

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 )

**NOTICE OF PROPOSED RULEMAKING**

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**Reply Comment Date: (30 days after Comment Date).**

By the Commission: Chairman Genachowski and Commissioners Copps, McDowell, Clyburn, and Baker issuing separate statements.

**TABLE OF CONTENTS**

Heading	Paragraph #
I. INTRODUCTION.....	1
II. BACKGROUND.....	4
A. The Telephone Consumer Protection Act of 1991 (47 U.S.C. § 227); FCC Regulations (47 C.F.R. §§ 64.1200, <i>et seq.</i> ).....	4
B. The Telemarketing Consumer Fraud and Abuse Prevention Act (15 U.S.C. §§ 6101-6108); FTC Telemarketing Sales Rule (16 C.F.R. Part 310).....	8
C. The Do Not Call Implementation Act (15 U.S.C. §§ 6101-6108); Coordination Between the FTC and the FCC.....	12
III. DISCUSSION.....	13
A. Prerecorded Message Calls.....	13
1. Written Consent Requirement.....	13
2. Exemption for Prerecorded Telemarketing Calls to Established Business Relationship Customers.....	24
3. Exemption for Health Care Related Calls Subject to HIPAA.....	33
4. Opt-Out Mechanism.....	37
B. Abandoned Calls/Predictive Dialers.....	44
C. Implementation Issues.....	48
IV. PROCEDURAL MATTERS.....	49
A. <i>Ex Parte</i> Presentations.....	49
B. Filing of Comments and Reply Comments.....	50
C. Initial Regulatory Flexibility Analysis.....	52
D. Paperwork Reduction Act.....	53
V. ORDERING CLAUSE.....	54
APPENDIX A - Draft Proposed Rules for Public Comment	
APPENDIX B - Initial Regulatory Flexibility Analysis	

## I. INTRODUCTION

1. In this Notice of Proposed Rulemaking (Notice or NPRM), we invite comment on proposed revisions to our rules under the Telephone Consumer Protection Act (TCPA)<sup>1</sup> that would harmonize those rules with the Federal Trade Commission's (FTC's) recently amended Telemarketing Sales Rule.<sup>2</sup> As amended, the Telemarketing Sales Rule differs in certain respects from the Commission's TCPA rules regarding prerecorded telemarketing calls (also known as "robocalls") and other telemarketing practices. Because the majority of entities that use prerecorded telemarketing calls are subject to both agencies' telemarketing regulations, most regulated entities must comply with the FTC's more restrictive standards.<sup>3</sup> However, entities under the sole jurisdiction of the Commission – such as common carriers (including telephone companies and airlines), banks, and insurance companies – are subject to less restrictive standards.<sup>4</sup>

2. In an effort to remove certain differences in the treatment of entities that operate outside of the FTC's jurisdiction, and to further empower residential telephone subscribers to avoid receiving telephone solicitations to which they object, we seek comment on whether we should conform our TCPA rules to the FTC's Telemarketing Sales Rule by taking the following steps: (1) requiring sellers and telemarketers to obtain telephone subscribers' express written consent (including electronic methods of consent) to receive prerecorded telemarketing calls even when there exists an established business relationship between the caller and the consumer; (2) exempting certain federally regulated healthcare-related calls from the general prohibition on prerecorded telemarketing calls to residential telephone lines; (3) requiring that prerecorded telemarketing calls include an automated, interactive mechanism by which a consumer may "opt out" of receiving future prerecorded messages from a seller or telemarketer; and (4) adopting a "per campaign" standard for measuring the maximum percentage of live telemarketing sales calls that a telemarketer lawfully may drop or "abandon" as a result of the use of automated dialing software or other automated dialing equipment. We seek comment on whether these proposed revisions would benefit consumers and industry by creating greater symmetry between the two agencies' regulations, and by extending the FTC's standards to regulated entities that are not currently subject to the FTC's rules.

3. We note that the rule revisions proposed herein would make no changes with respect to categories of prerecorded message calls that are not covered by our TCPA rules. Those categories include calls by or on behalf of tax-exempt non-profit organizations; calls for political purposes, including political polling calls and other calls made by politicians or political campaigns; and calls for other noncommercial purposes, including those that deliver purely "informational" messages – for example, prerecorded calls that notify recipients of a workplace or school closing.<sup>5</sup> In addition, because the TCPA's restrictions on prerecorded messages do not apply to calls initiated for emergency purposes, the proposed rule revisions would not affect messages sent to consumers to alert them to emergency

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<sup>1</sup> TCPA, Pub. L. No. 102-243, 105 Stat. 2394 (1991), codified at 47 U.S.C. § 227.

<sup>2</sup> See *Telemarketing Sales Rule, Final Rule*, Federal Trade Commission, 73 Fed. Reg. 51164-01 (2008) (*2008 Final Rule Amendments*); see also <http://www.ftc.gov/os/fedreg/2008/august/080829tsr.pdf>.

<sup>3</sup> Under the Commission's rules, the term *telemarketing* means 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. 47 C.F.R. § 64.1200(f)(10).

<sup>4</sup> In addition, whereas the FTC's Telemarketing Sales Rule applies only to *interstate* telemarketing calls, the TCPA authorizes the Commission to apply its telemarketing rules to *intrastate*, as well as *interstate*, telemarketing calls. See *infra* Sections II.A, B.

<sup>5</sup> See *infra* note 63.

situations, including, for example, emergency messages permitted by the WARN Act<sup>6</sup> and/or the Commercial Mobile Alert System (CMAS).<sup>7</sup>

## II. BACKGROUND

### A. The Telephone Consumer Protection Act of 1991 (47 U.S.C. § 227); FCC Regulations (47 C.F.R. §§ 64.1200, *et seq.*)

4. *Overview and Scope of Coverage.* The TCPA imposes restrictions on the use of the telephone network for unsolicited advertising by telephone and facsimile.<sup>8</sup> The scope of the Commission's authority under the TCPA is broad and extends to any person who engages in marketing activities covered by the TCPA.<sup>9</sup> In addition, the TCPA, by amending section 2(b) of the Communications Act, augments the Commission's traditional *interstate* authority by specifically authorizing it to apply the TCPA's restrictions to *intrastate* telemarketing activities as well.<sup>10</sup>

5. *The National Do-Not-Call Registry: Restrictions on Live Telephone Solicitations (47 U.S.C. § 227(c)).* The TCPA directs the Commission to adopt rules "to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object."<sup>11</sup> The Commission first adopted rules implementing the TCPA in 1992.<sup>12</sup> In the *1992 TCPA Order*, the Commission established company-specific "do-not-call" requirements, under which each company engaged in telephone solicitation was made responsible for maintaining a list of residential telephone subscribers who had asked not to be called by that company.<sup>13</sup> Citing "widespread consumer dissatisfaction" with the effectiveness of the company-specific rules and ever-increasing numbers of telemarketing calls, the Commission revised its TCPA rules in 2003 to establish a national do-not-call registry and to prohibit telemarketers from contacting a residential subscriber whose telephone number appears on the national do-not-call list, unless the call is subject to a recognized exemption.<sup>14</sup>

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<sup>6</sup> See Warning, Alert and Response Network ("WARN") Act, Title VI of the Security and Accountability for Every Port Act of 2006, Pub. L. No. 109-347, 120 Stat. 1884 (2006).

<sup>7</sup> See 47 C.F.R. Part 10 (Commission's CMAS rules).

<sup>8</sup> 47 U.S.C. § 227.

<sup>9</sup> *Id.*

<sup>10</sup> TCPA, Pub. L. No. 102-243, § 3(b) (amending section 2(b) of the Communications Act). Section 2(b) generally provides that nothing in the Communications Act "shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier." 47 U.S.C. § 152(b). It also includes a list of express exceptions to the general bar on the Commission's jurisdiction over intrastate communications. The TCPA conforming amendment adds section 227 to this list of exceptions. As revised by the conforming amendment, section 2(b) provides in relevant part: "Except as provided in sections 223 through 227, inclusive, and section 332, and subject to the provisions of section 301 and title VI, nothing in this Act shall be construed to apply or to give the Commission jurisdiction" with respect to intrastate communications. *Id.*, § 152(b) (section 2(b) of the Communications Act as amended by section 3(b) of the TCPA).

<sup>11</sup> 47 U.S.C. § 227(c).

<sup>12</sup> *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*).

<sup>13</sup> *1992 TCPA Order*, 7 FCC Rcd at 8761-62, paras. 23-24.

<sup>14</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 18 FCC Rcd 14014 (2003) (*2003 TCPA Order*). See also 47 C.F.R. § 64.1200(c)(2), (f)(9).

The national do-not-call registry, which went into effect on October 1, 2003, is jointly administered by this Commission and by the FTC.

6. *TCPA Restrictions on the Use of Automated Telephone Equipment, Including Prerecorded Messages (47 U.S.C. § 227(b))*. A separate section of the TCPA regulates the use of automated telephone equipment.<sup>15</sup> One provision, codified in subsection 227(b)(1)(B), makes it unlawful to place a non-emergency telephone call to a residential line “using an artificial or prerecorded voice” without the recipient’s “prior express consent” unless the call is “exempted by rule or order of the Commission under paragraph (2)(B).”<sup>16</sup> Paragraph (2)(B), in turn, authorizes the Commission to enact limited exemptions from this ban, including exemptions for calls “that are not made for a commercial purpose” and for commercial calls that the Commission has determined will not adversely affect the privacy rights of the called party and that do not transmit an unsolicited advertisement.<sup>17</sup> Under this authority, the Commission has exempted from the prohibition on prerecorded message calls to residences, among others, calls to a party with whom the caller has an established business relationship.<sup>18</sup>

7. Another TCPA provision, codified in subsection 227(b)(1)(A), prohibits certain additional categories of automated calls absent an emergency or the “prior express consent” of the called party.<sup>19</sup> This provision prohibits the use of automatic telephone dialing systems (autodialers) or artificial or prerecorded messages when calling: emergency telephone lines, health care facilities, telephone numbers assigned to wireless services, and services for which the called party is charged for the call.<sup>20</sup> In the *2003 TCPA Order*, the Commission noted that Congress prohibited the use of automated equipment with respect to these particular categories of calls because such practices were determined “to threaten public safety and inappropriately shift marketing costs from sellers to consumers.”<sup>21</sup> Paragraph 2(C) authorizes the Commission to exempt from this provision calls to a number assigned to a wireless service that are not charged to the called party subject to conditions necessary to protect consumers’ privacy rights.<sup>22</sup>

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<sup>15</sup> 47 U.S.C. § 227(b).

<sup>16</sup> 47 U.S.C. § 227(b)(1)(B). Subsection 227(b)(1)(B) provides in relevant part:

It shall be unlawful for any person within the United States or any person outside the United States if the recipient is within the United States - (B) to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the Commission under paragraph (2)(B)[.]

*Id.* See also 47 C.F.R. § 64.1200(a)(2).

<sup>17</sup> 47 U.S.C. § 227(b)(2)(B).

<sup>18</sup> 47 C.F.R. § 64.1200(a)(2). The FCC has also codified exemptions for non-commercial calls; commercial calls that do not include an unsolicited advertisement or constitute a telephone solicitation; and calls by or on behalf of tax-exempt nonprofit organizations. *Id.*

<sup>19</sup> 47 U.S.C. § 227(b)(1)(A).

<sup>20</sup> 47 U.S.C. § 227(b)(1)(A). See also 47 C.F.R. § 64.1200(a)(1). Under the TCPA, the term “automatic telephone dialing system” means “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.” 47 U.S.C. § 227(a)(1).

<sup>21</sup> *2003 TCPA Order*, 18 FCC Rcd at 14092, para. 133.

<sup>22</sup> 47 U.S.C. § 227(b)(2)(C). The Commission has declined to carve out any exemptions from this provision.

**B. The Telemarketing Consumer Fraud and Abuse Prevention Act (15 U.S.C. §§ 6101-6108); FTC Telemarketing Sales Rule (16 C.F.R. Part 310)**

8. *Overview and Scope of Coverage.* The FTC has authority under the Telemarketing Consumer Fraud and Abuse Prevention Act (Telemarketing Act) to adopt rules prohibiting deceptive and abusive telemarketing acts or practices, including “unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer’s right to privacy.”<sup>23</sup> The body of regulations adopted by the FTC to implement the Telemarketing Act is known as the Telemarketing Sales Rule.<sup>24</sup>

9. The scope of the FTC’s authority to regulate telemarketing activities is more limited than the Commission’s. For example, three types of entities are specifically exempt from the FTC’s jurisdiction, and therefore are not covered by the Telemarketing Sales Rule: 1) banks, federal credit unions, and federal savings and loans; 2) common carriers (such as telephone companies and airlines) when engaged in common carrier activity; and 3) non-profit organizations.<sup>25</sup> Another jurisdictional limitation is imposed by the McCarran-Ferguson Act, which provides that “the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by state law.”<sup>26</sup> Finally, the FTC’s rules only apply to *interstate* telemarketing calls.<sup>27</sup>

10. *The Telemarketing Sales Rule.* The original Telemarketing Sales Rule, as promulgated in 1995, established company-specific do-not-call requirements that, like the Commission’s 1992 rules, prohibited a telemarketer from placing telemarketing calls to persons who had previously requested not to receive sales calls from that company.<sup>28</sup> In 2003, the FTC amended the Telemarketing Sales Rule by, among other things, establishing the national do-not-call registry, making for-profit telemarketers who solicit charitable contributions on behalf of charities subject to company-specific do-not-call requirements, and prohibiting telemarketers from abandoning more than three percent of outbound telemarketing calls (subject to a safe harbor provision).<sup>29</sup>

11. *2008 Amendments to the Telemarketing Sales Rule.* On August 19, 2008, the FTC issued revisions to its Telemarketing Sales Rule regarding the permissibility of prerecorded telemarketing messages.<sup>30</sup> In adopting these revisions, the FTC determined that it is an abusive telemarketing act or practice for a seller or telemarketer to initiate an outbound telephone call that delivers a prerecorded telemarketing message unless, among other things, the seller has previously obtained the recipient's signed, written agreement to receive such calls.<sup>31</sup> The FTC also announced that prerecorded

<sup>23</sup> 15 U.S.C. §§ 6101– 08 (Telemarketing and Consumer Fraud and Abuse Prevention Act).

<sup>24</sup> 16 C.F.R. § 310.1, *et seq.* (FTC implementing regulations).

<sup>25</sup> 15 U.S.C. § 45(a)(2).

<sup>26</sup> 15 U.S.C. § 1012(b).

<sup>27</sup> 15 U.S.C. § 6106(4) (defining “telemarketing” as “a plan, program, or campaign which is conducted to induce purchases of goods or services, or a charitable contribution, donation, or gift of money or any other thing of value, by use of one or more telephones and which involves more than one *interstate* telephone call”) (emphasis added).

<sup>28</sup> *Telemarketing Sales Rule, Final Rule*, Federal Trade Commission, 60 Fed. Reg. 43842 (Aug. 23, 1995).

<sup>29</sup> *Telemarketing Sales Rule, Final Rule*, Federal Trade Commission, 68 Fed. Reg. 4580 (Jan. 29, 2003).

<sup>30</sup> *2008 Final Rule Amendments*, 73 Fed. Reg. 51164.

<sup>31</sup> *Id.*, 73 Fed. Reg. at 51165. Among the more than 13,000 comments supporting more restrictive rules governing prerecorded telemarketing calls, the FTC identified four general themes: (1) Sellers’ and telemarketers’ self interest in retaining established customers is not enough to prevent abuse through excessive pre-recorded message telemarketing; (2) Prerecorded message calls are coercive and abusive invasions of consumer privacy; (3)

(continued....)



telemarketing calls must include an automated, interactive mechanism by which a consumer may “opt out” of receiving future prerecorded messages from the seller or telemarketer.<sup>32</sup> Finally, the FTC announced a technical amendment modifying the method by which it calculates the three percent “call abandonment rate.”<sup>33</sup> In acknowledging the differences between the FTC’s amended rule and the Commission’s TCPA rules governing prerecorded telemarketing calls, the FTC indicated that because there is no actual conflict between the two sets of rules, entities subject to the regulatory authority of both agencies need only comply with the FTC’s more restrictive requirements in order to ensure compliance with both agencies’ regulations.<sup>34</sup>

### C. The Do Not Call Implementation Act (15 U.S.C. §§ 6101-6108); Coordination Between the FTC and the FCC

12. Coordination between the FTC and the FCC on the do-not-call registry was mandated by Congress in 2003 through the Do-Not-Call Implementation Act (DNCIA).<sup>35</sup> The DNCIA provided that “the Federal Communications Commission shall consult and coordinate with the Federal Trade Commission to maximize consistency with the rule promulgated by the Federal Trade Commission” in 2002.<sup>36</sup> Although each agency’s regulations are the product of distinct statutory mandates, the agencies have, for the most part, created consistent and complementary regulatory schemes.<sup>37</sup> There is also a Memorandum of Understanding between the FCC and FTC on enforcement of the agencies’ telemarketing rules to avoid unnecessary duplication of enforcement efforts.<sup>38</sup>

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(continued from previous....)

Prerecorded messages impose costs and burdens on consumers; and (4) Opt-out (as opposed to prior express consent) approaches may not adequately protect consumers. *Id.* at 51166.

<sup>32</sup> *Id.*, 73 Fed. Reg. at 51166.

<sup>33</sup> *Id.*, 73 Fed. Reg. at 51195-51200.

<sup>34</sup> *Id.*, 73 Fed. Reg. at 51172, n. 104 (citing *Telemarketing Sales Rule, Denial and Revised Proposed Rule*, Federal Trade Commission, 71 Fed. Reg. 58716 (Oct. 4, 2006), at 58719-20 & 58724-25 (stating that there may be a need to conform its rule to the Commission’s “if the two sets of regulations were so contradictory that they imposed inconsistent obligations on sellers and telemarketers, but that is not the case here, where compliance with the more restrictive requirements of the TSR does not violate the FCC regulations”).

<sup>35</sup> Do-Not-Call Implementation Act, Public Law No. 108-10, 117 Stat. 557 (2003), *codified at* 15 U.S.C. § 6101.

<sup>36</sup> *Id.* Section 4 of the DNCIA required, among other things, that within 45 days after the promulgation of final revised TCPA regulations by the Commission in 2003, the Commission and the FTC each transmit to the House Committee on Energy and Commerce and the Senate Committee on Commerce, Science, and Transportation a report to include: analyses of the telemarketing rules promulgated by the Commission and the FTC; a discussion of inconsistencies between the rules promulgated by the Commission and the FTC; a discussion of the effect of any inconsistencies on consumers, and persons paying for access to the national do-not-call registry; and proposals to remedy any such inconsistencies. The DNCIA also required the Commission and the FTC each to transmit an annual report to Congress on the status of the national “do-not-call” registry for each of fiscal years 2003 through 2007. *See* 15 U.S.C. § 6101.

<sup>37</sup> *See Report To Congress Pursuant To The Do Not Call Implementation Act On Regulatory Coordination In Federal Telemarketing Laws Submitted By The Federal Trade Commission*, Report to Congress, 2003 WL 22120161 (Sept. 2003) (available at <http://www.ftc.gov/os/2003/09/dnciareport.pdf>) (2003 FTC Report to Congress).

<sup>38</sup> FCC-FTC Memorandum of Understanding: Telemarketing Enforcement (Dec. 2003).

### III. DISCUSSION

#### A. Prerecorded Message Calls

##### 1. Written Consent Requirement

13. *The FCC's TCPA Rules.* As noted above, the TCPA prohibits the delivery of artificial or prerecorded voice messages to residential telephone lines, absent an emergency, without the “prior express consent” of the called party.<sup>39</sup> Under the Commission’s TCPA rules and orders, prior express consent of a residential telephone subscriber to receive a prerecorded telemarketing call (or live telephone solicitation) must be *in writing* if the subscriber’s number is listed on the national do-not-call registry, but may be obtained *orally or in writing* if the subscriber’s number is not listed on the registry.<sup>40</sup> In explaining the basis for this distinction, the Commission has noted that a residential subscriber who places his or her number on the registry has indicated a desire, through the act of registering, not to receive unsolicited telemarketing calls and, as such, written consent evidences the subscriber’s wish to be contacted by only particular sellers at a particular number.<sup>41</sup> When written consent is required under the Commission’s rules and orders (because the subscriber is listed on the national do-not-call registry), the seller or telemarketer must obtain a signed, written agreement between the subscriber and seller stating that the subscriber agrees to be contacted by that seller and including the telephone number to which the calls may be placed.<sup>42</sup> The Commission has indicated that the term “signed” may include an electronic or digital form of signature, to the extent such form of signature is recognized as a valid signature under applicable federal or state contract law.<sup>43</sup>

14. With respect to a residential subscriber who has *not* listed his number on the national do-not-call registry, the Commission has declined to require written consent to deliver prerecorded messages to such a subscriber and noted that allowing oral consent in that context is consistent with statements in the legislative history suggesting that Congress did not believe written consent was needed with respect to calls placed to unregistered subscribers.<sup>44</sup> Whether consent has been obtained orally or in writing, a seller

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<sup>39</sup> 47 U.S.C. § 227(b)(1)(B). *See also* 47 U.S.C. § 227(b)(1)(A) (prohibiting the non-emergency use of automatic telephone dialing systems or artificial or prerecorded messages, without the “prior express consent” of the called party when calling: emergency telephone lines, health care facilities, telephone numbers assigned to wireless services, and services for which the called party is charged for the call).

<sup>40</sup> *See Rules and Regulations Implementing The Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Second Order on Recon., 20 FCC Rcd 3788, 3804, para. 40 (2005) (*2005 Second Reconsideration Order*) (“Absent a consumer’s listing on the national do-not-call registry, [] prior express consent to deliver a lawful prerecorded message may be obtained orally.”); *see also 2003 TCPA Order*, 18 FCC Rcd at 14043, para. 44, n. 157 (discussing prior express permission required for consumers who have registered their numbers on the do-not-call list).

<sup>41</sup> *2003 TCPA Order*, 18 FCC Rcd at 14043, para. 44.

<sup>42</sup> *Id.* (citing *2003 TCPA Order*, 18 FCC Rcd at 14043-44, para. 44). *See also* 47 C.F.R. § 64.1200(c)(2)(ii). We note that the Commission has not yet addressed the question whether prior express consent to receive an autodialed or artificial or prerecorded message call under section 227(b)(1)(A) must be obtained in writing.

<sup>43</sup> *2003 TCPA Order*, 18 FCC Rcd at 14043-44, para. 44, n.158.

<sup>44</sup> *2005 Second Reconsideration Order*, 18 FCC Rcd at 1404, para. 40 (“Unlike the national do-not-call registry, through which consumers have indicated that they do not wish to receive telemarketing calls (by registering on the list), we find no evidence in the record suggesting that consent should be in writing when sending prerecorded messages to consumers not registered on the national do-not-call list”) (citing *2003 TCPA Order*, 18 FCC Rcd at 14043-44, para. 44, n. 157, and H.R. Rep. No. 102-317 at 13 (1991) (suggesting Congress did not believe such prior express permission need be in writing)).

or telemarketer placing a prerecorded telemarketing call must be prepared to provide “clear and convincing evidence” that it received prior express consent from the called party.<sup>45</sup>

15. *The FTC’s Telemarketing Sales Rule.* Under the Telemarketing Sales Rule, as amended, prior express consent to receive prerecorded telemarketing calls must be in writing.<sup>46</sup> The written agreement must be signed by the consumer and must be sufficient to show that he or she: (1) received “clear and conspicuous disclosure” of the consequences of providing the requested consent -- *i.e.*, that the consumer will receive future calls that deliver prerecorded messages by or on behalf of a specific seller-- and (2) having received this information, agrees unambiguously to receive such calls at a telephone number the consumer designates.<sup>47</sup> In addition, the written agreement must be obtained “without requiring, directly or indirectly, that the agreement be executed as a condition of purchasing any good or service.”<sup>48</sup> The FTC has determined that written agreements obtained in compliance with the E-SIGN Act will satisfy the requirements of its rule, such as, for example, agreements obtained via an email or website form, telephone keypress, or voice recording.<sup>49</sup> Finally, under the Telemarketing Sales Rule, the seller bears the burden of proving that a clear and conspicuous disclosure was provided, and that an unambiguous consent was obtained.<sup>50</sup>

16. *Discussion.* Consistent with Congress’s directive in the DNCIA to “maximize consistency” of the Commission’s TCPA rules with the FTC’s Telemarketing Sales Rule,<sup>51</sup> we seek comment on whether we should revise sections 64.1200(a)(1) and 64.1200(a)(2) of our rules to provide that, for all calls, prior express consent to receive prerecorded telemarketing messages must be obtained in writing.<sup>52</sup> We seek comment on these proposed revisions and specific related issues in the discussion that follows.<sup>53</sup>

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<sup>45</sup> 2005 Second Reconsideration Order, 18 FCC Rcd at 1404, para. 40.

<sup>46</sup> 16 C.F.R. § 310.4(b)(v)(A) (safe harbor requirements).

<sup>47</sup> 16 C.F.R. § 310.4(b)(v)(A)(i), (iii), (iv).

<sup>48</sup> 16 C.F.R. § 310.4(b)(v)(A)(ii).

<sup>49</sup> The Electronic Signatures In Global and National Commerce Act (E-SIGN Act) defines an “electronic signature” as “an electronic sound, symbol, or process attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.” 15 U.S.C. § 7006(5). The Act further defines an “electronic record” as “a contract or other record created, generated, sent, communicated, received, or stored by electronic means.” 15 U.S.C. § 7006(4).

<sup>50</sup> 16 C.F.R. § 310.4(b)(v)(A).

<sup>51</sup> Public Law No. 108-10, 117 Stat. 557 (Do-Not-Call Implementation Act).

<sup>52</sup> 47 C.F.R. § 64.1200(a)(1) (prohibiting any non-emergency telephone call, other than with the *prior express consent of the called party*, using an automatic telephone dialing system or an artificial or prerecorded voice to an emergency telephone line, a health care facility, or a number assigned to a cellular telephone service); 47 C.F.R. § 64.1200(a)(2) (prohibiting any non-emergency telephone call to any residential line using an artificial or prerecorded voice to deliver a message without the *prior express consent of the called party* or unless otherwise exempted).

<sup>53</sup> As a practical matter, the proposed written consent requirement, if adopted, would affect only those sellers and telemarketers that: a) are not subject to the FTC’s Telemarketing Sales Rule; and b) wish to place prerecorded telemarketing calls to residential subscribers whose numbers are not listed on the do-not-call registry. Entities subject to both agencies’ rules already must obtain written consent pursuant to the FTC’s recent amendments, and entities subject only to this Commission’s rules already must obtain written consent, absent an exemption, prior to placing a prerecorded telemarketing call to a registered subscriber.



17. As an initial matter, we seek comment on the Commission's authority to adopt a prior written consent requirement similar to the FTC's.<sup>54</sup> Specifically, while the term "prior express consent" appears in both subsections 227(b)(1)(A) and (b)(1)(B), the statute is silent regarding the precise form of such consent (*i.e.*, oral or written). Certain statements in the legislative history, however, suggest that Congress may have contemplated that consent may be obtained orally *or* in writing.<sup>55</sup>

18. Given that such a rule change would permit a telemarketer wishing to deliver prerecorded telemarketing messages to residential subscribers to obtain agreements from the subscribers by any electronic means authorized by the E-SIGN Act (including, for example, email, web form, telephone key press, or voice recording), we seek comment on whether Congressional concerns expressed nearly two decades ago regarding the potential burdens of a written consent requirement remain relevant today in light of the multitude of quick and cost effective options now available for obtaining written consent, other than via traditional pen and paper. We also note that section 227(b)(2)(B) of the TCPA, in authorizing the Commission to adopt exemptions from the prerecorded message prohibition, states that it may do so "subject to such conditions as the Commission may prescribe."<sup>56</sup> This statement suggests that Congress intended the Commission to exercise discretion in establishing the parameters of any exemption from the prohibition on prerecorded messages. We seek comment on whether the discretion afforded the Commission in this subsection extends to establishing a written consent requirement.<sup>57</sup> We also seek comment on how best to reconcile the congressional objective to maximize consistency between the FTC's rule and the Commission's rule with the statements referenced above in the TCPA's legislative history reflecting the concern that written consent may prove unduly burdensome to telemarketers and to subscribers who wish to receive telephone solicitations.<sup>58</sup> We seek comment on whether the convenience afforded by the E-SIGN Act addresses these concerns.

19. As noted above, when written consent is required under the Commission's current rules (because the called party's number is listed on the national do-not-call registry), the seller or telemarketer must obtain a signed, written agreement between the subscriber and seller stating that the subscriber

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<sup>54</sup> 16 C.F.R. § 310.4(b)(v)(A).

<sup>55</sup> See S. Rep. 102-178, 102d Cong., 1<sup>st</sup> Session (Oct. 8, 1991), at 4, 5, 10 (clarifying that the bill, as reported, would allow automated calls, including prerecorded messages, to be sent so long as the called party gives his or her prior express consent either orally or in writing). It is noteworthy that each of the examples provided by the Committee of "automated" calls involved the delivery of prerecorded informational messages as opposed to prerecorded telemarketing messages. See, *e.g.*, *id.* at 5 ("Many persons order goods over the phone and may give their oral consent to being called back by a computer telling them that their product is ready for pickup."). See also H. Rep. 102-317, 102d Cong., 1<sup>st</sup> Session (Nov. 15, 1991), at 13 ("[t]he Committee did not attempt to define precisely the form in which express permission or invitation must be given, but did not see a compelling need for such consent to be in written form").

<sup>56</sup> 47 U.S.C. § 227(b)(2)(B).

<sup>57</sup> See also TCPA Congressional Finding 13 ("While the evidence presented to the Congress indicates that automated or prerecorded calls are a nuisance and an invasion of privacy, regardless of the type of call, the Federal Communications Commission should have the flexibility to design different rules for those types of automated or prerecorded calls that it finds are not considered a nuisance or invasion of privacy...."); TCPA Congressional Finding 15 ("The Federal Communications Commission should consider adopting reasonable restrictions on automated or prerecorded calls to businesses as well as to the home....").

<sup>58</sup> See, *e.g.*, H. Rep. 102-317, 102d Cong., 1<sup>st</sup> Session (Nov. 15, 1991), at 13 (expressing concern that written consent would "unreasonably restrict the subscriber's rights to accept solicitations of interest and unfairly expose businesses to unwarranted risk from accepting permissions or invitations from subscribers"). Although the House committee's concerns were expressed in the context of exceptions to the definition of "telephone solicitation," and not in the context of consent to receive prerecorded message calls, it suggests that the committee was concerned that a written consent requirement, at least in the context of telephone solicitations, may be unduly burdensome or inconvenient for subscribers.

agrees to be contacted by that seller and including the telephone number to which the calls may be placed.<sup>59</sup> If the Commission were to adopt a written consent requirement for placing prerecorded telemarketing calls to unregistered subscribers, we seek comment on whether we also should adapt existing section 64.1200(c)(2)(ii) of our rules (governing the content of written consent agreements) to apply specifically to prerecorded telemarketing calls, as the FTC has done in its Telemarketing Sales Rule.<sup>60</sup> We tentatively conclude that requiring a written agreement evidencing consent to receive prerecorded messages in particular, such as that required by the FTC, may help to ensure that consumers are adequately apprised of the specific nature of the consent that is being requested and, in particular, of the fact that they will receive prerecorded message calls as a consequence of their agreement.

20. Assuming the Commission has legal authority to adopt a written consent requirement, we seek comment on whether we should adopt the same requirement both for calls governed by section 227(b)(1)(A) (generally prohibiting automated or artificial or prerecorded message calls without prior express consent to emergency lines, health care facilities, and cellular services), and for calls governed by section 227(b)(1)(B) (generally prohibiting prerecorded message calls without prior express consent to residential telephone lines).<sup>61</sup> Because the two provisions include an identically worded exception for calls made with the “prior express consent of the called party,” we tentatively conclude that any written consent requirement adopted by the Commission should apply to both provisions. We seek comment on this tentative conclusion.

21. We also seek information concerning the extent to which, in the absence of written consent, residential subscribers have been targeted by unscrupulous senders of prerecorded messages who erroneously claim to have obtained the subscriber’s oral consent. If, after reviewing the record, we determine that the Commission does not have legal authority to adopt a written consent requirement, we seek comment on what, if any, additional steps should be required by senders who choose to obtain consent orally in order to verify that consent was, in fact, given.

22. As a policy matter, we tentatively conclude that harmonizing our prior consent requirement with the FTC’s may reduce the potential for industry and consumer confusion surrounding a telemarketer’s obligations to the extent that similarly situated entities would no longer be subject to different requirements depending upon whether an entity is subject to the FTC’s rule or to the Commission’s rule. We tentatively conclude that written consent also may enhance the Commission’s enforcement efforts and serve to protect both consumers and industry from erroneous claims that consent was or was not given, to the extent that, unlike oral consent, the existence of a paper or electronic record may provide unambiguous proof of consent. We seek comment on these tentative conclusions.

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<sup>59</sup> *2005 Second Reconsideration Order*, 18 FCC Rcd at 1404, para. 40 (citing *2003 TCPA Order*, 18 FCC Rcd at 14043-44, para. 44). See also 47 C.F.R. § 64.1200(c)(2)(ii).

<sup>60</sup> The FTC’s rule states that it is an abusive telemarketing act or practice to “[i]nitiat[e] any outbound telephone call that delivers a prerecorded message... , unless: (A) in any such call to induce the purchase of any good or service, the seller has obtained from the recipient of the call an express agreement, in writing, that: (i) The seller obtained only after a clear and conspicuous disclosure that the purpose of the agreement is to authorize the seller to place prerecorded calls to such person; (ii) The seller obtained without requiring, directly or indirectly, that the agreement be executed as a condition of purchasing any good or service; (iii) Evidences the willingness of the recipient of the call to receive calls that deliver prerecorded messages by or on behalf of a specific seller; and (iv) Includes such person's telephone number and signature[.]” See 16 C.F.R. § 310.4(b)(1)(v)(A)(i)-(iv). For purposes of this rule, the term “signature” includes an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law. *Id.* at n.7.

<sup>61</sup> 47 U.S.C. § 227(b)(1)(A), (1)(B).

23. We note that in light of the numerous options available today under the E-SIGN Act to obtain a written agreement, a telemarketer may be afforded flexibility to determine the form of “written” consent that is most appropriate, least burdensome, and most cost effective for that particular business (e.g., email, website form, telephone keypress, or voice recording). We seek information and data on the specific compliance costs and burdens associated with various written consent options under the E-SIGN Act and on the extent to which sellers and telemarketers are already utilizing these methods for obtaining consumer consent, either pursuant to the FTC’s amended Telemarketing Sales Rule or pursuant to Commission rules when a called party’s number is listed on the national do-not-call registry. Finally, to the extent that the Commission currently requires sellers and telemarketers placing prerecorded telemarketing calls to be prepared to provide “clear and convincing evidence” of the receipt of prior express consent from the called party, even when consent has been obtained orally, we seek comment on the extent to which our adoption of a written consent requirement would add to the compliance burden associated with this existing requirement.<sup>62</sup>

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

24. *The FCC’s TCPA Rules.* The TCPA prohibits the use of artificial or prerecorded messages in telephone calls to residential (wireline) numbers without the prior express consent of the called party, but permits the Commission to exempt from this provision calls that are non-commercial and commercial calls that “do not adversely affect the privacy rights of the called party” and that do not transmit an “unsolicited advertisement.”<sup>63</sup> The TCPA does not explicitly exempt from the prohibition on artificial and prerecorded message calls those from a party with whom the subscriber has an established business relationship. Nevertheless, in 1992, the Commission determined to create such an exemption, based on its authority under the TCPA to exempt commercial calls that “do not adversely affect residential subscriber privacy interests.”<sup>64</sup> The Commission concluded, based upon “the comments received and the legislative history,” that a solicitation to someone with whom a prior business relationship exists does not adversely affect subscriber privacy interests.<sup>65</sup> It further concluded that such a solicitation can be “deemed to be invited or permitted” by a subscriber in light of the business relationship.<sup>66</sup> Finally, noting that the legislative history indicates that the TCPA “does not intend to unduly interfere with ongoing business relationships,” the Commission stated that “requiring actual

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<sup>62</sup> 2005 *Second Reconsideration Order*, 18 FCC Rcd at 1404, para. 40.

<sup>63</sup> 47 U.S.C. § 227(b)(1)(B), (2)(B). The Commission has determined that the following types of calls should be exempt from the ban on prerecorded messages: 1) calls that are non-commercial (e.g., political or religious speech calls); 2) calls that are commercial but do not contain an advertisement (e.g., informational calls notifying a customer of a scheduled delivery or notifying airline passengers of flight delays); 3) calls with whom the telemarketer has an established business relationship; and 4) calls by tax-exempt nonprofit organizations (e.g., charities). 47 C.F.R. § 64.1200(a)(2)(i)-(v). See also 2003 *TCPA Order*, 18 FCC Rcd at 14095-99, paras. 136-142 (discussing Commission decisions to exempt particular categories of calls from prerecorded message ban).

<sup>64</sup> 1992 *TCPA Order*, 7 FCC Rcd at 8770-71, para. 34. Under the Commission’s rules, the term *established business relationship* is defined as a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of the subscriber’s purchase or transaction with the entity within the eighteen (18) months immediately preceding the date of the telephone call or on the basis of the subscriber’s inquiry or application regarding products or services offered by the entity within the three months immediately preceding the date of the call, which relationship has not been previously terminated by either party. 47 C.F.R. § 64.1200(f)(4).

<sup>65</sup> 1992 *TCPA Order*, 7 FCC Rcd at 8770, para. 34.

<sup>66</sup> *Id.*

consent to prerecorded message calls where [established business] relationships exist could significantly impede communications between businesses and their customers.”<sup>67</sup>

25. *The FTC’s Telemarketing Sales Rule.* In 2004, the FTC published a notice of proposed rulemaking in which it proposed, at the request of a telemarketer, the creation of a safe harbor under the Telemarketing Sales Rule for prerecorded telemarketing calls to established business customers.<sup>68</sup> Under the proposed safe harbor, prerecorded messages to consumers with whom a seller has an “established business relationship” (as defined by the FTC’s rules) would not violate the FTC’s Telemarketing Sales Rule if, among other things, a keypress opt-out mechanism or other means were provided at the outset of the call for consumers to add their telephone number to the seller’s company-specific do-not-call list.<sup>69</sup>

26. In 2006, the FTC denied the proposed safe harbor request that would have permitted prerecorded telemarketing calls to established business customers based, in large measure, on the more than 13,000 consumer comments it had received opposing the proposal.<sup>70</sup> According to the FTC, many consumers expressed the view that, in light of the “intrusive and impersonal nature” of prerecorded messages, neither a prior inquiry nor a purchase should be deemed to imply consumer consent to receive future prerecorded solicitations from a seller.<sup>71</sup> The FTC noted that this reaction was contrary to prior consumer support among commenters for an exemption to allow *live* telemarketing calls to established business customers.<sup>72</sup> In addition, the FTC denied the proposed safe harbor based on record evidence indicating, among other things, that: 1) the self interest of sellers in retaining established customers could not be relied on to prevent abuse through excessive pre-recorded message telemarketing, especially as new digital technologies, including VoIP, reduce the cost of transmitting prerecorded telemarketing messages by telephone;<sup>73</sup> 2) prerecorded telemarketing messages impose potential costs, including risks to health and safety when an extended message ties up a line and prevents consumers from placing emergency calls, as well as burdens on consumers, including costs to store and retrieve prerecorded messages on home answering machines or voicemail services;<sup>74</sup> and 3) various methods by which

<sup>67</sup> *Id.* (citing H.Rep., 102-317, 102d Cong., 1<sup>st</sup> Session (Nov. 15, 1991), at 13).

<sup>68</sup> *Telemarketing Sales Rule, Notice of Proposed Rulemaking*, Federal Trade Commission, 69 Fed. Reg. 67287 (Nov. 17, 2004). At the same time, the FTC announced the adoption of an enforcement forbearance policy during the pendency of its rulemaking, subject to certain conditions, with respect to sellers and telemarketers that deliver prerecorded messages to consumers with whom the seller on whose behalf the telemarketing call is made has an established business relationship. *Id.*

<sup>69</sup> *Id.*, 69 Fed. Reg. 67290. Under the FTC’s Telemarketing Sales Rule, the term *established business relationship* is defined as a relationship between a seller and a consumer based on: (1) the consumer’s purchase, rental, or lease of the seller’s goods or services or a financial transaction between the consumer and seller, within the eighteen (18) months immediately preceding the date of a telemarketing call; or (2) the consumer’s inquiry or application regarding a product or service offered by the seller, within the three (3) months immediately preceding the date of a telemarketing call. 16 C.F.R. § 310.2(n).

<sup>70</sup> *Telemarketing Sales Rule, Denial and Revised Proposed Rule*, Federal Trade Commission, 71 Fed. Reg. 58716 (Oct. 4, 2006).

<sup>71</sup> *Id.*, 71 Fed. Reg. at 58722. According to the FTC, the consumer comments provided “compelling evidence that consumer aversion to prerecorded message telemarketing – regardless of whether an established business relationship exists – has not diminished since enactment of the TCPA, which, in no small measure, was prompted by consumer outrage about the use of prerecorded messages.” *Id.*, 71 Fed. Reg. at 58723.

<sup>72</sup> *Id.*, 71 Fed. Reg. at 58722 (“Notwithstanding the FCC’s rationale for allowing sellers to use prerecorded messages in calls to established customers, many consumers contended that neither a prior inquiry nor purchase implied their consent to receipt of future prerecorded solicitations from a seller, contrary to prior consumer support for live telemarketing calls.”).

<sup>73</sup> *Id.*, 71 Fed. Reg. at 58723-24.

<sup>74</sup> *Id.*, 71 Fed. Reg. at 58721, 58723.

consumers may elect to opt out of future prerecorded message calls are often cumbersome to use or simply do not work.<sup>75</sup> Based on this record, the FTC changed course and published a new proposed amendment to the Telemarketing Sales Rule to expressly prohibit all unsolicited prerecorded telemarketing calls without the consumer's prior written agreement, even with respect to prerecorded calls to established business relationship customers.<sup>76</sup>

27. In 2008, the FTC amended the Telemarketing Sales Rule to make explicit that the existence of an established business relationship will *not* serve as authorization for placing *prerecorded* telemarketing calls. Thus, although an established business relationship will continue to serve as authorization for placing *live* telemarketing calls to consumers under the FTC's Telemarketing Sales Rule, it no longer serves as authorization for placing prerecorded telemarketing calls. As amended, the FTC's Telemarketing Sales Rule prohibits prerecorded message calls unless the called party has given prior express written consent (*see* section III.A.1, *supra*) and the call complies with certain additional requirements in § 310.4(b)(1)(v) (*see* section III.A.4, *infra*).<sup>77</sup>

28. *Discussion.* In light of the substantial record of public comments developed over the course of the FTC's four-year rulemaking opposing the creation of a safe harbor for prerecorded telemarketing calls to established business customers, and in view of Congress's mandate to maximize consistency between the Commission's rules and the FTC's Telemarketing Sales Rule, we seek comment on whether the Commission should reconsider its 1992 determination that an established business relationship may be deemed to constitute express invitation or permission to receive unsolicited prerecorded telemarketing calls.<sup>78</sup> The FTC's 2008 rule amendments make explicit that, absent a consumer's express prior written agreement, sellers and telemarketers are prohibited from delivering a prerecorded telemarketing message, regardless of whether the call is made to a consumer who has an established business relationship with the seller. As a result, an "established business relationship" currently provides the necessary permission to deliver prerecorded telemarketing messages only for entities subject to the Commission's, but not the FTC's, jurisdiction (*e.g.*, banks, airlines, common carriers). Based on the foregoing, we seek comment on whether the Commission should conform its rule to the FTC's Telemarketing Sales Rule by eliminating the established business relationship exemption from the general prohibition on prerecorded telemarketing calls to residential telephone lines.

29. As noted above, the Commission created the "established business relationship" exemption from the TCPA's ban on artificial or prerecorded messages based on its authority under the TCPA to exempt calls that "do not adversely affect residential subscriber privacy interests."<sup>79</sup> It reasoned that a subscriber's privacy interests are not adversely affected by the receipt of such prerecorded message calls because, in that instance, the solicitation can be "*deemed to be invited or permitted*" by the

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<sup>75</sup> *Id.*

<sup>76</sup> *Id.*, 71 Fed. Reg. at 58722.

<sup>77</sup> 16 C.F.R. §310.4(b)(v)(B),(C),(D). The Telemarketing Sales Rule also exempts from the prohibition on prerecorded message calls certain healthcare-related calls (discussed in section III.A.3, *infra*), calls made by a for-profit telemarketer on behalf of a non-profit entity to an individual who is a member of, or previous donor to, the non-profit entity (no written consent required but opt-out requirements discussed below still apply), and calls made by a tax-exempt nonprofit.

<sup>78</sup> The FTC states that 13,600 comments were filed in response to its 2004 notice of proposed rulemaking and an additional 600 comments were filed in response to its 2006 Federal Register notice. *FTC 2008 Amendments*, 73 Fed. Reg. at 51165.

<sup>79</sup> 1992 *TCPA Order*, 7 FCC Rcd at 8770-71, para. 34.



subscriber in light of the business relationship.<sup>80</sup> In light of the strenuous opposition expressed by the thousands of consumers who filed comments in the FTC's rulemaking, we seek comment on the continued validity of this determination and whether prerecorded telemarketing calls (*i.e.*, sales calls) may reasonably be "deemed invited or permitted" by established business customers.<sup>81</sup> In particular, we seek comment on whether our established business relationship exception remains supportable on the basis that artificial or prerecorded message calls to established customers do not adversely affect residential subscriber privacy interests and do not transmit an unsolicited advertisement.<sup>82</sup>

30. In the 1992 rulemaking, the Commission also expressed the concern that "requiring actual consent to prerecorded message calls where [established business] relationships exist *could significantly impede communications between businesses and their customers*" and, as such, might be at odds with statements in the legislative history indicating Congress's desire not to "unduly interfere with ongoing business relationships."<sup>83</sup> We seek comment on the extent to which authorization to receive prerecorded message calls based on prior written or oral consent (rather than on the basis of an established business relationship) would in fact "unduly interfere with ongoing business relationships" or "impede communications" between businesses and their customers. In particular, we seek comment on whether technological advances, such as the use of one or more methods available under the E-SIGN Act for establishing a consumer's prior express written consent to receive prerecorded telemarketing calls, have minimized the burden associated with obtaining the express consent of established business customers (*e.g.*, instructing an established customer during a live telephone solicitation to use a keypress feature to request future prerecorded message calls).

31. We also seek specific comment on the experiences of telemarketers that have conducted marketing campaigns on behalf of sellers that are subject to the FTC's recently amended Telemarketing Sales Rule in obtaining the requisite prior written consent from those businesses' established customers. Has the FTC's revised rule had the effect of impeding communications between businesses and their customers and, if so, in what ways? If the Commission were to retain the current exemption for established business customers, we seek comment, particularly from individual consumers and consumer groups, regarding whether consumers would support the use of prerecorded telemarketing messages by sellers and telemarketers with established business customers if such messages provided an interactive opt-out mechanism that would provide a means to avoid future prerecorded messages from that seller.

32. Finally, we tentatively conclude that conforming our rule governing prerecorded message calls to established business customers to the FTC's may reduce the potential for industry and consumer confusion surrounding a telemarketer's authority to place unsolicited prerecorded message calls to established customers to the extent that similarly situated entities would no longer be subject to different requirements depending upon whether an entity is subject to the FTC's rule or to the Commission's. We seek comment on this tentative conclusion.

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<sup>80</sup> *Id.* (emphasis added)

<sup>81</sup> To be clear, we propose no changes to, and therefore do not seek comment on, the Commission's current rules governing: a) *live* telephone solicitations to established business customers; or b) prerecorded message calls that do not include a solicitation (*e.g.*, calls notifying customers of product recalls, or of scheduled deliveries).

<sup>82</sup> 47 U.S.C. § 227(b)(1)(B), (2)(B).

<sup>83</sup> *Id.* (citing H.Rep., 102-317, 102d Cong., 1<sup>st</sup> Session (Nov. 15, 1991), at 13). We note that these statements were made in the context of exceptions to the context of live telephone solicitations to established business customers, and not in the context of prerecorded message calls to such customers.

### 3. Exemption for Health Care Related Calls Subject to HIPAA

33. *The FCC's TCPA Rules.* As previously noted, section 227 allows the Commission to create exemptions from the TCPA's ban on artificial or prerecorded messages to residential lines for calls that are non-commercial and for commercial calls that do not adversely affect the privacy rights of the called party and that do not transmit an unsolicited advertisement.<sup>84</sup> The Commission's prerecorded message rules currently contain no specific exemption for healthcare-related prerecorded message calls that are subject to the Health Insurance Portability and Accountability Act of 1996 (HIPAA).<sup>85</sup>

34. *The FTC's Telemarketing Sales Rule.* In its 2008 amendments to the Telemarketing Sales Rule, the FTC exempted from its prior written consent requirement healthcare-related prerecorded message calls that are subject to HIPAA.<sup>86</sup> These prerecorded calls include, among others, flu shot and other immunization reminders, prescription refill reminders, health screening reminders; calls to obtain permission to contact doctors for renewal of medication or medical supply orders; calls to obtain documentation needed for billing health plans; calls by home health agencies to follow-up on patients for six months after discharge; calls monitoring patient compliance with prescribed medical therapies; and calls encouraging enrollment in disease management or treatment programs, and in migration from branded to generic drugs, and from retail to mail order pharmacies.<sup>87</sup> The FTC noted commenters' fear that such calls may be subject to the Telemarketing Sales Rule to the extent that they can result in a payment or co-pay for medication, durable medical equipment, or medical services.<sup>88</sup> An exemption is necessary, the FTC determined, because (among other things) the individuals most in need of these healthcare-related prerecorded messages (elderly or ill patients) might be unable or simply unlikely to take the steps necessary to provide their express written consent to receive them.<sup>89</sup> To the extent that the communications between healthcare-related entities subject to HIPAA regulations and their customers already are subject to extensive federal regulations, some of which directly address the making of telephone solicitations to patients, the FTC was persuaded that there would be little risk that the creation of an exemption for these calls would lead to abusive practices by these entities.<sup>90</sup> Finally, citing evidence that prerecorded healthcare messages of the type described above are generally deemed more welcome and less intrusive by consumers, the FTC determined that the creation of an exemption for this category of calls would not adversely affect consumer privacy rights.<sup>91</sup>

35. *Discussion.* On the basis of information presented in the record of the FTC's rulemaking proceeding on healthcare-related prerecorded message calls made by, or on behalf of, a covered entity or its business associate, as those terms are defined in the HIPAA Privacy Rule, we seek comment on whether the Commission likewise should exempt such calls from the general prohibition on prerecorded message calls to residential lines under the TCPA. If so, we seek comment on the Commission's authority to exempt these calls either under section 227(b)(2)(B)(i) (calls that are not made for a

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<sup>84</sup> 47 U.S.C. § 227(b)(1)(B), (2)(B).

<sup>85</sup> Pub. L. No. 104-191, 110 Stat. 1936 (1996) (codified, as amended, at 42 U.S.C. §§1320 *et seq.*).

<sup>86</sup> 2008 *Final Rule Amendments*, 73 Fed. Reg. at 51188-92.

<sup>87</sup> *Id.*, 73 Fed. Reg. at 51189.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*, 73 Fed. Reg. at 51191.

<sup>90</sup> *Id.*, 73 Fed. Reg. at 51189-90.

<sup>91</sup> *Id.*, 73 Fed. Reg. at 51192.

commercial purpose),<sup>92</sup> or under section 227(b)(2)(B)(ii) (commercial calls that do not adversely affect the privacy rights of the called party and that do not transmit an unsolicited advertisement).<sup>93</sup> In addition, we note that, with limited exception, HIPAA requires that a “covered entity” obtain an individual’s written authorization before using protected health information (including the individual’s name and telephone number) for marketing purposes. As a practical matter, this HIPAA restriction (in conjunction with other HIPAA provisions) would appear to preclude or limit the delivery of prerecorded telemarketing calls placed by a “covered entity” or its “business associate” to individuals with whom the covered entity or business associate has no pre-existing relationship (*i.e.*, “cold calling” of consumers). We seek comment on this aspect of the HIPAA requirements, on the relative frequency and volume of healthcare-related prerecorded telemarketing calls placed to individuals by entities that do not have a pre-existing relationship with the consumer, and on the extent to which consumers consider such calls intrusive or an invasion of privacy.

36. We note that when one of the Commission’s TCPA rules differs substantively from the FTC’s Telemarketing Sales Rule, it has been generally understood that the more restrictive requirement prevails and sets the standard applicable to all entities that are subject to the jurisdiction of both agencies.<sup>94</sup> In this instance, although the FTC has adopted a more specific provision, the Commission’s rule, by providing no exemption for healthcare-related prerecorded message calls subject to HIPAA, is arguably more restrictive. Accordingly, we seek comment on the practical impact of this disparity on regulated entities currently and if the Commission does not adopt a similar exemption in the future.<sup>95</sup>

#### 4. Opt-Out Mechanism

37. *The FCC’s TCPA Rules.* The TCPA directs the Commission to prescribe technical and procedural standards for systems that are used to transmit “any” artificial or prerecorded voice message via telephone.<sup>96</sup> Under any Commission-adopted standards, the entity initiating a call must be identified at “the beginning” of a prerecorded message, and, “during or after the message,” the telephone number or address of such entity must be provided.<sup>97</sup> Such Commission-adopted standards also must require that a prerecorded message call “automatically release the called party’s line within 5 seconds of the time notification is transmitted to the system that the called party has hung up, to allow the called party’s line to be used to make or receive other calls.”<sup>98</sup> Consistent with the TCPA’s technical and procedural standards provision, the Commission’s rules require that, *at the beginning* of all artificial or prerecorded

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<sup>92</sup> 47 U.S.C. § 227(b)(2)(B)(i).

<sup>93</sup> 47 U.S.C. § 227(b)(2)(B)(ii). The term “unsolicited advertisement” means “any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person’s prior express invitation or permission, in writing or otherwise.” *See* 47 U.S.C. § 227(a)(5); *see also* 47 C.F.R. § 64.1200(f)(13).

<sup>94</sup> *See, e.g., 2003 FTC Report to Congress*, at 2.

<sup>95</sup> If the Commission elected not to adopt a similar exemption, this would not preclude us from adopting an enforcement forbearance policy in deference to the FTC’s determination with respect to this issue. *See, e.g., Telemarketing Sales Rule, Notice of Proposed Rulemaking*, Federal Trade Commission, 69 Fed. Reg. 67287 (Nov. 17, 2004) (announcing enforcement forbearance policy, subject to certain conditions, with respect to sellers and telemarketers that deliver prerecorded messages to consumers with whom the seller on whose behalf the telemarketing call is made has an established business relationship).

<sup>96</sup> 47 U.S.C. § 227(d)(3).

<sup>97</sup> 47 U.S.C. § 227(d)(3)(A).

<sup>98</sup> 47 U.S.C. § 227(d)(3)(B).

message calls, the message identify the entity responsible for initiating the call (including the legal name under which the entity is registered to operate),<sup>99</sup> and *during or after the prerecorded message*, provide a *telephone number* that consumers can call during regular business hours to make a company-specific do-not-call request.<sup>100</sup>

38. *The FTC's Telemarketing Sales Rule.* The FTC's Telemarketing Sales Rule, as amended in 2008, requires, with limited exception, that any prerecorded message call that could be answered by the consumer in person provide an *automated interactive opt-out mechanism* that is announced *at the outset of the message* and is available *throughout the duration of the call*. The opt-out mechanism, when invoked, must automatically add the consumer's number to the seller's do-not-call list and immediately disconnect the call. Where a call could be answered by an answering machine or voicemail service, the message must also include a toll-free number that enables the consumer to call back and connect directly to an automated opt-out mechanism.<sup>101</sup>

39. *Discussion.* There are several key differences between the Commission's and the FTC's rules with respect to their respective "opt-out" and related disclosure requirements. First, the FTC opt-out requirement specifies that, if there is any possibility that a call could be answered in person by a consumer, an automated interactive opt-out mechanism must be available throughout the call.<sup>102</sup> The provision permits either a voice or keypress-activated opt-out mechanism to be used, or both in combination.<sup>103</sup> If there is any possibility that a prerecorded call could be answered by an answering machine or voicemail service, a toll-free number must be provided and disclosed promptly at the outset of the call.<sup>104</sup> The toll-free number must connect directly to an automated interactive opt-out mechanism that is accessible at any time throughout the duration of the telemarketing campaign.<sup>105</sup> The provision further requires that, once invoked, the interactive mechanism must automatically add the number called to the seller's entity-specific do-not-call list.<sup>106</sup> In contrast, the Commission's analogous provision does not require an automated opt-out mechanism and, instead, simply requires a telephone number that consumers can call "during regular business hours" to make an entity-specific do-not-call request.<sup>107</sup> Inasmuch as automated, interactive opt-out mechanisms are now widely available and, as discussed above, are now required of most sellers and telemarketers by virtue of the FTC's rule, we seek comment on whether the Commission should conform its rule to the FTC's rule by requiring their use. Comments supporting this revision should address the Commission's authority to adopt this change, consistent with the "technical and procedural standards" provision of the TCPA, as codified in section 227(d)(3) of the

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<sup>99</sup> 47 C.F.R. § 64.1200(b)(1).

<sup>100</sup> 47 C.F.R. § 64.1200(b)(2) ("All artificial or prerecorded telephone messages shall: . . . [d]uring or after the message, state clearly the telephone number (other than that of the autodialer or prerecorded message player that placed the call) of such business, other entity, or individual. The telephone number provided may not be a 900 number or any other number for which charges exceed local or long distance transmission charges. For telemarketing messages to residential telephone subscribers, such telephone number must permit any individual to make a do-not-call request during regular business hours for the duration of the telemarketing campaign.")

<sup>101</sup> 16 C.F.R. § 310.4(b)(1)(v)(B)(i)-(iii).

<sup>102</sup> 16 C.F.R. § 310.4(b)(1)(v)(B)(ii)(A).

<sup>103</sup> *Id.*

<sup>104</sup> 16 C.F.R. § 310.4(b)(1)(v)(B)(ii)(B).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> 47 C.F.R. § 64.1200(b)(2).

Communications Act.<sup>108</sup> In addition, given that section 227(d)(3) prescribes technical standards for “any” artificial or prerecorded voice message via telephone, we seek comment on whether the Commission may adopt additional disclosure and opt-out requirements mirroring the FTC’s solely for artificial or prerecorded voice message calls that are for telemarketing purposes.

40. Second, whereas the FTC’s Telemarketing Sales Rule requires that prerecorded message calls provide a disclosure at the outset of the message explaining how to opt out of future calls,<sup>109</sup> the TCPA itself provides that, for opt-out purposes, the telephone number of the entity initiating a call can be disclosed “during or after the message.”<sup>110</sup> Therefore, commenters supporting a requirement that the telephone number of the entity initiating the prerecorded message be disclosed at the outset of the message should address the Commission’s legal authority to do so.

41. Third, although each agency’s rule provides for prompt termination of the call after a consumer hangs up, the Commission’s standard is more specific (call must be released within 5 seconds of time notification is transmitted to system) than the FTC’s (call must be released immediately). Again, in light of the specific statutory language pertaining to call termination, commenters supporting a change to the Commission’s existing rules to require immediate release of a call once the consumer has hung up are asked to address the Commission’s authority to adopt such a requirement.

42. Finally, as discussed in section III.A.3 above, we note that, in addition to exempting certain healthcare-related prerecorded message calls from its express written consent requirement, the FTC likewise exempted such calls from its automated opt-out requirement.<sup>111</sup> Inasmuch as the TCPA technical standards codified in section 227(d)(3) apply to “any” artificial or prerecorded messages, we seek comment on the Commission’s authority to exempt any category of prerecorded message calls from the specific requirements of that section. If the Commission adopts separate disclosure and opt-out requirements (mirroring the FTC’s) specifically for prerecorded *telemarketing* calls, we seek comment on whether we may exempt the category of healthcare-related prerecorded message calls identified in the FTC’s rule from those separate requirements and, if so, whether the Commission should provide such an exemption.

43. As a policy matter, the FTC’s automated opt-out requirement appears to be more consumer friendly than the Commission’s to the extent that it allows consumers to easily and immediately assert their opt-out rights, regardless of the time of day, and without having to wait to opt out until the next business day during regular business hours when an operator is available to record the opt-out request. We therefore seek comment on whether the Commission should revise its opt-out requirements to make them more consistent with the FTC’s, and, if so, how to do so in a manner that is consistent with the “technical and procedural standards” provision of the TCPA.

## **B. Abandoned Calls/Predictive Dialers**

44. *The FCC’s TCPA Rules.* Under the Commission’s rules, an outbound telephone call is deemed “abandoned” if a person answers the telephone and the caller does not connect the call to a sales representative within two seconds of the person’s completed greeting.<sup>112</sup> The Commission imposes

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<sup>108</sup> 47 U.S.C. § 227(d)(3).

<sup>109</sup> 16 C.F.R. § 310.4(b)(1)(v)(B)(ii) (making it an abusive telemarketing act or practice and a rule violation not to “promptly” disclose seller’s identification, purpose of call, and nature of goods or service, followed “immediately” by a disclosure of opt-out information).

<sup>110</sup> 47 U.S.C. § 227(d)(3).

<sup>111</sup> 16 C.F.R. § 310.4(b)(1)(v)(D).

<sup>112</sup> 47 C.F.R. § 64.1200(a)(6).



restrictions on the percentage of live telemarketing calls that a telemarketer may drop or “abandon” as a result of the use of predictive dialers.<sup>113</sup> Under the Commission’s rules, a seller or telemarketer would not be liable for violating the restrictions on call abandonment if, among other things, it employs technology that ensures abandonment of no more than three percent of all calls answered by a person (rather than by an answering machine).<sup>114</sup> The Commission’s call abandonment rule measures the abandonment rate over a 30-day period, but contains no “per campaign” limitation.<sup>115</sup>

45. *The FTC’s Telemarketing Sales Rule.* Like the Commission’s rule, an outbound telephone call is deemed “abandoned” under the FTC’s Telemarketing Sales Rule if a person answers the telephone and the caller does not connect the call to a sales representative within two seconds of the person’s completed greeting.<sup>116</sup> A seller or telemarketer similarly is not liable for violating the prohibition on call abandonment if, among other things, the seller or telemarketer employs technology that ensures abandonment of no more than three percent of all calls answered by a person (rather than by an answering machine).<sup>117</sup>

46. In its 2008 final rule amendments, the FTC revised the standard it uses for measuring the three percent (permissible) call abandonment rate.<sup>118</sup> Whereas the FTC previously required that a telemarketer employ technology that ensures abandonment of no more than three percent of all calls answered by a person, *measured per day per calling campaign*, it revised the standard in 2008 to permit telemarketers to measure the abandonment rate over a *30-day period* for the duration of a *single calling campaign*, if less than 30 days, or separately over each successive 30-day period or portion thereof that the campaign continues.<sup>119</sup> According to the FTC, the effect of this change, which had been requested by the telemarketers, was to allow telemarketers to conduct smaller telemarketing campaigns, such as in test markets, in a more cost effective manner.<sup>120</sup> At the same time, the FTC considered, but rejected, a separate request to eliminate the “per campaign” limitation contained in its rule, which would have allowed call abandonment rates to be averaged across multiple telemarketing campaigns.<sup>121</sup> The FTC

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<sup>113</sup> *Id.* The abandoned call provision was intended to address the problem of dropped calls resulting from the use of predictive dialers. A predictive dialer is an automated dialing system that automatically dials consumers’ telephone numbers in a manner that “predicts” the time when a consumer will answer the phone and a telemarketer will be available to take the call. Such software programs are set up in order to minimize the amount of downtime for a telemarketer. In some instances, however, no telemarketer is free to take a call that has been placed by a predictive dialer and the consumer answers the phone only to hear “dead air” or a dialtone.

<sup>114</sup> *Id.* (prohibiting abandonment of “more than three percent of all telemarketing calls that are answered live by a person, or measured over a 30-day period”). The three percent (permissible) call abandonment rate allows this small percentage of abandoned calls so that the telemarketing industry may benefit from the cost savings made possible by the use of predictive dialers, as opposed to the manual dialing of telephone numbers.

<sup>115</sup> *Id.*

<sup>116</sup> 16 C.F.R. § 310.4(b)(1)(iv).

<sup>117</sup> 16 C.F.R. § 310.4(b)(4)(i).

<sup>118</sup> *2008 Final Rule Amendments*, 73 Fed. Reg. at 51195-51200.

<sup>119</sup> 16 C.F.R. § 310.4(b)(4)(i).

<sup>120</sup> *2008 Final Rule Amendments*, 73 Fed. Reg. at 51197-99. This amendment also made the FTC’s method of measuring the call abandonment rate more similar to the method adopted by the Commission, which also measures the call abandonment rate over a 30-day period (albeit over multiple campaigns).

<sup>121</sup> *Id.*, 73 Fed. Reg. at 51199-200. The FTC also clarified that the term “campaign” refers to “the offer of the same good or service for the same seller.” *Id.* at 51200.

reasoned that the absence of a “per campaign” limitation in its rule might encourage telemarketers “to target less-valued customers with a disproportionate share of abandoned calls.”<sup>122</sup>

47. *Discussion.* The Commission’s current rule measures the three percent (permissible) call abandonment rate over a 30-day period but, because it imposes no “per campaign” limitation, it effectively allows the averaging of call abandonment rates across multiple telemarketing campaigns during any single 30-day period. As noted above, the FTC’s rulemaking proceeding highlighted concerns that this approach might allow a telemarketer to compute a single call abandonment rate for all campaigns that it conducts during a 30-day period and, in so doing, to allocate a greater percentage of abandoned calls to a less desirable marketing campaign (*e.g.*, a campaign directed at lower income individuals) while allocating a smaller percentage to a more desirable campaign (*e.g.*, a campaign directed at upper income individuals). We seek comment on the prevalence of such practices among those sellers or telemarketers that are subject to the Commission’s (but not the FTC’s) telemarketing rules and on the practical impact of the two agencies’ currently differing standards. In addition, we seek comment on whether the Commission should revise the standard by which it measures the three percent call abandonment rate to include a “per campaign limitation” in order to eliminate any potential incentive for telemarketers to engage in such practices and to make the Commission’s standard more consistent with the FTC’s. Finally, we note that the FTC has clarified that the term “campaign” refers to “the offer of the same good or service for the same seller.”<sup>123</sup> If the Commission adopts a “per campaign limitation,” as proposed, we seek comment on whether the Commission also should adopt the FTC’s definition of the term “campaign.”

### C. Implementation Issues

48. In order to reduce initial compliance costs and burdens, the FTC deferred the effective date of the requirement that prerecorded message calls provide an automated interactive opt-out mechanism for three months, and the express written agreement requirement for twelve months.<sup>124</sup> If the Commission adopts an express written consent requirement and/or an automated interactive opt-out mechanism such as those adopted by the FTC, we seek comment on whether we also should adopt similar implementation periods to ensure that companies have adequate time to prepare to comply. If the Commission adopts these or similar requirements, we seek comment on whether to allow sellers and telemarketers, as did the FTC, to continue placing prerecorded telemarketing calls to consumers with whom the seller has an established business relationship for the duration of the implementation period for the express written consent requirement. Finally, we seek comment on an appropriate implementation period for the proposed change to our call abandonment rules discussed in section III.B above.

## IV. PROCEDURAL MATTERS

### A. *Ex Parte* Presentations

49. The proceeding this Notice initiates shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.<sup>125</sup> Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence

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<sup>122</sup> *Id.*, 73 Fed. Reg. at 51200.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*, 73 Fed. Reg. at 51166.

<sup>125</sup> 47 C.F.R. §§ 1.200 *et seq.*

description of the views and arguments presented generally is required.<sup>126</sup> Other requirements pertaining to oral and written presentations are set forth in section 1.1206(b) of the Commission's rules.<sup>127</sup>

### B. Filing of Comments and Reply Comments

50. Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. When filing comments or reply comments, please reference **CG Docket No. 02-278**. Comments may be filed using: (1) the Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://www.fcc.gov/cgb/ecfs/> or the Federal eRulemaking Portal: <http://www.regulations.gov>. Filers should follow the instructions provided on the website for submitting comments.
- Paper Filers: Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12<sup>th</sup> Street, SW, Room TW-A325, Washington, DC 20554. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12<sup>th</sup> Street, SW, Washington DC 20554.

51. People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an email to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the Consumer and Governmental Affairs Bureau at 202-418-0530 (voice) or 202-418-0432 (TTY). Contact the FCC to request reasonable accommodations for filing comments (accessible format documents, sign language interpreters, CART, etc.) by e-mail at: [FCC504@fcc.gov](mailto:FCC504@fcc.gov); phone: 202-418-0530 or TTY: 202-418-0432.

### C. Initial Regulatory Flexibility Analysis

52. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities of the policies and rules addressed in this document.<sup>128</sup> The IRFA is

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<sup>126</sup> See 47 C.F.R. § 1.1206(b)(2).

<sup>127</sup> 47 C.F.R. § 1.1206(b).

<sup>128</sup> See 5 U.S.C. §§ 601 *et seq.*

set forth in Appendix B. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the Notice provided on or before the dates indicated on the first page of this Notice.

#### **D. Paperwork Reduction Act**

53. This document contains proposed new information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995.<sup>129</sup> In addition, pursuant to the Small Business Paperwork Relief Act of 2002,<sup>130</sup> we seek specific comment on how we might “further reduce the information collection burden for small business concerns with fewer than 25 employees.”<sup>131</sup>

#### **V. ORDERING CLAUSE**

54. Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 1-2, 4, 201, 227, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-152, 154, 201, 227, and 403, this Notice of Proposed Rulemaking IS ADOPTED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>129</sup> Pub. L. No. 104-13.

<sup>130</sup> Pub. L. No. 107-198.

<sup>131</sup> 44 U.S.C. § 3506(c)(4).

## APPENDIX A

## Draft Proposed Rules for Public Comment

The Federal Communications Commission proposes to amend Part 64 of Title 47 of the Code of Federal Regulations as follows:

**PART 64 - MISCELLANEOUS RULES RELATING TO COMMON CARRIERS**

\* \* \* \* \*

**Subpart L - Restrictions on Telemarketing and Telephone Solicitation**

\* \* \* \* \*

**1. Amend § 64.1200 by revising paragraphs (a)(1), (a)(2)(iv)-(v), (a)(6), (a)(6)(i), (b)(1), and (b)(2), and by adding paragraphs (a)(1)(v), (a)(2)(v), (a)(2)(vi), and (b)(2) to read as follows:**

**§ 64.1200 Delivery restrictions.**

(a) No person or entity may: (1) Initiate any telephone call (other than a call made for emergency purposes or made with the prior express written consent of the called party) using an automatic telephone dialing system or an artificial or prerecorded voice;

(i) \* \* \*

(ii) \* \* \*

(iii) \* \* \*

(iv) \* \* \*

(v) For purposes of paragraph (a)(1) of this section, a person or entity shall be deemed to have obtained prior express written consent upon obtaining from the recipient of the call an express agreement, in writing, that:

(A) The person or entity obtained only after a clear and conspicuous disclosure that the purpose of the agreement is to authorize the delivery of calls to the recipient using an automatic telephone dialing system or an artificial or prerecorded voice;

(B) The person or entity obtained without requiring, directly or indirectly, that the agreement be executed as a condition of purchasing any good or service;

(C) Evidences the willingness of the recipient of the call to receive calls using an automatic telephone dialing system or an artificial or prerecorded voice; and

(D) Includes the telephone number to which such calls may be placed in addition to the recipient's signature<sup>1</sup> and



<sup>1</sup> For purposes of this provision, the term “signature” shall include an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.

(2) Initiate any telephone call to any residential line using an artificial or prerecorded voice to deliver a message without the prior express written consent of the called party, unless the call;

(i) \* \* \*

(ii) \* \* \*

(iii) \* \* \*

(iv) Is made by or on behalf of a tax-exempt nonprofit organization; or

(v) Delivers a prerecorded healthcare message made by, or on behalf of, a covered entity or its business associate, as those terms are defined in the HIPAA Privacy Rule, 45 CFR 160.103;

(vi) For purposes of paragraph (a)(2) of this section, a person or entity shall be deemed to have obtained prior express written consent upon obtaining from the recipient of the call an express agreement, in writing, that:

(A) The person or entity obtained only after a clear and conspicuous disclosure that the purpose of the agreement is to authorize the delivery of calls to the recipient using an artificial or prerecorded voice;

(B) The person or entity obtained without requiring, directly or indirectly, that the agreement be executed as a condition of purchasing any good or service;

(C) Evidences the willingness of the recipient of the call to receive calls using an artificial or prerecorded voice; and

(D) Includes the telephone number to which such calls may be placed in addition to the recipient's signature;<sup>2</sup> and

<sup>2</sup> For purposes of this provision, the term “signature” shall include an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.

\* \* \* \* \*

(6) Abandon more than three percent of all telemarketing calls that are answered live by a person, or measured over a 30-day period, per marketing campaign. A call is “abandoned” if it is not connected to a live sales representative within two (2) seconds of the called person's completed greeting. Whenever a sales representative is not available to speak with the person answering the call, that person must receive, within two (2) seconds after the called person's completed greeting, a prerecorded identification message that states only the name and telephone number of the business, entity, or individual on whose behalf the call was placed, and that the call was for “telemarketing purposes.” The telephone number so provided must permit any individual to make a do-not-call request during regular business hours for the duration of the telemarketing campaign. The telephone number may not be a 900 number or any other number for which charges exceed local or long distance transmission charges. The seller or telemarketer must maintain records establishing compliance with paragraph (a)(6) of this section.

(i) A call for telemarketing purposes that delivers an artificial or prerecorded voice message to a residential telephone line that is assigned to a person who has granted prior express written consent for the call to be made shall not be considered an abandoned call if the message begins within two (2) seconds of the called person's completed greeting.

\* \* \* \* \*

(b) All artificial or prerecorded telephone messages shall conform to the requirements of subparagraph (1) or (2) of this paragraph (b).

(1) All artificial or prerecorded telephone messages, other than those delivered to residential telephone subscribers for telemarketing purposes, shall (i) At the beginning of the message, state clearly the identity of the business, individual, or other entity that is responsible for initiating the call. If a business is responsible for initiating the call, the name under which the entity is registered to conduct business with the State Corporation Commission (or comparable regulatory authority) must be stated, and (ii) During or after the message, state clearly the telephone number (other than that of the autodialer or prerecorded message player that placed the call) of such business, other entity, or individual. The telephone number provided may not be a 900 number or any other number for which charges exceed local or long distance transmission charges.

(2) All artificial or prerecorded telephone messages delivered to residential telephone subscribers for telemarketing purposes shall (i) At the beginning of the message, state clearly the identity of the business, individual, or other entity that is responsible for initiating the call; that the purpose of the call is to sell goods or services; and the nature of the goods or services, and (ii) followed immediately by a disclosure of one or both of the following:

(A) In the case of a call that could be answered in person by a consumer, that the person called can use an automated interactive voice and/or keypress-activated opt-out mechanism to assert a do-not-call request at any time during the message. The mechanism must automatically add the number called to the caller's company-specific do-not-call list; once invoked, immediately disconnect the call; and be available for use at any time during the message; and

(B) In the case of a call that could be answered in person by an answering machine or voicemail service, that the person called can use a toll-free telephone number to assert a do-not-call request. The number provided must connect directly to an automated interactive voice or keypress-activated opt-out mechanism that automatically adds the number called to the caller's company-specific do-not-call list; immediately thereafter disconnects the call; and is accessible at any time throughout the duration of the telemarketing campaign.

(3) Paragraph (b)(2) shall not apply to a prerecorded healthcare message made by, or on behalf of, a covered entity or its business associate, as those terms are defined in the HIPAA Privacy Rule, 45 CFR 160.103.

\* \* \* \* \*

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The Federal Communications Commission proposes to amend Part 68 of Title 47 of the Code of Federal Regulations as follows:

**PART 68 – CONNECTION OF TERMINAL EQUIPMENT TO THE TELEPHONE NETWORK**

\* \* \* \* \*

**Subpart D – Conditions for Terminal Equipment Approval**

\* \* \* \* \*

**1. Amend § 68.318 by revising paragraph (c) to read as follows:**

**§ 68.318 Additional limitations.**

\* \* \* \* \*

(c) Line seizure by automatic telephone dialing systems. Automatic telephone dialing systems which deliver a recorded message to the called party must release the called party's telephone line within 5 seconds of the time notification is transmitted to the system that the called party has hung up, to allow the called party's line to be used to make or receive other calls. When a residential telephone subscriber asserts a do-not-call request pursuant to paragraph 64.1200(b)(2) of Part 64 of this Title, an automatic dialing system that delivers an artificial or prerecorded message to such subscriber for telemarketing purposes must release the called party's telephone line in the manner prescribed in paragraph 64.1200(b)(2).

**APPENDIX B****Initial Regulatory Flexibility Analysis**

1. As required by the Regulatory Flexibility Act of 1980, as amended, (RFA),<sup>1</sup> the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this Notice of Proposed Rule Making (NPRM). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the NPRM provided on the first page of this document. The Commission will send a copy of the NPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.<sup>2</sup> In addition, the NPRM and IRFA (or summaries thereof) will be published in the Federal Register.<sup>3</sup>

**1. Need for, and Objectives of, the Proposed Rules**

2. In this NPRM, we seek comment on proposed revisions to our rules under the TCPA pertaining to prerecorded telemarketing calls and certain other telemarketing practices.<sup>4</sup> The NPRM proposes to amend the Commission's TCPA rules in four areas. The first proposed amendment would conform the Commission's rules to the FTC's Telemarketing Sales Rule by prohibiting the use of prerecorded messages in telemarketing sales calls unless the seller or telemarketer has obtained the consumer's prior express consent, in writing, to receive such messages and irrespective of any established business relationship between the caller and the called party.<sup>5</sup> The Commission also proposes to allow sellers or telemarketers to obtain such consent using any medium or format permitted by the E-SIGN Act.<sup>6</sup> The Commission's objective in proposing to harmonize its prior consent requirement with the FTC's by adopting a written consent requirement is to reduce the potential for industry and consumer confusion surrounding telemarketers' obligations to the extent that similarly situated entities would no longer be subject to different requirements depending upon whether an entity is subject to the FTC's rule or to the Commission's rule. The Commission also believes that written consent may enhance its enforcement efforts and serve to protect both consumers and industry from erroneous claims that consent was or was not given, to the extent that, unlike oral consent, the existence of a paper or electronic record may provide unambiguous proof of consent.

3. The second proposed amendment would conform the Commission's rules to the FTC's Telemarketing Sales Rule by exempting certain healthcare-related calls from the general prohibition on prerecorded telemarketing calls to residential telephone lines.<sup>7</sup> The Commission proposes to exempt such calls based on the FTC's findings that: (1) the individuals most in need of these healthcare-related prerecorded messages (elderly or ill patients) might be unable or unlikely to take the steps necessary to provide their express written consent to receive them; (2) communications between healthcare-related

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<sup>1</sup> 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).

<sup>2</sup> See 5 U.S.C. § 603(a).

<sup>3</sup> See *id.*

<sup>4</sup> 47 U.S.C. § 227.

<sup>5</sup> See *supra* Sections III.A.1, 2.

<sup>6</sup> See *supra* Section III.A.1.

<sup>7</sup> See *supra* Section III.A.3.

entities subject to HIPAA regulations and their customers already are subject to extensive regulations at the federal level, including regulations directly addressing the making of telephone solicitations to patients, such that it would be unlikely that the creation of an exemption for these calls would lead to abusive practices; and (3) prerecorded healthcare messages of the type described in the NPRM are generally deemed more welcome and less intrusive by consumers and, as such, the creation of an exemption for this category of calls would not adversely affect consumer privacy rights. Thus, the Commission's objective in proposing the creation of this exemption is to avoid imposing duplicative regulations in an area that is already extensively regulated at the federal level and that, as a result, does not appear to give rise to the same privacy and other concerns as other types of calls.

4. The third proposed amendment would conform the Commission's rules to the FTC's Telemarketing Sales Rule by requiring that prerecorded telemarketing 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.<sup>8</sup> The Commission's objective in proposing this requirement is to make the opt-out process more consumer friendly by allowing consumers to easily and immediately assert their opt-out rights, regardless of the time of day, and without having to wait to opt out until the next business day during regular business hours when an operator is available to record the opt-out request. The Commission also believes that the use of an automated mechanism, as described above, may enhance the efficiency of companies' outbound telemarketing campaigns.

5. To the extent that the FTC's Telemarketing Sales Rule, as recently amended, imposes different requirements on sellers and telemarketers in these three areas than analogous rules adopted by the Commission, the Commission seeks comment on whether it should attempt to harmonize its TCPA requirements with those of the FTC. In proposing to conform its prerecorded message rules to the Telemarketing Sales Rule in the identified areas, the Commission also identified two overarching objectives: (1) to further empower residential telephone subscribers to avoid unwanted telemarketing messages; and (2) to advance Congress's directive to maximize consistency between the Commission's TCPA rules and the FTC's Telemarketing Sales Rule.<sup>9</sup> The Commission therefore seeks comment on whether these proposed revisions would benefit consumers and industry by creating greater symmetry between the two agencies' regulations and on the extent to which they would enhance the ability of residential telephone subscribers to avoid unwanted telemarketing messages.

6. The final proposed amendment would conform the Commission's rules to the FTC's Telemarketing Sales Rule by adopting a "per campaign" standard for measuring the "call abandonment rate."<sup>10</sup> As noted above, the "call abandonment rate" refers to the percentage of live telemarketing calls that a telemarketer drops or "abandons" as a result of the use of predictive dialers. The Commission proposes to adopt a "per campaign" limitation based on the concern raised in the FTC's rulemaking proceeding that telemarketers would be more likely to target less-valued customers with a disproportionate share of abandoned calls in the absence of such a limitation. Because the absence of a "per campaign" limitation may leave consumers to rely on the industry's good faith that it will not engage in such practices, despite obvious economic incentives to do otherwise, the Commission seeks comment on whether it should revise its current standard for measuring the three percent call abandonment rate by adopting this proposed limitation.

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<sup>8</sup> See *supra* Section III.A.4.

<sup>9</sup> See *Telemarketing Sales Rule, Final Rule*, Federal Trade Commission, 73 Fed. Reg. 51164-01 (2008) (2008 *Final Rule Amendments*); see also <http://www.ftc.gov/os/fedreg/2008/august/080829tsr.pdf>.

<sup>10</sup> As noted above, the "call abandonment rate" refers to the percentage of live telemarketing calls that a telemarketer drops or "abandons" as a result of the use of predictive dialers.<sup>10</sup> See *supra* Section III.B.



## 2. Legal Basis

7. The legal basis for any action that may be taken pursuant to this NPRM is contained in sections 1-4, 227, and 303(r) of the Communications Act of 1934, as amended; the Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394; and the Do-Not-Call Implementation Act, Pub. L. No. 108-10, 117 Stat. 557.

## 3. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

8. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that will be affected by the proposed rules, if adopted.<sup>11</sup> The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”<sup>12</sup> In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.<sup>13</sup> Under the Small Business Act, a “small business concern” is one that: 1) is independently owned and operated; 2) is not dominant in its field of operation; and 3) meets any additional criteria established by the Small Business Administration (SBA).<sup>14</sup>

9. In general, the Commission’s rules on telephone solicitation and on the use of autodialers, or artificial or prerecorded messages apply to a wide range of entities. The proposed rules, in particular, would apply (with certain exceptions) to all persons using prerecorded or artificial voice messages for telemarketing purposes.<sup>15</sup> Therefore, we expect that the proposals in this proceeding potentially could have a significant economic impact on a substantial number of small entities. Determining the precise number of small entities that would be subject to the requirements proposed in this NPRM, however, is not readily feasible.<sup>16</sup> Therefore, we invite comment on such number and, after evaluating the comments, will examine further the effect of any rule changes on small entities in the Final Regulatory Flexibility Analysis. Below, we have described some current data that are helpful in describing the number of small entities that might be affected by our proposed action, if adopted.

10. Nationwide, there are a total of approximately 29.6 million small businesses, according to the SBA.<sup>17</sup> A “small organization” is generally “any not-for-profit enterprise which is independently

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<sup>11</sup> 5 U.S.C. § 603(b)(3).

<sup>12</sup> 5 U.S.C. § 601(6).

<sup>13</sup> 5 U.S.C. § 601(3) (incorporating by reference the definition of “small business concern” in the Small Business Act, 5 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.”

<sup>14</sup> 15 U.S.C. § 632.

<sup>15</sup> 47 C.F.R. § 64.1200.

<sup>16</sup> See generally, *Telemarketing Sales Rule, Final Rule*, Federal Trade Commission, 73 Fed. Reg. 51164, 51202 (2008) (*2008 Final Rule Amendments*) (Regulatory Flexibility Analysis) (noting FTC’s belief that, based on the absence of available data, a precise estimate of the number of small entities that would be subject to the prerecorded call amendment or that would fall under the amended method for measuring the maximum permissible call abandonment rate is “not currently feasible”).

<sup>17</sup> See SBA, Office of Advocacy, “Frequently Asked Questions,” <http://web.sba.gov/faqs/faqindex.cfm?areaID=24> (revised Sept. 2009).

owned and operated and is not dominant in its field.”<sup>18</sup> Nationwide, as of 2002, there were approximately 1.6 million small organizations.<sup>19</sup>

11. *Telemarketing Bureaus and Other Contact Centers.* According to the Census Bureau, this economic census category “comprises establishments primarily engaged in operating call centers that initiate or receive communications for others-via telephone, facsimile, email, or other communication modes-for purposes such as (1) promoting clients’ products or services, (2) taking orders for clients, (3) soliciting contributions for a client; and (4) providing information or assistance regarding a client’s products or services.”<sup>20</sup> The SBA has developed a small business size standard for this category, which is: all such entities having \$7 million or less in annual receipts.<sup>21</sup> According to Census Bureau data for 2002, there were 1,876 firms in this category that operated for the entire year.<sup>22</sup> Of this total, 1,610 firms had annual sales of under \$5 million, and an additional 129 had sales of \$5 million to \$9,999,999. Thus, the majority of firms in this category can be considered small.

#### 4. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

12. The express written consent requirement proposed in the NPRM may entail additional recordkeeping requirements for covered entities to the extent that they would be required to obtain and keep records of consumers’ written consent to receive prerecorded message calls.<sup>23</sup> As a practical matter, however, it appears that there would not be a significant change in this recordkeeping burden for at least two reasons. First, because a seller or telemarketer placing a prerecorded telemarketing call must be prepared to provide, under the Commission’s current requirements, “clear and convincing evidence” that it received prior express consent from the called party, whether consent has been obtained orally or in writing, covered entities already are required to maintain records to demonstrate compliance with the existing express consent requirement.<sup>24</sup> In addition, covered entities already maintain electronic or other records of the existence of an established business relationship in order to demonstrate compliance with current Commission requirements governing prerecorded message calls to established business relationship customers. In place of keeping records of “oral consent” or of “established business relationships” as a precondition for placing prerecorded telemarketing calls, the proposed rule change would require covered entities to maintain records of consumers’ express written agreement to receive

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<sup>18</sup> 5 U.S.C. § 601(4).

<sup>19</sup> Independent Sector, *The New Nonprofit Almanac & Desk Reference* (2002).

<sup>20</sup> U.S. Census Bureau, 2007 NAICS Definitions, “561422 Telemarketing Bureaus and Other Contact Centers”; <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=561422&search=2007>.

<sup>21</sup> 13 C.F.R. § 121.201, NAICS code 561422.

<sup>22</sup> U.S. Census Bureau, 2002 Economic Census, Subject Series: Administrative and Support and Waste Management and Remediation Services, Table 4, “Receipts Size of Firms for the United States: 2002,” NAICS code 561422 (issued Nov. 2005); <http://www.census.gov/econ/census02/guide/subsumm.htm>. The 2002 census data are the most recent available; however, preliminary 2007 data show that this category has grown approximately 5.2 percent since 2002. See U.S. Census Bureau, American FactFinder, 2007 Economic Census, “Sector 56: EC075612: Administrative and Support and Waste Management and Remediation Services: Industry Series: Preliminary Comparative Statistics for the United States (2002 NAICS basis): 2007 and 2002” (released Dec. 1, 2009) (data on total “enterprises”); [http://factfinder.census.gov/servlet/IBQTable?\\_bm=y&-geo\\_id=&-ds\\_name=EC075612&-lang=en](http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-ds_name=EC075612&-lang=en).

<sup>23</sup> See *supra* Sections III.A.1, 2.

<sup>24</sup> 2005 *Second Reconsideration Order*, 18 FCC Rcd at 1404, para. 40.

such calls. And because the Commission has proposed that these agreements may be obtained pursuant to the E-SIGN Act, minimal additional recordkeeping should be necessary. For these reasons, the proposed written consent requirement, as a practical matter, is unlikely to result in significant new reporting, recordkeeping or other compliance requirements for sellers and telemarketers, including small entities.

#### **5. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered**

13. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed 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 or reporting requirements under the rule for 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 small entities.<sup>25</sup>

14. By proposing to conform the Commission's TCPA rules to those of the FTC in the areas described in paragraphs two through six above, the actions proposed are consistent with the mandate of the DNCIA to "maximize consistency" of the Commission's TCPA rules with the FTC's Telemarketing Sales Rule.<sup>26</sup> One alternative to the proposed amendments would be to adopt no changes to the Commission's rules on prerecorded messages and call abandonment. Although the Commission considered the option of doing nothing for each of the proposed rules, this option was outweighed by the anticipated benefits of the proposed changes, including: (1) reducing the potential for industry and consumer confusion surrounding a telemarketer's obligations to the extent that similarly situated entities would no longer be subject to different federal requirements; (2) enhancing the Commission's enforcement efforts and protecting both consumers and industry from erroneous claims that consent was or was not given, to the extent that the written consent requirement may provide more verifiable proof of consent; (3) empowering consumers to determine which prerecorded commercial solicitations they will receive via their telephones and providing a convenient and consumer-friendly method to "opt-out" of receiving those to which they object; and (4) ensuring that telemarketers do not calculate the three percent (permissible) call abandonment rate in a way that certain communities or populations are subject to a disproportionately greater number of dropped or abandoned calls.

15. In order to reduce initial compliance costs and burdens, the Commission proposes to defer the effective date of the proposed requirement that prerecorded calls provide an automated interactive opt-out mechanism for three months, and the proposed written agreement requirement for twelve months, to ensure that the industry will have adequate time to prepare to comply. The NPRM proposes to allow sellers and telemarketers to continue placing prerecorded calls to consumers with whom the seller has an established business relationship during the pendency of the implementation period for the written agreement requirement. In addition, by proposing that written consent agreements be obtained pursuant to any method allowed under the E-SIGN Act, the Commission's proposed written consent requirement would afford small entities flexibility in determining the method of "written" consent that is best suited to those entities' marketing plans and business operations. Although the Commission has determined that there may be an economic impact on small entities as a result of the proposed rules, such impact, which has been minimized to the extent possible, would appear to be minor and not unjustifiably adverse or burdensome.

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<sup>25</sup> 5 U.S.C. § 603(c).

<sup>26</sup> Public Law No. 108-10, 117 Stat. 557 (Do-Not-Call Implementation Act).

16. The Commission has determined that, on balance, any such burden is outweighed by the potentially significant benefits of the proposed rules to industry and consumers, as identified in the preceding paragraph. Because these anticipated significant benefits outweigh, based on our analysis, any minor burden our proposed rules may impose on small entities, we have determined that no further discussion of alternatives to the proposed rules is warranted beyond what we have set forth in paragraphs 14 and 15, *supra*.

**6. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules**

17. As discussed above, the Telemarketing Consumer Fraud and Abuse Prevention Act (“Telemarketing Act”), 15 U.S.C. §§ 6101-6108, and the Telemarketing Sales Rule (TSR)<sup>1</sup> adopted by the FTC also address certain telemarketing acts or practices. The NPRM identifies several aspects of the FTC’s Telemarketing Sales Rule, as recently amended, that differ from the Commission’s TCPA rules. Therefore, we seek comment in this NPRM on whether we should revise our rules to harmonize them with the FTC’s rule.<sup>2</sup> Amending the Commission’s rules, as proposed above, would reduce the inconsistencies that currently exist between the two sets of rules.

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<sup>1</sup> 16 C.F.R. Part 310.

<sup>2</sup> *See supra* para. 1.

**STATEMENT OF  
CHAIRMAN JULIUS GENACHOWSKI**

Re: *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG  
Docket No. 02-278.

It has been nearly two decades since the Commission first adopted rules addressing prerecorded telemarketing calls under the Telephone Consumer Protection Act of 1991. Since then, technologies have developed that allow telemarketers to conduct so-called “robocall” campaigns, generating more than a thousand prerecorded message calls per minute at a cost of just a few cents per call.

The rulemaking we initiate today considers whether consumers are adequately protected against unsolicited and unwanted telemarketing calls. We propose to prohibit telemarketers from making prerecorded telemarketing calls without first obtaining consumers’ written consent, and to allow consumers who no longer wish to receive these calls to withdraw their consent through convenient automated methods.

Those changes will empower consumers to choose the messages they wish to receive and avoid those they do not. They will also harmonize our rules with the FTC’s recently amended Telemarketing Sales Rule. Because of recent rule changes by the FTC, businesses now operate under different robocall requirements depending on whether they are subject to both the FTC’s and the FCC’s rules, or only to the FCC’s. For consumers, this may be confusing.

Today’s action will help reconcile differences between FTC and FCC rules, and will advance the goals of the Telephone Consumer Protection Act. It will help fulfill Congress’ directive to the Commission in the Do-Not-Call Implementation Act to “maximize consistency” of our telemarketing rules with the FTC’s.

I salute the Federal Trade Commission for its action and leadership on this issue. I look forward to further work with my colleagues as we seek to ensure that consumers are protected and empowered.



**STATEMENT OF  
COMMISSIONER MICHAEL J. COPPS**

Re: *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG  
Docket No. 02-278.

This Notice of Proposed Rulemaking kicks off another consumer-focused proceeding in which we expand our goal—taken up in 2003 when we implemented the Do-Not-Call registry and again in 2008 when we eliminated the expiration of the registry—of returning a measure of privacy and control to citizens, allowing each of us to choose limits on the telemarketing calls we receive. The Notice specifically addresses pre-recorded telemarketing calls. It tentatively concludes that harmonizing the Commission’s rules, adopted pursuant to the Telephone Consumer Protection Act, with the Federal Trade Commission’s recently-amended Telemarketing Sales Rule, would reduce the potential for consumer and industry confusion. I am pleased to support the item and look forward to an expeditious conclusion to the entire proceeding as quickly as we can do it.

I commend the Chairman and my colleagues for putting a priority on this consumer-friendly item, another step in building a strong record of proactive consumer protection here at the FCC. And gratitude also to the Bureau for its work in teeing this up for us.

**STATEMENT OF  
COMMISSIONER ROBERT M. MCDOWELL**

Re: *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG  
Docket No. 02-278.

I commend the Chairman and his staff for their work on updating the Federal Communications Commission's rules on robocalls. I also thank the Chairman for reinstating the practice of including actual text of the proposed rules in the Notice of Proposed Rulemaking (NPRM). As I have stated many times before, the American public and Congress could greatly benefit from such transparency.

In short, this NPRM updates and harmonizes our rules with the Federal Trade Commission's (FTC) counterpart rules and, in effect, would reduce consumer confusion for those who wonder why they are receiving unsolicited robocalls from some entities but not from others.

Over the years, consumers have complained about unsolicited telemarketing calls - especially robocalls - interrupting their lives, especially around dinnertime and other important moments in their lives. There are two areas where this NPRM proposes to empower consumers to control what calls they receive. First, a consumer would only receive such calls if prior express written consent has been given by the consumer to the telemarketer. For convenience sake, such consent could be given electronically. Second, robocalls would have to include an automated message that allows a consumer to "opt out" of receiving future calls. The proposal requires this message to be interactive so the consumer can elect to use the "opt out" feature immediately. This NPRM raises important questions regarding matters such as established business relationships, and I look forward to reviewing the record as we move forward.

Finally, I note that these rules apply only to commercial calls and do not apply to political calls, non-profit calls and, most importantly, emergency calls – all which are held to higher standards of protection. On that topic, I thank the staff for working with my office to ensure that the exemption for emergency calls includes calls that are permitted under the Warning, Alert, and Response Network Act (WARN Act) and the Commercial Mobile Alert System (CMAS).

**STATEMENT OF  
COMMISSIONER MIGNON L. CLYBURN**

Re: *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG  
Docket No. 02-278.

Thank you to the Bureau for its fine work on this Notice. The Notice is positive both for consumers and industry. There is little question that consumers stand to benefit from having increased control over whether or not they may receive telephone solicitations at home. By proposing to require sellers and telemarketers to obtain residential telephone subscribers' prior written consent for prerecorded calls, we are ensuring that consumers are making an **affirmative choice** to receive such calls. For industry, it is important in this arena to have a uniform set of rules that makes compliance straightforward. While in some cases it may be preferential to permit a varied regulatory approach, in this case it appears that continuity across jurisdictions is far more sensible.

I look forward to reviewing the comments filed in response to this Notice and working with my fellow Commissioners to institute appropriate rules that enable consumers to prevent the receipt of unwanted prerecorded calls.

**STATEMENT OF  
COMMISSIONER MEREDITH A. BAKER**

Re: *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG  
Docket No. 02-278

I am pleased to support this Notice of Proposed Rulemaking today. It takes an important step toward policy changes that will give consumers greater control over the prerecorded telemarketing calls they receive—calls that many consumers find annoying and intrusive. At the same time, the proposed rules would include important exemptions, including for calls initiated for emergency purposes and health care-related calls subject to the Health Insurance Portability and Accountability Act of 1996. I also think it is good to harmonize rules across the federal government where the statute allows and it makes good policy sense, as we propose to do here with the telemarketing rules of the Federal Trade Commission. I do have some questions about the proposal related to established business relationships and I look forward to reviewing the record on that issue in particular. Thanks to the Consumer & Governmental Affairs Bureau for all of your hard work on this item.