁷⁰ The TCPA specifically prohibits calls using an autodialer or artificial or prerecorded message “to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other common carrier service, or any service for which the called party is charged.”⁷¹ In addition, the TCPA required the Commission to “initiate a rulemaking proceeding concerning the need to protect residential telephone subscribers’ privacy rights” and to consider several methods to accommodate telephone subscribers who do not wish to receive unsolicited advertisements.⁷²

27. In 2003, the Commission released a Report and Order (2003 TCPA Order) revising the TCPA rules to respond to changes in the marketplace for telemarketing.⁷³ Specifically, we established in conjunction with the Federal Trade Commission (FTC) a national do-not-call registry for consumers who wish to avoid unwanted telemarketing calls. The national do-not-call registry supplements long-standing company-specific rules which require companies to maintain lists of consumers who have directed the company not to contact them. In addition, we determined that the TCPA prohibits *any call* using an automatic telephone dialing system or an artificial or prerecorded message to any wireless telephone number.⁷⁴ We concluded that this encompasses both voice calls and text calls to wireless numbers

⁶⁶ See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (*SBREFA*), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

⁶⁷ *Rules and Regulations Implementing the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003; Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 04-53, CG Docket No. 02-278, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking (rel. March 19, 2004) (*2004 TCPA Further Notice*).

⁶⁸ See 5 U.S.C. § 604.

⁶⁹ Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991), *codified at* 47 U.S.C. § 227. The TCPA amended Title II of the Communications Act of 1934, 47 U.S.C. §§ 201 *et seq.*

⁷⁰ See *TCPA*, Section 2(5), *reprinted in* 7 FCC Rcd 2736 at 2744.

⁷¹ 47 U.S.C. § 227(b)(1)(A)(iii).

⁷² 47 U.S.C. § 227(c)(1)-(4).

⁷³ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014 (2003) (*2003 TCPA Order*).

⁷⁴ *2003 TCPA Order*, 18 FCC Rcd at 14115, para. 165.

including, for example, Short Message Service calls.⁷⁵ We acknowledged in the 2003 TCPA Order that, beginning in November of 2003, numbers previously used for wireline service could be ported to wireless service providers and that telemarketers will need to take the steps necessary to identify these numbers.⁷⁶ Intermodal local number portability (LNP) went into effect November, 2003. We now modify the Commission's rules to establish a limited safe harbor period in which persons will not be liable for placing autodialed or artificial or prerecorded message calls to numbers ported from wireline to wireless service within the previous 15 days.⁷⁷

28. The 2003 TCPA Order also required that telemarketers use the national do-not-call registry maintained by the FTC to identify consumers who have requested not to receive telemarketing calls. In order to avail themselves of the safe harbor for telemarketers, a telemarketer was required to update or "scrub" its call list against the national do-not-call registry every 90 days. Recently the FTC amended its safe-harbor provision to require telemarketers to scrub their call lists every 31 days.⁷⁸ We now modify the Commission's rules to parallel changes to the FTC's rules. With this amendment, all telemarketers are required to scrub their lists against the national do-not-call registry every 31 days in order to avail themselves of that safe harbor.⁷⁹

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

29. There were no comments raised that specifically addressed the proposed rules and policies presented in the IRFA. Nonetheless, the agency considered the potential impact of the rules proposed in the IRFA on small entities and attempted, to the extent possible, to reduce the economic impact of the rules enacted herein on such entities. Comments to the 2004 Further Notice fell into two categories. The first category includes those comments on the safe harbor provision for calls to wireless numbers; the second category includes comments regarding the safe harbor provision for the national do-not-call list. These two categories of comments are discussed in the Order, paragraphs 7-11 and paragraphs 12-15, respectively.

30. Two comments were filed that specifically mentioned small businesses – Montalvan and the National Automobile Dealers Association (NADA). Montalvan commented on the unreasonableness of asking small businesses to scrub lists on a monthly basis.⁸⁰ NADA filed comments urging the Commission not to adopt the proposed amendment requiring businesses to download the do-not-call list monthly instead of quarterly.⁸¹ NADA claims that any benefit to maintaining consistency between the FTC and the Commission is outweighed by the burden on small businesses caused by the scrubbing of call lists three times more often.⁸² In addition, NADA seeks clarification that the use of the single number lookup feature constitutes compliance with the requirement that businesses check the do-not-call list every 31 days.⁸³ Lastly, NADA argues that small businesses need "adequate time to comply with the

⁷⁵ See *2003 TCPA Order*, 18 FCC Rcd at 14115, para. 165.

⁷⁶ *2003 TCPA Order*, 18 FCC Rcd at 14117, para. 170.

⁷⁷ See *Order*, *supra* paras. 7-11.

⁷⁸ See *Telemarketing Sales Rule*, Notice of Proposed Rulemaking, Federal Trade Commission, 69 Fed. Reg. 7330 (February 13, 2004).

⁷⁹ See *Order*, *supra* paras. 12-15.

⁸⁰ Montalvan Comments.

⁸¹ NADA Comments at 1.

⁸² NADA Comments at 2, 3.

⁸³ NADA Comments at 4.

monthly download requirement.”⁸⁴ And, NADA seeks an effective date no earlier than January 1, 2005 or six months after publication in the Federal Register, whichever is later.⁸⁵

C. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply

31. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the rules adopted herein.⁸⁶ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”⁸⁷ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.⁸⁸ Under the Small Business Act, a “small business concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.⁸⁹

32. The Commission’s rules on telephone solicitation and the use of autodialers and artificial or prerecorded messages apply to a wide range of entities, including all entities that use the telephone to advertise.⁹⁰ That is, our action affects any entity that uses an autodialer or prerecorded message to make telephone calls and the myriad of businesses throughout the nation that use telemarketing to advertise their goods or services. For instance, funeral homes, mortgage brokers, automobile dealers, newspapers, and telecommunications companies could all be affected. Thus, we expect that the rules adopted in this proceeding could have a significant economic impact on a substantial number of small entities.

33. **Small Businesses.** Nationwide, there are a total of 22.4 million small businesses, according to SBA data.⁹¹

34. **Small Organizations.** As of 1992, nationwide there were approximately 275,801 small organizations [not-for-profit].⁹²

35. **Telemarketers.** Again, we note that our action affects an exhaustive list of business types. We will mention with particularity the intermediary groups that engage in this activity. SBA has determined that “telemarketing bureaus” with \$6 million or less in annual receipts qualify as small businesses.⁹³ For 1997, there were 1,727 firms in the “telemarketing bureau” category, total, which

⁸⁴ NADA Comments at 5.

⁸⁵ NADA Comments at 5.

⁸⁶ 5 U.S.C. § 604(a)(3).

⁸⁷ 5 U.S.C. § 601(6).

⁸⁸ 5 U.S.C. § 601(3) (incorporating by reference the definition of “small-business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

⁸⁹ 15 U.S.C. § 632.

⁹⁰ 47 C.F.R. § 64.1200.

⁹¹ See SBA, Programs and Services, SBA Pamphlet No. CO-0028, at page 40 (July 2002).

⁹² 1992 Economic Census, U.S. Bureau of the Census, Table 6 (special tabulation of data under contract to Office of Advocacy of the U.S. Small Business Administration).

⁹³ See 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 561422.

operated for the entire year.⁹⁴ Of this total, 1,536 reported annual receipts of less than \$5 million, and an additional 77 reported receipts of \$5 million to \$9,999,999.⁹⁵ Therefore, the majority of such firms can be considered to be small businesses.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

36. The revision to the safe harbor rules that require telemarketers to update their lists monthly instead of quarterly, carries no additional compliance costs for accessing the national do-not-call registry, because once a telemarketer has paid its fee to the FTC the telemarketer may access the list as often as it wants, up to once a day. There may, however, be an increase in costs associated with scrubbing the telemarketer's call list more frequently. Increased costs might be caused by a decrease in staff efficiency because staff will be required to scrub the call list monthly instead of quarterly or by increased payments to a third party for "scrubbing" services. We note in the Order, however, that the national do-not-call registry includes a feature whereby businesses that have already downloaded the entire database may thereafter request only a list of changes to their previous list (containing newly added and removed numbers), rather than downloading the entire database of approximately 60 million numbers every 31 days.⁹⁶ This feature should substantially alleviate any burdens imposed on small businesses that may result from more frequent update requirements by minimizing for small businesses the cost of updating the list each time they must do so. In addition, at the request of NADA, we clarify that small sellers or telemarketers that register and pay the annual fee to use the national do-not-call database are not required to either conduct an initial or subsequent download of the entire database if they use only the single number lookup feature to screen their outgoing telephone solicitations.⁹⁷ In conclusion, we believe that the enhanced consumer privacy protections derived from reducing from three months to 31 days the maximum period in which telemarketers must update their call lists using the do-not-call list, taken in conjunction with the regulatory benefits to state and federal governments and consumers in establishing consistent requirements for all telemarketers, outweigh the administrative burdens associated with this increase in compliance requirements.

E. Steps Taken to Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered

37. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in developing its approach, which may include the following four alternatives (among others): "(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities."⁹⁸

38. First, the TCPA specifically prohibits calls using an autodialer or artificial or prerecorded

⁹⁴ U.S. Census Bureau, 1997 Economic Census, Subject Series: "Administrative and Support and Waste Management and Remediation Services," Table 4, Receipts Size of Firms Subject to Federal Income Tax: 1997, NAICS code 561422 (issued October 2000).

⁹⁵ U.S. Census Bureau, 1997 Economic Census, Subject Series: "Administrative and Support and Waste Management and Remediation Services," Table 4, Receipts Size of Firms Subject to Federal Income Tax: 1997, NAICS code 561422 (issued October 2000).

⁹⁶ See Order, *supra* at para. 14, citing *FTC Order*, 69 Fed. Reg. at 16372.

⁹⁷ NADA Comments at 4-5.

⁹⁸ 5 U.S.C. § 603(c)(1) – (c)(4).

message to any wireless telephone number.⁹⁹ With the advent of intermodal number portability it became important for companies engaged in telemarketing to track ported numbers in order to ensure continued compliance with the TCPA. The Commission is now adopting a limited safe harbor for autodialed and prerecorded message calls to wireless numbers that were ported within 15 days from a wireline service to a wireless service provider.¹⁰⁰ It is our belief that this 15-day safe harbor period will provide a reasonable opportunity for small businesses to identify numbers that have been ported and to comply with the rules. In addition, we believe that the creation of this safe harbor will not have a significant economic impact on any small businesses, only a benefit.

39. One alternative we considered was not to adopt a safe harbor. That alternative could make compliance with the TCPA's prohibition almost impossible for small businesses using autodialers and prerecorded messages. The majority of commenters support the adoption of a safe harbor,¹⁰¹ although most request a minimum of 30 days.¹⁰² In our view, 30 days places too much of a burden on consumers, who may be subjected to calls to their wireless phones for which they must pay for up to a month's time. This is an inappropriate shifting of the costs of advertising from businesses, including small businesses, to wireless subscribers. We believe that the creation of a limited safe harbor period of 15 days balances the needs of small businesses against the needs of wireless customers. Furthermore, we do not believe that consumer privacy interests will be negatively impacted by our decision, in part because consumers may continue to avail themselves of the national and company-specific do-not-call lists.

40. Second, as indicated in Section D of the FRFA, the Commission has modified the TCPA safe-harbor provision. This modification requires that telemarketers scrub their lists on a monthly, rather than a quarterly basis. One alternative considered by the Commission was to leave the safe harbor unchanged. The advantage to such an alternative was that there would have been no increased burden on small businesses. Businesses would continue to download numbers from the national do-not-call registry and scrub their own call lists of those numbers every three months. The disadvantage in maintaining the status quo would have been that the FTC and Commission rules would be inconsistent, contrary to Congress' directive in the Do-Not-Call Implementation Act. Small businesses subject to the jurisdiction of both agencies would have been faced with this inconsistency. We believe that it is easier and less burdensome for small businesses if the two agencies have consistent requirements.

41. Several commenters stated that it may take some time for telemarketers and small businesses to implement procedures before they can access the national registry on a monthly basis.¹⁰³ In addition, the FTC has indicated that some additional time is required to enable the FTC and the vendor that operates the national do-not-call registry to implement modifications to the registry systems anticipated by the increase in usage resulting from this rule amendment.¹⁰⁴ For both these reasons, we establish January 1, 2005, as the effective date of this rule amendment.¹⁰⁵ This additional period will provide telemarketers and small businesses more time to modify their procedures to accommodate these

⁹⁹ See *2004 TCPA Further Notice* at para. 43.

¹⁰⁰ See *Order*, *supra* paras. 7-11.

¹⁰¹ See, e.g., ATA Comments at 1-2; AT&T Comments 1; BellSouth Comments at 2; Cingular Comments at 1; Countrywide Comments at 6; DMA Comments at 2; MCI Comments at 2; SBC Comments at 1.

¹⁰² See, e.g., AT&T Comments 7-9; BellSouth Comments at 2; DMA Comments at 3; SBC Comments at 2. See also MCI Comments at 10 (requesting a "reasonable" time).

¹⁰³ See, e.g., ATA Comments at 9-10; AT&T Comments at 11; NADA Comments at 5.

¹⁰⁴ *FTC Order*, 69 Fed. Reg. at 16371. The FTC notes that the national database is currently updated and available for access by telemarketers on a daily basis. *Id.* at 16368.

¹⁰⁵ *Order*, *supra* para. 15.

changes.

42. **REPORT TO CONGRESS:** The Commission will send a copy of the Order, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act.¹⁰⁶ In addition, the Commission will send a copy of the Order, including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the Order and FRFA (or summaries thereof) will also be published in the Federal Register.¹⁰⁷

¹⁰⁶ See 5 U.S.C. § 801(a)(1)(A).

¹⁰⁷ See 5 U.S.C. § 604(b).