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Synopsis

On April 29, 2005, a coalition of 33 organizations, including trade associations, individual companies, and non-profit entities engaged in interstate telemarketing activities ("*Joint Petitioners*"), filed with the Commission a joint petition for declaratory ruling. The joint petition raises issues concerning the scope of the Commission's jurisdiction over interstate telemarketing calls under the TCPA. In particular, *Joint Petitioners* ask the Commission to issue a ruling declaring the Commission's exclusive regulatory jurisdiction over interstate telemarketing calls and barring state regulation of such calls. The Commission seeks comment on the issues raised in the joint petition.

Joint Petitioners assert that, in the TCPA, Congress sought to "establish uniform national standards that balance the concerns of consumers with the legitimate interests of telemarketers." According to *Joint Petitioners*, states have adopted and proposed "divergent rules applicable to interstate telemarketing that undermine the

desired uniform federal regulatory regime." Citing dozens of existing and proposed state laws that differ from the Commission's TCPA rules and that do not distinguish between intrastate and interstate telemarketing calls, *Joint Petitioners* contend that these state regulations place "undue and at times impossible compliance burdens on interstate telemarketers, and lead state courts in enforcement actions to * * * impose substantial fines on telemarketers for interstate calls expressly permitted by the federal rules."

To resolve this situation, *Joint Petitioners* ask the Commission to "revisit" determinations that it made in its 2003 TCPA Order concerning "the interplay between federal and state authority" over interstate telemarketing activities and "clarify that the FCC has exclusive authority over interstate telemarketing." *Joint Petitioners* contend that the Commission's conflict preemption approach to resolving alleged conflicts between state and federal telemarketing laws is "unsound" because, in their view, states have no authority to regulate interstate telemarketing. *Joint Petitioners* state that the Commission's regulatory authority under the TCPA must be understood against the backdrop of pre-existing federal law governing the regulation of interstate communications. Specifically, they assert that Congress: (1) Provided the Commission with exclusive jurisdiction over interstate communications in section 2(a) of the Communications Act; (2) expanded the Commission's authority over intrastate telemarketing calls in the TCPA amendments to section 2(b) of the Act; and thus (3) made clear that it considered telemarketing to be "communication" covered by section 2 of the Act. *Joint Petitioners* also take issue with the Commission's statement in its 2003 TCPA Order that section 227(e)(1) of the Act is "ambiguous" as to whether states may regulate interstate telemarketing calls, asserting that that section instead reflects Congress's desire to "(a) expand federal power over intrastate calls, (b) restrict, but * * * not eliminate, state authority over such calls, and (c) * * * not grant to the states any authority over interstate calls."

Based on the view that Congress intended the Commission to have exclusive jurisdiction over interstate telemarketing calls, *Joint Petitioners* contend that the Commission cannot lawfully delegate that jurisdiction to the states. *Joint Petitioners* assert that "acknowledging the Commission's exclusive jurisdiction over interstate

telemarketing" would not deprive states of their ability to protect their residents from unwanted interstate telephone solicitations. *Joint Petitioners* note that the TCPA both allows state attorneys general to enforce federal telemarketing rules in federal court and "preserves the right of state attorneys general to proceed in state court against telemarketers 'on the basis of an alleged violation of any general civil or criminal statute of such State'." Thus, *Joint Petitioners* contend, the TCPA does not interfere with state police powers or long-arm statutes, which are used to protect consumers generally against fraud.

If the Commission determines that the Communications Act, as amended by the TCPA, does not already bar states from regulating interstate telemarketing, *Joint Petitioners* argue, in the alternative, that the Commission should exercise its own authority to "categorically preempt" state regulation of interstate telemarketing calls. *Joint Petitioners* urge the Commission to categorically preempt all state regulation of interstate telemarketing on the basis that such regulation is "inconsistent with the sound, pro-competitive policy of prohibiting multiple, inconsistent regulation."

Federal Communications Commission.

Monica Desai,

Acting Chief, Consumer & Governmental Affairs Bureau.

[FR Doc. 05-12467 Filed 6-28-05; 8:45 am]

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 64

[CG Docket No. 02-278; DA 05-1347]

Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991

AGENCY: Federal Communications Commission.

ACTION: Proposed rule; petition for declaratory ruling, comments requested.

SUMMARY: In this document, the Commission reopens the public comment period for six declaratory ruling petitions that seek Commission preemption under the Telephone Consumer Protection Act ("TCPA") of the application of particular state laws to interstate telemarketing calls.

DATES: Comments are due on or before July 29, 2005, and reply comments are due on or before August 18, 2005.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554. See **SUPPLEMENTARY INFORMATION** for further filing instructions.

FOR FURTHER INFORMATION CONTACT: Kelli Farmer, Consumer Policy Division, Consumer & Governmental Affairs Bureau, (202) 418-2512 (voice), Kelli.Farmer@fcc.gov.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's document, DA 05-1347, released May 13, 2005. On July 3, 2003, the Commission released a *Report and Orders* revising its rules under the TCPA (2003 TCPA Order), published at 68 FR 44144, July 25, 2003. The Commission determined that it would consider any alleged conflicts between state and Federal requirements and the need for preemption on a case-by-case basis. The Commission instructed any party who believes that a state law is inconsistent with section 227 of the Communications Act or the Commission's rules to seek a declaratory ruling from the Commission. The six Petitions that are the subject of this document sought such a declaratory ruling. In order to assemble a more complete administrative record that encompasses and reflects relevant developments in this area, the Commission invites interested parties to file supplemental comments in the record of the following proceedings: (1) *American Teleservices Association Petition for Declaratory Ruling with Respect to Certain Provisions of the New Jersey Consumer Fraud Act and the New Jersey Administrative Code*, DA 04-3185, filed Aug. 24, 2004 (citing N.J. Statutes Ann. section 56:8-119, *et seq.* (West 2003) and N.J. Admin. Code title 13, section 45D (2004)); (2) *ccAdvertising (aka FreeEats.com, Inc.) Petition for Expedited Declaratory Ruling*, DA 04-3187, filed Sept. 13, 2004 (citing N.D. Cent. Code section 51-28-02); (3) *Consumer Bankers Association Petition for Declaratory Ruling with Respect to Certain Provisions of the Indiana Revised Statutes and Indiana Administrative Code*, DA 04-3835, filed Nov. 19, 2004 (citing Burns Ind. Code Ann. section 24-4.7-4 (2004) and Ind. Admin. Code section 11 IAC 1-1-4 and section 11 IAC 1-1-3.5 (2004)); (4) *Consumer Bankers Association Petition for Expedited Declaratory Ruling with Respect to Certain Provisions of the Wisconsin Statutes and Wisconsin Administrative Code*, DA 04-3836, filed Nov. 19, 2004 (citing Wis. Statutes section 100.52 (2003) and Wis. Admin. Code, Agriculture, Trade and Consumer Protection, sections 127.02-127.20 and

127.80-127.84)); (5) *National City Mortgage Co. Petition for Expedited Declaratory Ruling with Respect to Certain Provisions of the Florida Statutes*, DA 04-3837, filed Nov. 22, 2004 (citing Fla. Statutes section 501.059); and (6) *TSA Stores, Inc. (The Sports Authority) Petition for Declaratory Ruling with Respect to Certain Provisions of the Florida Laws and Regulations*, DA 05-342, filed Feb. 1, 2005 (citing Fla. Statutes section 501.059)).

When filing comments, please reference CG Docket No. 02-278, DA 05-1347, and the DA number assigned to the petition to which the comments relate, including one or more of the following: DA 04-3185, DA 04-3187, DA 04-3835, DA 04-3836, DA 04-3837, or DA 05-342. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121, May 1, 1998. Comments filed through the ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/e-file/ecfs.html>. Generally, only one copy of an electronic submission must be filed. In completing the transmittal screen, commenters should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form <your e-mail address>." A sample form and directions will be sent in reply.

Parties who choose to file by paper must send an original and four (4) copies of each filing. Filings can be sent by hand or messenger delivery, by electronic media, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although the Commission continues to experience delays in receiving U.S. Postal Service mail). The Commission's contractor, Natek, Inc., will receive hand-delivered or messenger-delivered paper filings or electronic media for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial and electronic media sent by 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 mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW., Washington, DC 20554. All filings must be addressed to the Commission's Secretary, Marlene H. Dortch, Office of the Secretary, Federal Communications Commission, 445 12th Street, SW., Room TW-B204, Washington, DC 20554.

This proceeding shall be treated as a "permit but disclose" proceeding in accordance with the Commission's *ex parte* rules, 47 CFR 1.1200. Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substances of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required. See 47 CFR 1.1206(b). Other rules pertaining to oral and written *ex parte* presentations in permit-but-disclosed proceedings are set forth in section 1.1206(b) of the Commission's rules, 47 CFR 1.1206(b).

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Synopsis

In late 2004 and early 2005, the Commission received six petitions for declaratory ruling seeking Commission preemption under the TCPA of particular state laws, as applied to interstate telemarketing calls. In response to public notices issued by the Commission's Consumer & Governmental Affairs Bureau, interested parties filed comments with the Commission on issues raised in the six

declaratory ruling petitions. Since the close of the comment cycles relating to these petitions, the Commission's staff has learned of a number of recent developments that, if made a part of the formal record, may help to inform the Commission's consideration of particular issues raised in the petitions. In particular, a recently filed petition for declaratory ruling describes an increasing number of divergent state laws applicable to interstate telemarketing and lists several telemarketing-related bills that have been introduced in state legislatures in recent months that, if enacted, would apply to interstate telemarketing calls. See *Alliance Contact Services, et al. Petition for Declaratory Ruling that the FCC has Exclusive Regulatory Jurisdiction Over Interstate Telemarketing*, filed April 29, 2005. Similarly, we are aware of recent court proceedings involving adjudications of state enforcement actions in which the proper relationship between state and federal telemarketing laws has been at issue before the court. See, e.g., *North*

Dakota v. FreeEats.com, Inc., Opinion and Order, No. 04-C-1694 (N.D. Dist. Ct. Feb. 2, 2005); *North Dakota v. FreeEats.com, Inc.*, Stipulation for Entry of Final Judgment, No. 04-C-1694 (N.D. Dist. Ct. March 9, 2005) (state court holding that interstate political polling calls using prerecorded message violate state's telemarketing law).

Finally, we note that the Consumer & Governmental Affairs Bureau released contemporaneously with this document two additional public notices seeking public comment on two separate petitions for declaratory ruling that raise issues relating to the Commission's jurisdiction and preemption authority under the TCPA. See *Consumer & Governmental Affairs Bureau Seeks Comment on Petition for Declaratory Ruling Relating to Commission's Jurisdiction Over Interstate Telemarketing*, Public Notice, CG Docket No. 02-278, DA 05-1346 (rel. May 13, 2005) (seeking comment on joint petition filed by 33 organizations engaged in interstate telemarketing activities in which petitioners ask

Commission to declare its exclusive regulatory jurisdiction over interstate telemarketing); *Consumer & Governmental Affairs Bureau Seeks Comment on Petition for Declaratory Ruling on Preemption of California Telemarketing Rules*, Public Notice, CG Docket No. 02-278, DA 05-1348 (rel. May 13, 2005) (seeking comment on petition for declaratory ruling in which petitioner asks Commission *not* to preempt particular provisions of California's telemarketing laws). In order to assemble a more complete administrative record that encompasses and reflects relevant developments in this area, the Commission reopens the public comment period for the six declaratory ruling petitions referenced above and invites interested parties to file supplemental comments in the record of those proceedings.

Federal Communications Commission.

Monica Desai,

Acting Chief, Consumer & Governmental Affairs Bureau.

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