Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)
ALLIANCE CONTACT SERVICES; AMERICALL GROUP, INC.; AMERICAN BANKERS ASSOCIATION; AMERICAN BREAST CANCER FOUNDATION; AMERICAN FINANCIAL SERVICES ASSOCIATION; AMERICAN RESORT DEVELOPMENT ASSOCIATION; AMERICAN TELESERVICES ASSOCIATION; AMERICA'S COMMUNITY BANKERS; ANSWERNET NETWORK; CANCER RECOVERY FOUNDATION OF AMERICA; CONNEXTIONS; DIRECT MARKETING ASSOCIATION; EFFECTIVE TELESERVICES, INC.; FREEEATS.COM, INC. D/B/A CCADVERTISING; HUMANE SOCIETY OF GREATER AKRON; INFOCISION MANAGEMENT CORP.; KIDS WISH NETWORK; MIRACLE FLIGHTS FOR KIDS; MULTIPLE SCLEROSIS ASSOCIATION OF AMERICA; NATIONAL CHILDREN'S CANCER SOCIETY; NATIONAL MULTIPLE SCLEROSIS SOCIETY; NOBLE SYSTEMS CORP.; NORTHWEST DIRECT MARKETING, INC.; NPS; OPTIMA DIRECT, INC.; PRECISION RESPONSE CORP.; SITEL CORP.; SOUNDBITE COMMUNICATIONS, INC.; SYNERGY SOLUTIONS, INC.; TELE-RESPONSE CENTER, INC.; TELETECH HOLDINGS, INC.; TPG TELEMANAGEMENT, INC.; AND WEST BUSINESS SERVICES, LP	)
Petition for Declaratory Ruling that the FCC has Exclusive Regulatory Jurisdiction Over Interstate Telemarketing	)

JOINT PETITION FOR DECLARATORY RULING THAT THE FCC HAS EXCLUSIVE REGULATORY JURISDICTION OVER INTERSTATE TELEMARKETING

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SUMMARY

Joint Petitioners respectfully request a declaratory ruling that the FCC has exclusive regulatory jurisdiction over interstate telemarketing and that, consequently, states have no authority to regulate in that area. That conclusion, urgently needed to resolve the current regulatory chaos in interstate telemarketing, follows directly from the supremacy of federal law.

In the Telephone Consumer Protection Act (TCPA), Congress acted with clear purpose. It sought to establish uniform national standards for interstate telemarketing that properly balance individuals' privacy interests, their interests in being informed as consumers, and the interests of legitimate telemarketers. And the Commission has consistently adhered to these objectives in establishing the federal regulatory scheme for telemarketing (*see infra* at 7-8). The Commission adopted the current case-by-case conflict preemption approach with the belief that states would acknowledge the supremacy of these federal policies and would harmonize their interstate telemarketing regulations with the federal rules.

The states' staunch refusal to do so has led to the current predicament, in which interstate telemarketing is governed for all practical purposes not by the federal rules but by an ever more complicated patchwork of highly variable state laws that do not recognize the well established distinction between interstate and intrastate telemarketing (*see infra* at 9-22). This morass of existing and proposed state laws undermines the congressional goals of uniformity and balance, places undue and at times impossible compliance burdens on interstate telemarketers, and leads state courts in enforcement actions to misinterpret the Commission's authority and impose substantial fines on telemarketers for interstate calls expressly permitted by the federal rules (*see infra* at 23-29).

To resolve this crisis, Petitioners request that the Commission revisit the interplay between federal and state authority in this area and clarify that the FCC has exclusive authority over interstate telemarketing. The legal basis for this conclusion is a matter of straightforward statutory analysis: Congress, in the Communications Act of 1934 and the Telephone Consumer Protection Act, conferred on this Commission exclusive regulatory jurisdiction over interstate telemarketing (*see infra* at 33-36). Commission precedent directly on point reinforces that conclusion (and provided the legal basis for a staff opinion letter concluding that states have no authority to regulate interstate telemarketing) (*see infra* at 36-39). Moreover, and contrary to the states' assertion, acknowledging the Commission's exclusive jurisdiction over interstate telemarketing does not deprive states of their ability to protect their residents. The TCPA plainly establishes a role for the states both in enforcing uniform national standards for the regulation of telemarketing and in redressing violations of state statutes of general applicability (*see infra* at 40-42).

Alternatively, even if the Commission finds that Congress has not already barred states from regulating interstate telemarketing, the Commission should exercise its own authority to do so (*see infra* at 42-44). Consistent with the TCPA, and well-supported by judicial and Commission precedent, that action is necessary to resolve the current crisis in interstate telemarketing regulation and to achieve the federal policy goal of carefully balanced uniform national standards for interstate telemarketing.

In sum, we cannot overstate the importance or the urgent need for the requested declaratory ruling. Commission action is required for numerous compelling reasons: to give effect to the supremacy of federal law (*see infra* at 33-36); to achieve the balance and uniformity mandated by Congress (*see infra* at 7-33); to recognize and adhere to directly analogous

Commission precedent (*see infra* at 36-39); to correct states' misinterpretation of the TCPA's reservation of state authority over *intrastate* telemarketing (*see infra* at 35-36, 40-42); to eliminate the existing patchwork of divergent state regulations of interstate telemarketing (*see infra* at 9-22); to curtail states' ongoing legislative proposals for additional far-reaching restrictions, such as the further narrowing of state EBR exemptions, the extension of state rules to business-to-business calls and inbound calling, and the addition of requirements for the rerouting of foreign call center calls back to the United States upon request (*see infra* at 29-32); to lessen the unfair compliance burdens and compliance risks placed on interstate telemarketers (*see infra* at 23-26); and to provide direction to state attorneys general and courts, which are misinterpreting the Commission's authority and are punishing telemarketers for interstate calls permissible under the federal scheme (*see infra* at 26-29). For all of these reasons, the Commission must declare its exclusive regulatory jurisdiction over interstate telemarketing.

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JOINT PETITION FOR DECLARATORY RULING THAT THE FCC HAS EXCLUSIVE REGULATORY JURISDICTION OVER INTERSTATE TELEMARKETING

Joint Petitioners Alliance Contact Services; Americall Group, Inc.; American Bankers Association; American Breast Cancer Foundation; American Financial Services Association; American Resort Development Association; American Teleservices Association; America's Community Bankers; AnswerNet Network; Cancer Recovery Foundation of America;

Connextions; Direct Marketing Association; Effective Teleservices, Inc.; FreeEats.com, Inc. d/b/a ccAdvertising; Humane Society of Greater Akron; InfoCision Management Corp.; Kids Wish Network; Miracle Flights for Kids; Multiple Sclerosis Association of America; National Children's Cancer Society; National Multiple Sclerosis Society; Noble Systems Corp.; Northwest Direct Marketing, Inc.; NPS; Optima Direct, Inc.; Precision Response Corp.; SITEL Corp.; SoundBite Communications, Inc.; Synergy Solutions, Inc.; Tele-Response Center, Inc.; TeleTech Holdings, Inc.; TPG TeleManagement, Inc.; and West Business Services, LP[1] ("Petitioners") respectfully ask the Commission for a declaratory ruling that the FCC has exclusive regulatory jurisdiction over interstate telemarketing and that, consequently, states have no authority to regulate in that area. Federal statutes and this Commission's own precedents mandate that result. Moreover, such a ruling is the Commission's only means to avoid an otherwise inevitable succession of individual preemption proceedings that unfairly burden interstate commerce, waste Commission resources, and most importantly, leave unresolved the basic question of federal jurisdiction over interstate telemarketing.

INTRODUCTION

The legal principles supporting the declaratory ruling sought in this petition can be summarized very succinctly. The Supremacy Clause commands that where Congress has conferred on a federal agency exclusive regulatory jurisdiction over a particular area, states have

[1] Joint Petitioners represent a broad coalition of organizations engaged in interstate commerce that comply scrupulously with federal telemarketing regulations but are adversely affected by the prospect (or in some cases, the actuality) of state efforts to subject interstate telemarketing to state regulations that exceed and in many cases conflict with applicable federal regulations. The coalition includes trade associations and individual companies that represent a large and varied sampling of the national economy – commercial entities that rely on lawful telemarketing to sell goods and services, political advocacy organizations, non-profit organizations that rely on lawful telemarketing to solicit charitable contributions, and vendors that provide calling services to all of the above.

no authority to regulate in that area – whether or not any given state law conflicts with federal law.[2] That is precisely the way Congress has allocated regulatory jurisdiction over interstate telecommunications regulation. Section 2(a) of the Communications Act grants the Commission jurisdiction over "all interstate and foreign commerce in communication by wire or radio" and over "all persons engaged . . . in such communication."[3] That comprehensive jurisdiction over communications is subject only to section 2(b), which reserves to the states jurisdiction over "intrastate communication service by wire or radio."[4] Thus, as both courts and this Commission have long recognized, *Congress drew a clear and definitive distinction between interstate and intrastate communications, and granted to the FCC exclusive authority over interstate communications*.[5] And because Congress considers telemarketing regulation to be a species of telecommunications regulation,[6] federal regulatory jurisdiction over interstate telemarketing is also exclusive.

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2 *See Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 377 (1988); *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 236 (1947); *Missouri Pac. R. Co. v. Stroud*, 267 U.S. 404, 408 (1925).

3 47 U.S.C. § 152(a).

4 47 U.S.C. § 152(b); *Louisiana Pub. Serv. Comm'n, v. FCC*, 476 U.S. 355, 370 (1986).

5 *See e.g., National Ass'n of Regulatory Util. Comm'rs v. FCC*, 746 F.2d 1492, 1498 (D.C. Cir. 1984) *(NARUC)* (interstate and foreign communications are "totally entrusted to the FCC."); *North Carolina Utils. Comm'n v. FCC*, 537 F.2d 787, 793 (4th Cir. 1976) (*NCUC*) (describing the Commission's "plenary jurisdiction over the rendition of interstate and foreign communication services"); *State Corp. Comm'n of Kansas v. FCC*, 787 F.2d 1421, 1426 (10th Cir. 1986) (noting that it is the FCC's "basic function under the Act" to govern "'all interstate and foreign communication by radio or wire'") (quoting Section 2(a)); *AT&T Communications v. Public Service Comm'n*, 625 F. Supp. 1204, 1208 (D. Wyo. 1985) ("It is beyond dispute that interstate telecommunications service is normally outside the reach of state commissions and within the exclusive jurisdiction of the FCC."). *Accord*, *Operator Services Providers of America/Petition for Expedited Declaratory Ruling*, Memorandum Opinion and Order, 6 F.C.C. Rcd. 4475 (1991) ¶ 10 ("*OSPA*") ("The Commission's jurisdiction over interstate and foreign communications is exclusive of state authority."); *American Telephone and Telegraph Company and the Associated Bell System Companies Interconnection With Specialized Carriers in Furnishing Interstate Foreign Exchange (FX) Service and Common Control Switching Arrangements (CCSA)*, Memorandum Opinion and Order, 56 FCC 2d 14 (1975) ¶ 21 ("The States do not have jurisdiction over interstate communications.").

6 In enacting the TCPA, Congress not only placed the regulation of telemarketing within Title II of the Communications Act, but also *expanded Commission authority over intrastate calls*, by amending section 2(b) to give the Commission jurisdiction over both interstate and intrastate telemarketing calls. *See* Telephone Consumer Protection Act of 1991 § 3(a) & (b), P.L. No. 102-243, 105 Stat. 2394 (1991) (adding section 227 to Title II of the Communications Act of 1934 and amending section 2(b) of that Act).

If petitioners were writing on a clean slate, the foregoing short summary might well be sufficient. However, for many months now the basic issue here has been framed differently before this Commission – not as a question of *jurisdiction*, but as a question of whether state telemarketing regulations that purport to apply to interstate telemarketing *conflict* with federal telemarketing regulations and are therefore "preempted." While the "conflict" inquiry is, constitutionally speaking, a close cousin of the jurisdictional analysis set forth above (both of them tracing their lineage back to the Supremacy Clause), there are important differences. First, the outcome of the conflict inquiry depends in large part on analysis of the content of various state telemarketing laws, whereas the jurisdictional inquiry turns exclusively on construction of federal law. Second, the conflict inquiry can provide only piecemeal relief that is by its nature limited to specific provisions of specific existing state laws, whereas the jurisdictional inquiry will result in a categorical rule that settles virtually all present or future issues about federal vs. state authority over interstate telemarketing. Finally, and perhaps most importantly, the conflict inquiry effectively grants to the states concurrent jurisdiction over interstate telemarketing by implicitly *assuming* that state regulation in that area is permissible *unless* it conflicts with federal law, whereas the jurisdictional inquiry focuses on the logically prior question of whether states have any authority to regulate interstate telemarketing in the first place. These practical and legal differences between the jurisdictional approach and the conflict approach have important implications for the Commission, for all concerned parties, and indeed for interstate commerce.

Because many state laws that purport to regulate interstate telemarketing *do*, in fact, conflict with federal telemarketing regulations, the conflict approach invited by the Commission's 2003 *Report and Order*[7] has received a great deal of attention in recent months.[8]

[7] The Commission adopted that approach in the 2003 *Report and Order* despite its recognition in that same document that "states traditionally have had jurisdiction over only intrastate calls" and that "states lack

In fact, some of the parties joining in this petition have filed comments requesting or supporting preemption of specific provisions of state laws purporting to regulate interstate telemarketing. Some Petitioners have also filed comments in support of more comprehensive preemption of state telemarketing provisions as applied to interstate telemarketing. The instant petition retracts none of the support already expressed for the merits of these preemption arguments. Herein, however, we urge the Commission to adopt a different approach – grounded in the Commission's exclusive jurisdiction over interstate communications – that will more effectively, efficiently, and definitively resolve the confusion about what standards apply to interstate telemarketing, and give full effect to the goals of the TCPA.

Anticipating voluntary "harmonization" of state and federal regulations,[9] the Commission "encourage[d] states to avoid subjecting telemarketers to inconsistent rules."[10] Unfortunately, states have ignored the Commission's *Report and Order*. Telemarketers continue to be subject to a dizzying array of state laws purporting to regulate interstate telemarketing, and state legislative proposals for additional restrictions clearly reflect a trend toward greater *inconsistency* rather than greater *harmony*. In addition, the Commission's attempts to resolve

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Continued . . .

jurisdiction over interstate calls." *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 F.C.C. Rcd. 14014 (2003) ¶ 83.

[8] *See* FreeEats.com, Inc. d/b/a ccAdvertising Petition for Expedited Declaratory Ruling (filed Sept. 13, 2004) (seeking preemption of section 51-28-02 of North Dakota Century Code as applied to interstate automatic telephone dialing systems or prerecorded voice messages) ("FreeEats.com Petition"); American Teleservices Association, Inc. Petition for Declaratory Ruling with Respect to Certain Provisions of the New Jersey Consumer Fraud Act and the New Jersey Administrative Code (filed Aug. 24, 2004) ("ATA Petition"); Consumer Banking Association for Declaratory Ruling with Respect to Certain Provisions of the Indiana Revised Statutes and the Indiana Administrative Code (filed Nov. 19, 2004) ("CBA Petition"); National City Mortgage Co. Petition for Expedited Declaratory Ruling with Respect to Section 501.059 of the Florida Statutes (filed Nov. 22, 2004) ("NCMC Petition"); TSA Stores, Inc. (The Sports Authority) Petition for Declaratory Ruling with Respect to Certain Provisions of the Florida laws and regulations (filed Feb. 1, 2005) ("TSA Petition").

[9] *Id.* ¶ 74.

[10] *Id.* ¶ 84. *See also id.* ¶ 77 (encouraging convergence of all state and federal do-not-call lists into a single list).

particular controversies under a conflict approach have met with procedural resistance that rivals the states' substantive opposition.[11] Mistakenly asserting sovereign immunity, the states have consistently argued that the Commission lacks authority to remedy inconsistencies between state and federal regulation of interstate telemarketing no matter how gross the conflict. These developments accentuate the practical as well as legal differences between the conflict approach and the jurisdictional approach, and reinforce the conclusion that the conflict approach is unsound, inefficient, unfair, and ultimately doomed to fail.

The conflict approach is unsound because states simply have no authority to regulate interstate telemarketing. It is also inefficient, as it requires this Commission first to rule on each individual claim of conflict, and then to defend the inevitable individual appeals from each ruling. Because state regulations differ not only from the federal rules but also from each other, these appeals will be truly piecemeal, proceeding not only state-by-state but provision-by-provision.[12] Even if it were possible for the Commission to commit the resources this would require, such an approach is unfair because it will force small companies – those that cannot finance years of litigation while their claims remain unresolved – to yield to state pressure, even if that means the cessation of interstate activities authorized by federal law.[13] And ultimately, the case-by-case conflict approach is doomed to fail because it is inherently incapable of providing certainty about new state restrictions that continue to be proposed and enacted at a disturbing rate. Clearly, the legally appropriate – and most practical – approach to preserving the

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[11] *See, e.g.*, Indiana's Motion to Dismiss the CBA Petition on Grounds of Sovereign Immunity at 2-5 (Jan. 24, 2005); Florida Motion to Dismiss the NCMC Petition for Lack of Jurisdiction and Other Grounds at 3-5 (Jan. 11, 2005).

[12] For example, if the FCC were to conclude that Wisconsin's EBR regulations conflict with the federal rules, separate preemption proceedings would still be required to address the conflicts presented both by other states' EBR regulations *and* by other provisions of Wisconsin's rules that restrict interstate telemarketing to a greater extent than the federal rules.

[13] *See, e.g.*, Telelytics, LLC Letter to Chairman Powell at 4 (Nov. 8, 2004) (Telelytics Letter).

careful balance and national uniform standards contemplated by Congress in 1991 and by the Commission in 2003 is the path that was logically prior in any event: the jurisdictional approach.

In the balance of this Petition, we explore both the practical and legal aspects of the much-needed shift from the conflict inquiry to the jurisdictional inquiry. In Part I, we document the states' rejection of national uniformity, detail some of the practical problems this entails for companies engaged in interstate telemarketing, and describe the states' campaign of enforcing their laws in complete disregard of the clear distinction between interstate and intrastate telemarketing established by federal law. In Part II, we explore the jurisdictional "road not taken," and demonstrate why it is not merely the most prudent path but indeed the only one that is legally consistent with the express will of Congress in the TCPA. Part III examines the contention of various state attorneys general that federal supremacy in the field of interstate telemarketing would leave states incapable of protecting their residents, a contention that has no legal basis. Finally, to the extent there might be any question about the intent of Congress, Part IV discusses the delegated regulatory authority the Commission could invoke to declare state regulation of interstate telemarketing categorically incompatible with the federal regulatory framework.

ARGUMENT

I. Multistate Regulation Of Interstate Telemarketing Frustrates The Federal Goals Of Balance And Uniformity.

Congress's principal objectives in enacting the TCPA were very clear — to establish uniform national standards that balance the concerns of consumers with the legitimate interests of telemarketers. In enacting the TCPA, Congress specifically found that "[i]ndividuals' privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in

a way that protects the privacy of individuals and permits legitimate telemarketing practices."[14] And as this Commission already recognized in the *Report and Order*, Congress acted with the "clear intent . . . to promote a uniform regulatory scheme under which telemarketers would not be subject to multiple, conflicting regulations."[15] Throughout the TCPA rulemaking proceedings, the Commission has attempted to achieve these objectives.[16]

Ignoring the Commission's attempts to effectuate Congress's goal, states have adopted and enforced – and continue to propose – divergent rules applicable to interstate telemarketing that undermine the desired uniform federal regulatory regime and throw it totally out of balance. Current state telemarketing law is a confusing patchwork of more restrictive laws purporting to apply to interstate telemarketing. These divergent laws are not just on the books. On the contrary, they are being vigorously enforced against interstate telemarketers – even when calls are made in full compliance with the federal rules. As a result, companies face substantial uncertainty as they struggle to avoid costly exposure to disparate state provisions while risking large monetary penalties and damaging publicity. Even worse, the trend is in the wrong direction, with states continuing to propose a variety of new laws that are more restrictive than the federal rules and make no distinction between interstate and intrastate telemarketing. State telemarketing regulations are becoming increasingly incompatible both with the federal rules and with each other, creating a regulatory environment that presents tremendous practical problems for companies engaged in interstate telemarketing.

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14 TCPA § 2(9).

15 *Report and Order* ¶ 83.

16 *See, e.g., id.* ¶ 1 (The Commission's rules "strike an appropriate balance between maximizing consumer privacy protections and avoiding imposing undue burdens on telemarketers"); *id.* ¶ 83 ("We conclude that inconsistent interstate rules frustrate the federal objective of creating uniform national rules, to avoid burdensome compliance costs for telemarketers and potential consumer confusion.") In adopting the Established Business Relationship concept, for example, the Commission determined that it "constitutes a reasonable balance between the interests of consumers that may object to such calls with the interests of sellers in contacting their customers." *Id.* ¶ 43; *See also id.* ¶¶ 26, 29, 31, 40, 46, 86, 89, 90, 92, 94, 113, 134, 149, 193, 210.

A. Existing State Regulation of Interstate Telemarketing.

The Commission's July 2003 *Report and Order* drew a sharp, and entirely correct, distinction between state regulation of *interstate* telemarketing and state regulation of *intrastate* telemarketing. Specifically, the Commission noted that although "the TCPA applies to both intrastate and interstate communications,"[17] Congress expressly preserved state authority over intrastate telemarketing while simultaneously recognizing that "states lack jurisdiction over interstate calls."[18] Nonetheless, since the *Report and Order*, at least fifteen states have enacted do-not-call rules that make no distinction whatsoever between intrastate and interstate calling. As a result, companies engaged in interstate telemarketing must comply with an array of confusing and incompatible state rules, or else litigate to enforce state compliance with the federal scheme, thereby risking both fines and damage to their reputations. The following overview of a few categories of state regulation places this problem in perspective:

Established Business Relationship (EBR) Exemption. Under the Commission's rules, calls to consumers with whom the seller has an "established business relationship" are excluded from the prohibition against solicitations to telephone numbers on the national do-not-call registry. While the definition of the federal exemption itself is quite complicated,[19] parties to the currently pending petitions — most of which center around states' EBR rules — have already identified thirty states whose convoluted EBR definitions are incompatible with the federal

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[17] *Id.* ¶ 81.

[18] *Report and Order* ¶¶ 82-83. The jurisdictional analysis of the TCPA is presented in much more detail in Part II, *infra*.

[19] Indeed, the Commission recently issued a reconsideration order, in part, to help clarify the scope of the federal EBR exemption. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Second Order on Reconsideration (¶¶ 24-27), CG Docket No. 20-278 (rel. Feb. 18, 2005) ("Second Reconsideration Order").

rules.[20] Because these states use different terms and different definitions for the customer relationship, it is exceedingly difficult to compare one state's rules either to another state's rules or to the federal rules. And it is practically impossible to determine how each state will interpret the terms used in its own rules. Indeed, these divergent state definitions have so little in common that it is nearly impossible to identify a "least common denominator."

Figure 1, which focuses on the more restrictive EBR requirements of twelve representative states, illustrates the complexity of state regulation in this area. Notably, these states' EBR regulations differ not only from the federal rules but also from each other. While Indiana allows for no EBR exemption, other states restrict the eighteen-month federal timeframe for the EBR to 180 days (Missouri[21]), six months (Louisiana[22]), or twelve months (Michigan[23]). Certain states make no provision for calls responding to an inquiry or application (*e.g.*, South Dakota[24]), which are covered by the federal EBR under certain circumstances. Others, like Mississippi,[25] cover such calls, but under different circumstances than the federal rules. And while the federal rules extend the EBR to certain calls from companies affiliated with the seller, many state rules make no reference to calls by affiliated companies (*e.g.*, Pennsylvania[26]), and others (*e.g.*, New Jersey[27]) expressly prohibit *all* calls by affiliates to customers on the state's do-not-call list.

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[20] *See* Infocision Management Corp. Comments at 6-13 (Nov. 11, 2004); Direct Marketing Association Letter to Commissioners at 3 (Jan. 10, 2005).

[21] Mo. Rev. Stat. § 407.1095(3)(b).

[22] La. Rev. Stat. Ann. § 45:844.12(6)(c).

[23] Mich. Comp. Laws Ann. § 445.111(j).

[24] S.D. Codified Laws § 49-31-1(32)(c).

[25] Miss. Code Ann. § 77-3-705(h).

[26] Pa. Stat. Ann. tit. 73, § 2242.

[27] N.J. Admin. Code §§ 13:45D-1.3, 4.1, 4.2 & 4.4.

Certain states impose additional unique requirements. To claim an EBR exemption in Nevada, for example, a company must send each customer an annual notice that contains information on how to make a do-not-call request, as well as contact information for the company and for the Nevada Attorney General.[28] Thus, rather than working toward a uniform scheme of regulation, states have adopted idiosyncratic rules that control whether, when, and how companies can communicate with their own customers across state lines. As Part I.C demonstrates, the existing complexity among state EBR exemptions is likely to worsen in the future.

[28] Nev. Rev. Stat. § 228.600(3).

FIGURE 1: ESTABLISHED BUSINESS RELATIONSHIP EXEMPTION
SUMMARY OF FEDERAL RULE AND MORE RESTRICTIVE STATE RULES

Federal	Term(s) Used	EBR Definition/Timeframe		Exemption for Inquiry or Application/ Corresponding Timeframe		Additional Provisions	Exemption Available To Affiliates
FCC TCPA	Established Business Relationship	Means 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 or 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 terminated by either party.	18 months	Yes - both	3 months	Subscriber's seller-specific do not call request terminates EBR for purposes of telemarketing and telephone solicitation, even if subscriber continues to do business with seller.	EBR extends to affiliated entities if the subscriber would reasonably expect them to be included, given the nature and type of goods or services offered by the affiliate and the identity of the affiliate.

State	Term(s) Used	EBR Definition/Timeframe		Exemption for Inquiry or Application/ Corresponding Timeframe		Additional Provisions	Exemption Available To Affiliates
Indiana	None	No EBR exemption		No reference to inquiry in statute or rules			No reference to affiliates in statute or rules
Louisiana	Existing Business Relationship/ Prior Business Relationship	Any person with whom the telephonic solicitor has an existing business relationship, or a prior business relationship that was not terminated or lapsed within six months of solicitation call	6 months for prior business relationships, undefined for existing business relationships	No reference to inquiry in statute or rules			No reference to affiliates in statute or rules
Michigan	Existing Customer	An individual who has purchased goods or services from a person, who is the recipient of a voice communication from that person, and who either paid for the goods or services within the 12 months preceding the voice communication or has not paid for the goods and services at the time of the voice communication because of a prior agreement between the person and individual	12 months	No reference to inquiry in statute or rules			No reference to affiliates in statute or rules
Mississippi	Established Business Relationship	A prior or existing relationship formed by a voluntary two-way communication between a person or entity and a consumer, with or without an exchange of consideration, on the basis of an inquiry, application, purchase, or transaction by the consumer, which the relationship is currently existing or was terminated within 6 months of the telephone solicitation	6 months	Yes - both	6 months	The act of purchasing consumer goods or services under an extension of credit does not create an existing business relationship between the consumer and the entity extending credit to the consumer for such purpose. The term does not include the situation wherein the consumer has merely been subject to a telephone solicitation by or at the behest of the telephone solicitor within the 6 months immediately preceding the contemplated telephone solicitation.	No reference to affiliates in statute or rules
Missouri	Established Business Relationship	Calls by or on behalf of any person or entity with whom a residential subscriber has had a business contact with within the past 180 days or a current business or personal relationship	180 days	No reference to inquiry in statute or rules			No reference to affiliates in statute or rules

State	Term(s) Used	EBR Definition/Timeframe		Exemption for Inquiry or Application/ Corresponding Timeframe		Additional Provisions	Exemption Available To Affiliates
New Jersey	Established Customer Existing Customer	Established customer: customer for whom a seller has previously provided continuing services where relationship has not been terminated Existing customer: person obligated to make payments to a seller on merchandise purchased; or person who has entered into written contract with seller involving obligation to perform, either by the customer, seller, or both	18 months	No reference to inquiry in statute or rules		No telemarketer shall make or cause to be made any telemarketing sales calls to an existing customer on the no telemarketing call list on behalf of: A seller whose sole obligation to the customer is the extension of credit; i. Eighteen months after the date of the customer's last credit transaction; ii. Upon satisfaction of the credit obligation, whichever is later; or iii. Upon cancellation or termination of the agreement to extend credit and satisfaction of the credit obligation.	No reference to affiliates in statute or rules
Nevada	Pre-existing Business Relationship	A relationship between a telephone solicitor and a person that is based on (a) the person's purchase, rental or lease of goods or services. . Or (b) any other financial transaction directly between the person and the telephone solicitor . . that occurs within the 18 months immediately preceding the date of the unsolicited telephone call for the sale of goods or services	18 months	No reference to inquiry in statute or rules		To claim pre-existing business relationship exemption, must send annual notice to customers with company -specific DNC request contact information and NV AG contact information	No
Pennsylvania	Established Business Relationship	Prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential or wireless telephone subscriber, with or without an exchange of consideration, on the basis of an inquiry, application, purchase, or transaction by the residential or wireless telephone subscriber . .	12 months	Yes - both	12 months	In regards to an inquiry, the person or entity shall obtain the consent of a . . Subscriber to continue the business relationship beyond the initial inquiry	No reference to affiliates in statute or rules
South Dakota	Established Business Relationship	Relationships that existed within the preceding 12 months	12 months	No reference to inquiry in statute or rules			No reference to affiliates in statute or rules
Tennessee	Existing Customer	A residential subscriber with whom the person or entity making a telephone solicitation has had a prior relationship within the prior 12 months	12 months	No reference to inquiry in statute or rules			No reference to affiliates in statute or rules
Texas	Established Business Relationship	A prior or existing relationship formed by a voluntary two-way communication between a person and a consumer regardless of whether consideration is exchanged, regarding consumer goods or services offered by the person, that has not been terminated by either party.	12 months	No reference to inquiry in statute or rules			No reference to affiliates in statute or rules
Wisconsin	Current client	Undefined in statutes; In regulations, "Client" means a person who has a current agreement to receive, from the telephone caller or person on whose behalf the call is made, property, goods, or services of the type promoted by the telephone call	None	No reference to inquiry in statute or rules			No reference to affiliates in statute or rules

Disclosure Requirements. The federal rules detail the specific information a telemarketer must provide to the person answering the telephone.[29] Thirty states, however, impose additional requirements and restrictions on the content and timing of disclosures to be made during each and every call, resulting in the checkerboard of conflicting disclosure regulation set forth in Figure 2. While some states require affirmative disclosure of certain information (*e.g.*, purpose of call; whether caller is registered), others *restrict* what can be said during the call. Beyond the content of the disclosure, some states impose widely different rules as to when disclosures must occur (*e.g.*, immediately, within thirty seconds, or at the beginning and/or end of the call), while others closely regulate when and how a call is terminated. In Kentucky, for example, a caller must obtain, within thirty seconds, permission to continue the call; must disclose the seller's name, phone number and location at the beginning and end of every call; and must promptly discontinue the solicitation if the person gives a negative response at any time during the call.[30] In New Mexico, by contrast, a caller must disclose the purpose of the call within fifteen seconds, and cannot describe it as a "courtesy call."[31] In Kansas, the caller must "immediately" disclose the call's purpose and discontinue if there is any negative response.[32]

Because most interstate telemarketers' campaigns are conducted by product rather than by state, complying with these disparate rules requires sales representatives to follow a different script for nearly every call they make. These incompatible state requirements obviously increase compliance costs. More importantly, they increase the risk of unintentional non-compliance, which can lead to statutory sanctions.

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[29] 47 C.F.R. § 64.1200(d)(4) (requiring that telemarketers provide the called party with the name of the caller, the identity of the seller, and contact information to reach the seller directly).

[30] Ky. Rev. Stat. Ann. § 367.46953.

[31] N.M. Stat. Ann. § 57-12-22.

[32] Kan. Stat. Ann § 50-670(b)(4).

FIGURE 2: STATE DISCLOSURE REQUIREMENTS

State	Purpose of Call[1]	Permission To Continue[2]	Discontinue if negative response[3]	Terminate when asked[4]	Full ID beginning & end[5]	Location disclosure[6]	State Registration[7]	Don't say Courtesy Call[8]
Alabama								
Alaska								
Arkansas								
Arizona								
California								
Colorado								
District of Columbia								
Florida								
Hawaii								
Illinois								
Idaho								
Kansas								
Kentucky								
Louisiana								
Massachusetts								
Mississippi							every call	
New Jersey								
New Mexico								
North Carolina								
North Dakota								
Ohio								
Oregon								
Pennsylvania								
Rhode Island								
South Dakota								
Texas								
Utah								
Washington								
Wisconsin							if asked	
Wyoming								

1. **Purpose:** After identifying self and organization, and prior to any presentation, caller must state purpose of call.
2. **Permission to continue:** After identifying self and purpose of call, caller must ask permission to continue with presentation.
3. **Discontinue if negative response:** If consumer makes any type of negative response at any time during the call, caller must end the conversation, even if the comment is unrelated to the purpose of call.
4. **Terminate when asked**: If asked, caller must immediately terminate the call.
5. **Full ID at beginning and end:** Caller must state their identity, organization, and phone number both at the beginning and end of the call.
6. **Location disclosure:** Caller must disclose actual location (street address, city, and state).
7. **State Registration:** Caller must disclose state registration or license number during call or if sale is made.
8. **Don't say courtesy call:** Caller is forbidden, at any time during call, to use the words 'courtesy' or 'courtesy call.'

Calling Hours and Holiday Restrictions. The federal rules allow telemarketing calls between 8 a.m. and 9 p.m.[33] but impose no other restrictions, based on the sensible view that telemarketers will make reasonable business judgments about the appropriateness of calling during certain days and times. Indeed, most telemarketers have their own business rules that are more limiting than the federal requirements. Seventeen states, however, further restrict calling hours, ban calls on weekends, or prohibit calls during federal and local holidays, such as those listed below.

Holidays On Which Calls Are Prohibited In Certain States		
Acadian Day	Inauguration Day	Pioneer Day
Confederate Memorial Day	Jefferson Davis Day	Shrove Tuesday
Good Friday	Mardi Gras	Robert E. Lee Day
Huey P. Long Day	International Rice Festival	Victory Day

Louisiana, for example, prohibits calls between 8 p.m. and 9 p.m., and on Sundays, federal holidays, and "state holidays," including Acadian Day, Confederate Memorial Day, Good Friday, Huey P. Long Day, and any day declared a state of emergency by the Governor.[34] Figure 3 shows that interstate telemarketing calls — otherwise allowed under federal law — are prohibited during different times and on different days in different states, vastly complicating telemarketers' call-scheduling challenges and increasing their compliance burdens.

[33] 47 C.F.R. § 64.1200(c)(1).

[34] La. Rev. Stat. Ann. §§ 45:811(3), 1:55.

FIGURE 3: TELEMARKETING CALLING HOURS BEYOND FEDERAL RULES								
State	**9 AM Start Time**	**9 AM Autodial Start Time**	**10 AM Start Time**	**6 PM End Time**	**8 PM End Time**	**Saturdays**	**Sundays**	**Federal Holidays**
Alabama							**No Calls**	**No Calls**
Connecticut								
Illinois								
Kentucky								
Louisiana							**No Calls**	**No Calls**
Massachusetts								
Michigan								**No Calls**
Mississippi							**No Calls**	
Nevada								
New Mexico								
Oklahoma								
Pennsylvania						**No Auto Dial**	**No Auto Dial Before 1:30 PM**	
Rhode Island						**10-5PM**	**No Calls**	**No Calls**
South Dakota							**No Calls**	
Texas							**12-9PM**	
Utah							**No Calls**	**No Calls**
Wyoming								

Restrictions on Nonprofit Organizations. Nonprofit organizations are particularly hard hit by states' requirements that calls soliciting donations or selling goods/services on the non-profit's behalf must comply with state do-not-call rules. Under the Commission's rules, all calls made by or on behalf of tax-exempt non-profit organizations are exempt from the do-not-call rules.[35] As Figure 4 illustrates, however, twenty-one states place additional restrictions on such calls. Alaska, for example, only exempts calls made by members or volunteers of the non-profit, and only if they are made to other members, previous donors, or those who have expressed an

[35] 47 C.F.R. § 64.1200(d)(7) and (f)(9). *See also* Second Reconsideration Order ¶¶ 28-31 (reaffirming the scope of the federal exemption for nonprofit calls).

interest in contributing to the organization within the previous eighteen months.[36] Ten states require compliance with their do-not-call list for *all* calls involving the sale of goods or services made on behalf of a non-profit by an outsourced call center. And in Idaho, solicitations for goods or services on behalf of a nonprofit are only exempt if a minor is making the call.[37] As a result, nonprofits making calls — plainly allowed under federal law — must instead abide by a plethora of divergent do-not-call rules imposed by states in which potential donors reside.

FIGURE 4: STATE RESTRICTIONS APPLIED TO NON-PROFIT ORGANIZATIONS

State	Non-Profit Sale of Good/Service	Non-Profit Donation	Outsourced Call Center Sale of Good/Service	Outsourced Call-Center Donation
Alaska	Qualified yes*	Qualified yes*	Yes (only calls by non-employee volunteers fall within exemption)	Yes (only calls by non-employee volunteers fall within exemption)
Arkansas			Yes	Yes
Idaho	Yes, unless "minor" is making call		Yes, unless "minor" is making call	
Indiana			Yes	Yes
Kansas	Yes		Yes	
Kentucky	Yes		Yes	
Louisiana			Yes	Yes
Maine	Yes		Yes	
Mississippi	No (but MS PUC has discretion to require)	No (but MS PUC has discretion to require)	No (but MS PUC has discretion to require)	No (but MS PUC has discretion to require)
Missouri	Perhaps		Yes	Yes
Montana	Perhaps		Yes	Yes
Nevada			Yes	Yes
New Mexico	Probably		Probably	
New York			Yes	
Oklahoma	Unclear		Unclear	
Oregon	Qualified yes*	Qualified yes*	Yes (only calls by non-employee volunteers fall within exemption)	Yes (only calls by non-employee volunteers fall within exemption)
South Dakota	Yes		Yes	
Tennessee	Probably		Yes	Yes
Texas	Yes		Yes	
Virginia	Yes (no express or definitional exemption)		Yes (no express or definitional exemption)	
Wyoming	Yes		Yes	

* State DNC rules apply to calls to non-members and/or persons who have not given or expressed an interest in giving to the non-profit previously.

[36] Alaska Stat. § 45.50.475 as amended by AK HB 15, Sec. 7 (2004).

[37] Idaho Code § 48-1003A(4)(c).

Prerecorded Messages. The Commission adopted a carefully structured framework for regulating the use of Automatic Dialing and Announcing Devices ("ADADs"),[38] requiring that certain information be included in permissible messages,[39] and providing exemptions for EBRs and calls of a non-commercial nature.[40] As summarized in Figure 5, however, states have imposed a confusing array of additional restrictions on these calls.

These restrictions are, for all intents and purposes, random. In Idaho and Washington, for example, telemarketers must notify all relevant local exchange carriers of any intended ADAD usage.[41] Florida and Wyoming both strictly prohibit ADAD use with pre-recorded solicitation messages, have broad definitions of solicitation, and have no EBR exemption, although they do permit ADAD use with live calls that satisfy their requirements.[42] Arizona, Colorado, Georgia, New Mexico, North Carolina, and Texas all prohibit, without exemption, the use of pre-recorded messages for solicitation without the consumer's prior consent.[43] And many states impose separate ADAD requirements relating to registration, calling hours, disclosure rules, and disconnection that differ both from the federal rules and from each other. Because state regulations differ along so many lines, telemarketers are forced as a practical matter to treat any interstate calling campaign using ADAD messages as if it were fifty single-state campaigns – precisely the effect that state regulation is not supposed to have on interstate commerce.

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38 47 C.F.R. § 64.1200(a)(2) & (a)(6).

39 47 C.F.R. § 64.1200(b).

40 47 C.F.R. § 64.1200(a)(2)(ii), (a)(2)(iv), & (a)(6)(i).

41 I.D.A.P.A. 31.51.02.104; Wash. Admin. Code 480-120-253(7).

42 Fla. Stat. § 501.059(7); Wyo. Stat. Ann. §§ 6-6-104; 40-12-303 (2002).

43 Ariz. Rev. Stat. §§ 13-2919, 44-1278(B)(4) & (5); Colo. Rev. Stat. §§ 18-9-311; 6-1-302(2)(a); Ga. Code Ann. § 46-5-23 & 24; N.M. Stat. Ann. § 57-12-22; N.C. Gen. Stat. § 75-104; Tex. Util. Code § 55.126.

FIGURE 5: STATE PRE-RECORDED MESSAGE RESTRICTIONS

State	ADAD-Specific Registration or LEC Notification	Some or all Pre-Recorded Messages Prohibited	EBR Exemption	ADAD Calling Hours	Consent	Disclosures	Disconnect
Alabama	Yes			8am-8pm Mon.-Sat. No Calls Sun.		Yes	Yes
Alaska		Yes	Yes				
Arizona		Yes	No		Yes		
Arkansas		Yes	No				
California	Yes	Yes	Yes		Yes	Yes	Yes
Colorado		Yes	Yes, but express consent required		Yes		
Connecticut	Yes						
District of Columbia		Yes	Yes, only for calls concerning previously ordered goods or services				Yes
Florida		Yes	No				
Georgia	Yes	Yes	Yes, only for calls concerning previously ordered goods or services		Yes	Yes	Yes
Idaho	LEC Notification		Yes, but other restrictions apply				Yes
Illinois				9am-9pm	Yes	Yes	Yes
Indiana		Yes	Yes	9am-8pm	Yes		Yes
Iowa		Yes	Yes, but other restrictions apply				Yes
Kansas		Yes	Yes			Yes	Yes
Kentucky		Yes	Yes, only for calls concerning previously ordered goods or services		Yes	Yes	Yes
Louisiana	Yes	Yes	Yes	8am-8pm Mon-Sat., No calls Sun., holidays	Yes	Yes	Yes
Maine				9am-5pm		Yes	Yes
Massachusetts		Yes	Yes				Yes
Michigan		Yes	Yes, only for calls concerning previously ordered goods or services				Yes
Minnesota		Yes	Yes	9am-9pm	Yes	Yes	Yes
Mississippi	Yes	Yes	Yes	9am-9pm	Yes	Yes	Yes
Missouri						Yes	
Montana		Yes	Yes	9am-8pm		Yes	Yes
Nebraska	Yes	Yes	Yes	8am-9pm Mon. -Sat. 1pm-9pm Sun./holidays		Yes	Yes
Nevada		Yes	Yes	9am-8pm		Yes	
New Hampshire	Yes					Yes	Yes
New Jersey		Yes	Yes		Yes		
New Mexico		Yes	Yes, but express consent required		Yes	Yes	Yes
New York						Yes	Yes
North Carolina		Yes	No		Yes		
North Dakota		Yes	Yes		Yes		Yes
Oklahoma		Yes	Yes, only for calls concerning previously ordered goods or services	9am-9pm	Yes		Yes
Oregon		Yes	Yes				
Pennsylvania				9am-9pm Mon.-Sat., 1:30pm-9pm Sun.		Yes	Yes
Rhode Island		Yes	Yes		Yes	Yes	Yes
South Carolina		Yes	Yes	8am-7pm		Yes	Yes
South Dakota	Yes			9am-9pm		Yes	Yes
Tennessee	Yes	Yes	Yes, but express consent required		Yes	Yes	Yes
Texas	Yes	Yes	No	9am-9pm Mon.-Sat., 12pm-9pm Sun.	Yes	Yes	Yes
Utah		Yes	Yes				Yes
Washington	LEC Notification	Yes	No				
Wisconsin		Yes	No		Yes		
Wyoming		Yes	No				

ADAD: Automated dialing and announcing device
ADAD-specific registration: Registration with state required for specific pre-recorded message campaigns
LEC notification: Company must notify each customer's local exchange carrier of forthcoming pre-recorded message campaigns
Some or all pre-recorded messages prohibited: Certain types of prerecorded messages prohibited, *e.g.*, messages containing a solicitation
EBR exemption: Exemption for pre-recorded messages to customers with an EBR
Calling hours: Specific hours designated for ADAD use (separate from live telemarketing calling hours)
Consent: Either live operator or key pad consent required from recipient prior to playing pre-recorded message
Disclosures: Specific requirements for content of messages, and/or specific time frames for making disclosures
Disconnect: ADAD must disconnect the line within a specified time frame after customer or ADAD completes call.

State DNC List and Registration Requirements. As shown in Figure 6, telemarketers are still required to purchase the state do-not-call lists in sixteen states, even though state lists should by now have been incorporated into the national registry. In Wisconsin, for example, the list can cost as much as $20,000 based on the number of "telephone lines that will be used to make telephone solicitations under the registration."[44]

Even many states that have adopted the national DNC list nonetheless impose additional state requirements on interstate telemarketers that are more restrictive than the federal rules. Thirty-seven states mandate registration by telemarketers whether or not they have a physical presence in the state and even if they engage exclusively in interstate calling. In most of these states, telemarketers must pay either a flat registration fee as high as $6,000 (Nevada[45]), or a fee that varies based on the number of locations (Texas[46]) or salespersons (Alabama[47]). While some registration requirements may be within states' general authority to regulate businesses operating within the state, many states impose telemarketing-specific registration requirements that are impermissible as applied to interstate telemarketing. Certain states require telemarketers to purchase state do-not-call lists, or to file registration forms disclosing detailed personal information about individual employees and salespeople, and – in nineteen states – drafts of the scripts used in calls. Moreover, twenty-one states require that telemarketers obtain surety bonds; West Virginia alone requires a bond that can be as high as $500,000.[48]

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44 Wis. Admin. Code ATCP 127.81(2)(g), 3(b) (2002).

45 Nev. Rev. Stat. § 599B.090(5)(b).

46 Tex. Bus. & Com. Code §§ 38.101(b); 38.103

47 Ala. Code §§ 8-19A-5(f)(2); 8-19A-7(b)(2).

48 W. Va. Code § 46A-6F-302(a).

FIGURE 6: STATE DNC LIST AND REGISTRATION REQUIREMENTS

State	Must Purchase DNC List	DNC List Fee	Must Register as a Telemarketer	Registration Fee	Must Submit Scripts	Surety Bond Required
Alabama			yes	$500 Base $50/Salesperson $10/Changes	yes	$50,000
Alaska			yes			
Arizona			yes	$500	yes	$100,000
Arkansas			yes	$100/Year $10/Salesperson	yes	$50,000
California			yes	$50	yes	$100,000
Colorado	yes	$0-500/Year	yes	$200/Year $100/Renewal	yes	
Delaware			yes	$100	yes	$50,000
District of Columbia			yes			$50,000
Florida	yes	$120-400/Year	yes	$1,500	yes	50,000
Idaho			yes	$50 Initial $25 Renewal	yes	
Indiana	yes	$750/Year	yes	$50	yes	
Kentucky	yes	$0	yes	$300 Initial $50 Renewal	yes	$50,000
Louisiana	yes	$400-2000/Year	yes	$150	yes	$20,000 - 50,000
Maine	yes	$465/Year	yes	$300		$10,000
Massachusetts	yes	$1,100/Year				
Michigan	yes	Per FTC Fee Schedule				
Mississippi	yes	$800/Year	yes			$50,000
Missouri	yes	$25-600/Year				
Montana			yes		yes	$50,000
Nevada			yes	$6,000	yes	$50,000
New Jersey			yes	$150-2000		
New York			yes	$500		$25,000
North Carolina			yes	$100		
Ohio			yes	$250	yes	$50,000
Oklahoma	yes	$150/Quarter $600/Year	yes	$250 Initial $100 Renewal	yes	$50,000
Oregon			yes	$400	yes	
Pennsylvania	yes	$465/Year	yes	$50		$50,000
Rhode Island			yes	$100	yes	$30,000
South Dakota			yes	$0-$500		
Tennessee	yes	$500-1000+/Year				
Texas	yes	$75/Quarter	yes	$200 Plus $10/Location & $50 Quarterly	yes	$10,000
Utah			yes	$250	yes	$25,000
Vermont			yes			
Washington			yes	$15 Application Fee $72 Solicitor Fee		
West Virginia			yes	$100		$100,000/Location or $500,000 For All Locations
Wisconsin	yes	$500/700 Year, Plus $75/Phone Line, Cap of $20,000	yes			
Wyoming	yes	$465/Year	yes			

Non-Commercial Calls. At least four states – Minnesota, Montana, New Hampshire, and North Dakota – have enacted broadly worded statutes that do not distinguish between calls that are non-commercial or that do not contain an unsolicited advertisement, and commercial telemarketing calls, at least in connection with pre-recorded messages.[49] Enforcement of these state laws is contrary to the Commission's rules, which specifically exempt non-commercial calls from the general prohibition on initiating residential telephone calls using artificial or prerecorded messages without the called party's prior consent. Such laws also are at odds with the federal policy goal of establishing uniform national standards that balance the concerns of consumers with other interests – in this case, protected First Amendment rights. As the Commission has stated, it has "exempt[ed] calls that are non-commercial and commercial calls that do not contain an unsolicited advertisement, [because] the messages that do not seek to sell a product or service do not tread heavily upon the consumer interests implicated by section 227"[50] of the Communications Act.

B. States Are Enforcing Their Do-Not-Call Laws Against Interstate Telemarketers.

Interstate telemarketers are exposed to real, not merely theoretical, civil liabilities and reputational risks from the enforcement of these state laws. Figure 7 summarizes some of the recent state enforcement actions by state attorneys general against interstate telemarketers. We have not even attempted to review the private causes of action brought by individuals alleging that interstate calls violated state do-not-call laws. Many states are invoking their parochial regulations against interstate telemarketers and collecting tens of thousands of dollars in fines and "voluntary settlements," and are totally disregarding telemarketers' arguments that the calls

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[49] *See* Minn. Stat. § 325E.27; Mont. Code § 45-8-216; N.H. Rev. Stat. § 359-E:1; N.D. Cent. Code § 51-28-02.

[50] *Report & Order* ¶ 136.

at issue would be permitted under the federal scheme. Smaller companies simply do not have the resources to challenge state enforcement actions, and even those that do face unfair and costly exposure to inconsistent state telemarketing provisions. On the other hand, larger companies are concerned that challenging such actions will expose them to adverse publicity and reputational risk.

FIGURE 7: RECENT STATE ENFORCEMENT ACTIONS AGAINST INTERSTATE TELEMARKETERS

State	Defendant	Type of Action	Plaintiff/Court	Case No	Penalty	Date	Nature of complaint
Florida	Vitana Financial Group, Inc, dba Direct Satellite (CA)	Judgment	AG & Cons Svcs Comm. Charles Bronson/Orange County Circuit Court, Judge Donald E. Grincewicz	48-2004-CA-003414-O	$25,500	11/4/2004	Prohibited pre-recorded messages, calls to consumers on FL DNC list (Jan 03-Feb 04)
Missouri	Jack Price Sports/Marc Meghrouni (CA)	Agreement	AG Jay Nixon	n/a	$15,000	9/9/2004	Calling consumers on State list
Missouri	Xentel (FL, DE, Canada)	Consent Order	AG Jay Nixon/approved by Circuit Judge David Dowd	n/a	$75,000	5/28/2004	Calling consumers on state list, calling customers after company specific request made
North Carolina	Vitana Financial Group, Inc, dba Direct Satellite (CA)	Prelim. Injunction	AG Roy Cooper, Wake Cnty Superior Court, Jude Howard Manning		Stop calling NC	7/12/2004	Prohibited pre-recorded messages
North Carolina	Warrior Custom Golf (CA)	Consent Judgment	AG Roy Cooper	n/a	$10,000	1/20/2004	Prohibited autodialer/pre-recorded message calls/calls to consumers on DNC list
North Carolina	Communications Concepts (TN)	Settlement	AG Roy Cooper	n/a	$1,000	1/5/2004	Prohibited autodialer/pre-recorded message calls/calls to consumers on DNC list
North Carolina	Consumer Credit Counseling Foundation (FL)	Consent Judgment	AG Roy cooper		$15,000	1/5/2004	Prohibited autodialer/pre-recorded message calls/calls to consumers on DNC list
North Dakota	FreeEats(VA)	Judgment	ND Circuit Court/ South Central District, Judge Gail Hagerty	04-C-1649	$20,000	3/18/2005	Prohibited pre-recorded messages
North Dakota	Platinum Credit Counseling (CA)	Judgment	ND Circuit Court/ South Central District, Judge Thomas Schneider	n/a	$13,000	2/24/2005	Did not give city, state, phone in pre-recorded message
Oklahoma	Consumer Benefits Group (AZ)	Suit Filed	AG Drew Edmonson/Oklahoma County District Court	CJ-2004-7901	TBD (seeks > $10,000)	Filed 9/27/2004	No state registration, calls to consumers on OK DNC list (case is open)
Oklahoma	Satellite Solutions (TX)	Consent Judgment	AG Drew Edmonson	n/a	$5,000	6/24/2004	No state registration, calls using autodialer, calls to consumers on OK DNC list
Pennsylvania	QiTel Communications (TX)	Agreement	AG Jerry Pappert/filed Commonwealth Court	n/a	$3,750	2/11/2004	Did not access & use PA DNC list (Nov 02-May 03)
Pennsylvania	GutterGuard, Inc (GA)	Agreement	AG Jerry Pappert/filed Commonwealth Court	n/a	$10,500	8/31/2004	Did not access & use PA DNC list (2004, unspecified)
Pennsylvania	AT&T (NJ)	Agreement	AG Tom Corbett	n/a	$34,500	3/11/2005	Called consumers on PA DNC list (Nov 02-Jun 04)
Pennsylvania	Advance Promotions (MO)	Agreement	AG Jerry Pappert/filed Commonwealth Court	n/a	$3,750	2/11/2004	Did not access & use PA DNC list (Nov 02-May 03)
Pennsylvania	TimeLife, Inc (VA)	Agreement	AG Jerry Pappert/filed Commonwealth Court	n/a	$32,000	1/6/2004	Did not access & use PA DNC list (Nov 02-Mar 03)
Pennsylvania	Satellite Systems Direct/Elephant Wireless (NJ)	Suit	AG Jerry Pappert/filed Commonwealth Court		unknown	2/25/2004	Did not access & use PA DNC list (Nov 02-Jul 03) (status of suit unknown)
Pennsylvania	Guardian Communications(IL)	Suit	AG Tom Corbett/Deputy AG Carm Presogna/filed Commonwealth Court.		TBD (seeks $190,000)	Filed 3/23/2005	Calls to consumers on PA list (2004), failing to purchase list, intentionally blocking caller ID
Texas	Mortgage Investors Corp. dba Amerigroup Mortgage Corp (FL)	Assurance of voluntary compliance	AG Greg Abbott/PUC Commissioner Julie Parsley - District Court of Travis County, TX	n/a	$15,000	9/1/2004	Did not purchase TX list; Calls to consumers on TX list, disregarded company specific dnc requests
Wisconsin	P&M Consulting (MO)	Consent Judgment	AG Peg Lautenschlager Outagamie County Circuit Court, Judge Joseph Troy	n/a	$4,917	5/25/2004	Using pre-recorded messages, and calling residents on DNC list
Wisconsin	Marktel II (MO)	Consent Judgment	AG Peg Lautenschlager Outagamie County Circuit Court, Judge Joseph Troy	n/a	$4,917	5/25/2004	Pre-recorded messages, and calls to consumers on DNC list
Wisconsin	Soho Marketing (CA)	Judgment	AG Peg Lautenschlager Kenosha County Circuit Court, Judge Michael Fisher	n/a	$86,000	3/18/2004	No state registration, using pre-recorded messages, calling residents on DNC list
Wisconsin	Platinum Marketing, Inc (TN)	Judgment	AG Peg Lautenschlager, Dane County Circuit Court, Judge Michael Nowakowski	n/a	$11,594	1/8/2004	No state registration, using pre-recorded messages, calling residents on DNC list

In response to the preemption petitions specifically invited by the *Report and Order*, states have grown increasingly intractable, claiming that the comprehensive federal scheme mandated by Congress and adopted by this Commission cannot protect their residents. According to Wisconsin's governor, for example, the pending petitions amount to "multiple attacks" that threaten to weaken the provisions of Wisconsin law that have "ke[pt] our home phones quiet."[51] Indiana's aggressive campaign against the federal scheme has gone even further, claiming that the federal preemption requested in the CBA petition would "mean[] that . . . companies will be calling [Indiana consumers] forever," and exhorting consumers to demand that members of the CBA drop their petition.[52] Most recently, the Indiana legislature has been considering legislation that would require companies doing business with the state to comply with its do-not-call law, even if *the state law is preempted by this Commission*.

Meanwhile, states continue to enforce do-not-call laws that are more restrictive than the federal rules and make no distinction between intrastate and interstate calls. As a result, interstate telemarketers making calls permissible under federal law face the risk of fines as high as $10,000 for the first infraction and $25,000 for subsequent infractions.[53] For example, in the North Dakota enforcement action against FreeEats.com, whose preemption petition is pending before the Commission, a state judge found that prerecorded calls made by Virginia-based FreeEats.com in a get-out-the-vote effort violated the state's more restrictive prerecorded messages regulations – even though *all of the calls at issue were interstate calls that fully*

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[51] *See* Wisconsin Department of Agriculture, Trade, and Consumer Protection, *Help! The Not Call List Is Being Threatened*, *available at*, http://www.datcp.state.wi.us/nocall.html.

[52] *See* Steve Carter, *Banks Driving Latest Effort to Change Do-Not-Call Law*, *available at*, http://www.fortwayne.com/mld/journalgazette/news/editorial/10904281.htm?template=con.

[53] *See, e.g.*, Ind. Code Ann. § 24-4.7-5-2.

complied with the federal rules.[54] Pursuant to the court's order, the company was required to pay a $10,000 penalty as well as $10,000 in costs and attorneys fees.[55]

State enforcement efforts and the risks of non-compliance are particularly onerous for smaller companies that lack the resources to litigate the issue of federal authority over interstate telemarketing. For example, Telelytics' previously-filed letter in Docket 02-278 points out that it has been contacted by numerous states seeking to enforce state laws purporting to regulate interstate telemarketing, notwithstanding Telelytics' compliance with the federal rules.[56] The states uniformly refuse to "give effect to the preemptive effect" of the federal rules, and "all but dare telemarketers to pursue the case-by-case option" established by the *Report and Order.*[57] As a result, companies that cannot afford to seek preemption on a case-by-case basis can be forced to make large "voluntary" payments to the states and to comply with conflicting state rules – what Telelytics calls "*de facto* reverse preemption by the states."[58] Where a state prefers its rules to the federal regime, this "effectively eliminates the federal rules from having *any* preemptive effect – or even applying at all – with respect to interstate calls."[59]

In addition, the Commission's narrow conflict preemption approach has caused courts adjudicating state enforcement actions to misinterpret the extent of federal supremacy over interstate telemarketing. The U.S. District Court order [60] that corresponds to the pending preemption petition by TSA Stores, Inc. (The Sports Authority) illustrates this problem. In that

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54 *North Dakota v. FreeEats.com, Inc*., Opinion and Order, No. 04-C-1694 (N.D. Dist. Ct. Feb. 2, 2005)

55 *North Dakota v. FreeEats.com, Inc*., Stipulation for Entry of Final Judgment, No. 04-C-1694 (N.D. Dist. Ct. March 9, 2005).

56 *See* Telelytics Letter at 1.

57 *Id*. at 1, 3.

58 *Id*. at 3.

59 *Id*.

60 *Florida v. The Sports Authority Florida, Inc.*, Order, No. 6:04-cv-115-Orl-JGG (M.D. Fla. June 4, 2004) ("TSA Order").

case, the State of Florida's Department of Agriculture and Consumer Services successfully sought an injunction and civil penalties against TSA for interstate calls made in full compliance with the federal do-not-call rules.[61] Although the TSA Order primarily addresses removal issues not relevant here, the court made fundamental misinterpretations of specific provisions of the TCPA.

Most seriously, the court misinterpreted section 227(e)(1), which provides that "nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive *intrastate* requirements or regulations on, or which prohibits" the use of certain telemarketing practices.[62] The very text of that provision *draws a clear distinction between interstate and intrastate telemarketing,* and reflects the well-established allocation of authority between federal and state regulators. Ignoring that distinction, the court erroneously relied on section 227(e)(1) as evidence that the TCPA preserves state authority to regulate telemarketing, *whether intrastate or interstate.*[63] The court could have easily avoided that misstep by recognizing, as explained further below, that Congress intended the Commission to exercise exclusive regulatory jurisdiction over interstate telemarketing and that 227(e)(1) accords the states no authority whatsoever over *interstate* calls.

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[61] Specifically, Florida's Amended Complaint alleges that the TSA violated section 501.059 of the Florida Statute, which prohibits sellers from making unsolicited prerecorded telephone calls – regardless of whether the calls are interstate or intrastate – to Floridians who are on the do-not-call list, and does not provide any EBR exceptions. *See* TSA Petition, Exhibit B, *Florida v. The Sports Authority Florida*, Amended Supplemental Complaint ¶¶ 7- 8, No. 03-CA 10535 (May 19, 2004). According to TSA's Answer, however, all of the calls at issue were interstate calls made to Floridians with whom TSA had an EBR and complied with 47 C.F.R. § 64.1200(a)(2)(iv). *See* TSA Petition, Exhibit D, *Florida v. The Sports Authority Florida*, Answer to Amended Complaint, Affirmative Defenses ¶¶ 2-5, No. 03-CA 10535 (May 19, 2004).

[62] 47 U.S.C. § 227(e)(1) (emphasis added).

[63] Although the court acknowledged TSA's assertion that *interstate* calls were at issue, it deferred to the complaint, which was silent on the matter. That silence, however, simply reflects Florida's statute, which – like all of the state laws purporting to regulate interstate telemarketing – makes no distinction between interstate and intrastate calls.

Similarly, the court misinterpreted section 227(f)(6), which provides that "[n]othing contained in this subsection shall be construed to prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any general civil or criminal statute of such state."[64] That language is unambiguous. It allows states to enforce criminal and civil laws of *"general"*[65] applicability (*i.e.*, laws *not* directed at a particular communications activity or entity, such as state anti-fraud or contract laws) against in-state or out-of-state parties who violate them, including interstate telemarketers. Nothing in the TCPA, let alone in section 227(f)(6), authorizes states to impose special burdens on companies engaged in lawful interstate telemarketing. Despite the clear text of the provision, however, the court mistakenly suggested that section 227(f)(6) preserves state-court actions enforcing state do-not-call laws that target telemarketing. In fact, as described in Part II, state imposition of additional restrictions on interstate telemarketers would substitute the state's legislative judgment for the command of Congress, which directed the Commission to exercise its exclusive authority to adopt a uniform regulatory regime for interstate telemarketing.

C. Proposed State Regulation of Interstate Telemarketing.

Despite the Commission's 2003 *Report and Order*, states have continued to propose new and ever more burdensome legislation to regulate interstate telemarketing. None of these proposals distinguish between interstate and intrastate calling. Figure 7 summarizes some of the many telemarketing-related bills introduced in state legislatures during the 2003 and 2004 sessions.

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[64] 47 U.S.C. § 227(f)(6).

[65] *Id.* (emphasis added).

FIGURE 7: PROPOSED STATE TELEMARKETING LEGISLATION – 2003 AND 2004

The summary does not reflect all telemarketing-related bills introduced in state legislatures. Rather, it is intended to identify various areas of proposed state regulation that exceed the scope of, or are otherwise inconsistent with, federal telemarketing regulations.

Topic	States	General scope of bills
Restrict EBR exemption	CO, NJ, NY NV	* Must obtain written permission or authorization before calling those with EBR: CO, NJ NV * Eliminate EBR exemption: CO * EBR exemption applies only when a call relates to an existing contract; changes "existing customer" exemption to an existing customer who has provided written consent to being called: NY
Expand DNC rules	AL, FL, IA, IN, KS, KY, LA, MA, MD, MO, NJ, NE, NY, PA, RI, VA	* Include business numbers on DNC registry: FL, IN, MO, PA * Include wireless numbers on DNC registry: IA, KS, MD, NY, PA * Include e-mails on DNC registry: NY * Eliminate exemption from the no-call law for entities over which a federal agency has regulatory authority: MO * Require exempt parties to purchase DNC list: AL * Establish and maintain do not solicit list for vulnerable consumers and senior citizens (over age 60) to prevent mail, phone, and electronic mail solicitations for issuance of credit cards: NJ * Prohibit calls to any or all of the following: wireless numbers, pagers, text messaging devices, facsimile, graphic imaging or data communication: KY, LA, MO, NJ, RI, VA
Require connection to seller upon request	AZ, CA, HI, KS, MN, MO, NC, SC, TN, WV	*Must disclose that, upon request, customer has the right to be connected to an employee of the seller
Reroute calls to U.S. upon request	FL, IL, NJ, WA	*Must reroute calls from foreign call centers to U.S. upon request
Additional calling time restrictions	LA, RI, UT	* No calls Sundays and holidays: LA, UT * Calling only between 9am-5pm: RI
Restrict / Prohibit ADADs	IA, NE, NH, NY, WV	* Prohibit Automated Dialing and Announcing Device (ADAD) use: IA, NH * Include auto dialers with live operators in "telephone solicitation" definition: NE * If ADAD used, must identify name and phone-number of caller and organization within 25 seconds and at conclusion of call: WV * Prohibit predictive dialers that would result in a call connection where no person is immediately available to converse with caller or machine: NY * If ADAD used on basis of exemption, must release called party's line within 5 seconds: NH
Location disclosure requirements	AL, AZ, CA, CO, CT, FL, GA, HI, IL, KS, MN, MO, NC, NJ, NY, PA, SC, TN, VT, WA, WI	*Call center representative must disclose some or all of the following: name, employer name, city, state, and country (if foreign), and name and phone of ultimate seller. Six states include time frames for disclosing this information, ranging from 30 seconds to one minute. Disclosures required for inbound or outbound calls, or both.

Some of these proposals would have imposed additional restrictions on the types of calls already discussed above. Four states, for example, considered amending their state do-not-call laws to further narrow the EBR exemption: requiring a seller or telemarketer to obtain written consent before calling customers with whom the seller has an EBR; restricting the EBR to customers with existing contracts; or, in one case, eliminating the EBR altogether. Twenty-one

states proposed legislation altering the form and content of disclosures; three states considered additional calling time restrictions; and five states would have imposed new ADAD restrictions, exacerbating the already confusing array of regulations in that area. Other state legislative proposals would have regulated telemarketers' use of the telephone network in new ways. Ten states would have provided that a customer has the right, upon request to a telemarketer, to be connected to an employee of the seller. And, under legislation proposed in Florida, Illinois, New Jersey, and Washington, calls from foreign countries would have had to be rerouted back to the United States upon request (which would require costly new technology and procedures).

Finally, some states' proposals would have dramatically expanded the scope of do-not-call rules beyond anything currently in place. Nearly all of the proposals requiring location disclosures would have extended those requirements to *inbound* calls, where the consumer makes the telephone call to the seller. Florida, Indiana, Missouri, and Pennsylvania would have included business numbers on their do-not-call lists. Six states would have prohibited telemarketing calls to wireless numbers, pagers, fax machines, and other devices. New Jersey, on the other hand, would have established and maintained a separate do-not-call list — with its own set of rules and restrictions — for "vulnerable" consumers and senior citizens.

As Figure 8 shows, many of these proposals have already been reintroduced in 2005. For example, Iowa and New York would restrict the scope of the EBR exemption by shortening the applicable timeframe or requiring sellers to obtain written consent from EBR customers before making a call. Arizona, Illinois, Minnesota, Missouri, and West Virginia would apply new, more restrictive disclosure requirements to both outbound calls to consumers *and* inbound calls made by consumers to sales and service centers. Mississippi and Florida would expand their do-not-call rules to business calls, and six states would impose new restrictions on foreign call centers.

FIGURE 8: PROPOSED STATE TELEMARKETING LEGISLATION – 2005

Below is a summary of various telemarketing-related bills introduced in state legislatures through March 2005. The summary does not reflect all telemarketing-related bills introduced in state legislatures. Rather, it is intended to identify various areas of proposed state regulation that exceed the scope of, or are otherwise inconsistent with, federal telemarketing regulations.

Topic	States	General scope of bills
Restrict EBR exemption	IA, NY	* Establish EBR exemption of six months (IA) * Require written consent to call customers with EBR (NY)
Establish state DNC registry	IN, IA, RI, WV	* Establish state DNC registry (IA, RI, WV) * Establish state do-not-fax registry (IN)
Expand DNC rules	CO, CT, FL, IN, MO, MS, NY	* Add cell/mobile phone numbers to DNC rules (CO, CT, IN, MO, NY) * Add business numbers to DNC rules (MS, FL) * Add fax numbers to DNC rules (CT, NY)
Require connection to seller upon request	AZ, FL, IL, MN, MO, WV	* Must disclose that, upon request, customer can be connected to the ultimate seller
Restrictions on non-profits	CT, IA, OK, PA, TN	* Remove exemptions for non-profit solicitors (PA) * Limit percentage of donation that a third-party solicitor receives (CT) * Make outsourced, for profit call center making calls on behalf of non-profit subject to state DNC list (IA) * Require disclosure of caller's name and percentage of donation that charity receives(TN) * Require non-profit organizations or entities soliciting on their behalf have at least one member or employee residing within the county where the call is received (OK)
Expand penalty for violating state DNC law	IN	* Impose contractual and monetary penalties on companies holding state contracts who fail to comply with state DNC rules, even if rules are preempted by federal law.
Additional calling time restrictions	ME, NY	* Prohibit calling between 5-7pm, and 8pm-10am (NY) * Prohibit calling outside of 9am-5pm (ME)
Foreign call center restrictions	AZ, IL, MN, MS, MO, WV	* Prohibit sending of a consumer's financial, credit, or identifying information to a foreign county without express permission (AZ, IL, MN, MO, WV) * Prohibit entities with state contracts from contracting with telemarketing vendors that employ people not U.S. citizens (MS, WV) * Telephone sellers required to register with the state may not contract with vendors that operate foreign call centers (AZ)
Restricts / prohibits ADADs	IA, NY, ME	* Eliminate all ADAD exemptions (IA) * Restrict abandon rate (NY) * Extend prohibitions on solicitations using ADAD (ME)
Location disclosure requirements	AZ, IL, MN, MO, WV	* On both inbound and outbound telemarketing and customer service calls, caller must disclose city, state, country, employee's name and employer's name

All of this confusion makes one thing clear. What is already a largely incomprehensible multivariate landscape of state telemarketing regulations is only getting worse. State regulations are growing ever more incompatible with the federal regime and inconsistent with each other, obliterating any hope of uniformity and imposing significant compliance burdens and risks on companies who rely on interstate telemarketing. The Commission *must* intercede in this deteriorating situation and must do so in a definitive and comprehensive way.

II. Federal Law Dictates A Broad, Jurisdictional Approach To Regulation Of Interstate Telemarketing.

The Commission's current case-by-case review of individual provisions of state laws purportedly applicable to interstate telemarketing is simply unworkable.[66] More importantly, however, it is also legally impermissible because *Congress* already determined that *only* the FCC has jurisdiction over interstate telemarketing calls. Congress having spoken, *the Commission has no legal authority to cede federal jurisdiction to the states.*[67] The Commission's current conflict preemption approach effectively grants to the states concurrent jurisdiction over interstate telemarketing except where state law conflicts with the federal rules.

The Communications Act of 1934: Congress's division of authority between state and federal regulators dates back to 1934, when the Communications Act was adopted. Section 2(a) of the Act grants the Commission jurisdiction over "all interstate and foreign communication" and over "all persons engaged . . . in such communication."[68] Section 2(b) of the Act reserves to the states jurisdiction "with respect to . . . intrastate communication service."[69] Both this Commission and the federal courts have expressly and repeatedly reaffirmed that the Act means what it says: the Commission has *exclusive* jurisdiction over interstate telecommunications.

The Commission put the point very plainly thirty years ago in a proceeding involving interstate foreign exchange service: "The States do not have jurisdiction over interstate

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66 *See supra* at 3-6.

67 *See United States Telecom Ass'n v. FCC*, 359 F.3d 554, 566 (D.C. Cir.) ("A general delegation of decision-making authority to a federal administrative agency does *not*, in the ordinary course of things, include the power to subdelegate that authority beyond federal subordinates."), *cert. denied sub nom. National Ass'n of Regulatory Util. Comm'rs v. United States Telecom Ass'n*, 125 S. Ct. 313 (2004).

68 47 U.S.C. § 152(a). Congress defined "interstate communication" as "communication or transmission . . . from any State, Territory, or possession of the United States . . . to any other State, Territory, or possession of the United States . . . but shall not . . . include wire or radio communication between points in the same State . . . through any place outside thereof, if such communication is regulated by a State commission." 47 U.S.C. § 153(22).

69 47 U.S.C. § 152(b).

communications."[70] Fifteen years later, in addressing interstate calls to operator service providers, the Commission was equally unequivocal: "The Commission's jurisdiction over interstate and foreign communications is exclusive of state authority."[71] And a wide variety of courts have likewise concluded that interstate and foreign communications are "totally entrusted to the FCC."[72]

The TCPA: The TCPA was enacted against the backdrop of the Communications Act's basic division of regulatory authority – state authority over intrastate calls and federal authority over interstate calls. At the time Congress enacted the TCPA, it made one important change to that structure: it *expanded* federal authority over telemarketing by amending section 2(b) to give the Commission jurisdiction over both interstate and intrastate calls.[73] The Act itself indicates that Congress did so based on the concern that states lack jurisdiction over interstate calls."[74]

The Commission's discussion of jurisdiction in the *Report and Order* was largely correct. The Commission observed that "states traditionally have had jurisdiction over *only* intrastate calls, while the Commission has had jurisdiction over interstate calls."[75] The Commission also correctly cited relevant legislative history demonstrating that Congress shared that understanding

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[70] *American Telephone and Telegraph Company and the Associated Bell System Companies Interconnection With Specialized Carriers in Furnishing Interstate Foreign Exchange (FX) Service and Common Control Switching Arrangements (CCSA)*, Memorandum Opinion and Order, 56 FCC 2d 14 (1975) ¶ 21.

[71] *Operator Services Providers of America/Petition for Expedited Declaratory Ruling*, Memorandum Opinion and Order, 6 F.C.C. Rcd. 4475 (1991) ¶ 10 ("*OSPA*").

[72] *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 746 F.2d 1492, 1498 (D.C. Cir. 1984). *See also State Corp. Comm'n of Kansas v. FCC*, 787 F.2d 1421, 1426 (10th Cir. 1986) (noting that it is the FCC's "basic function under the Act" to govern "'all interstate and foreign communication by radio or wire'") (quoting Section 2(a)); *AT&T Communications v. Public Service Comm'n*, 625 F. Supp. 1204, 1208 (D. Wyo. 1985) ("It is beyond dispute that interstate telecommunications service is normally outside the reach of state commissions and within the exclusive jurisdiction of the FCC.")

[73] Specifically, Congress added section 227 to the *exceptions* to the usual rule of section 2(b) that the Commission lacks jurisdiction over intrastate communications. *See* 47 U.S.C. § 152(b) (historical notes, explaining the 1991 amendments).

[74] *See* TCPA § 2(7) (finding that "[o]ver half the States now have statutes restricting various uses of the telephone for marketing, but telemarketers can evade their prohibitions through interstate operation").

[75] *Report and Order* ¶ 83 (emphasis added).

at the time of the TCPA's enactment. For example, the *Report and Order* notes that the Senate Report on the bill that became the TCPA expressly stated that "[f]ederal action is necessary because States do not have jurisdiction . . . [over] interstate telephone calls."[76] Similarly, the Commission quoted Senator Hollings's blunt observation that "[s]tate law does not, and cannot, regulate interstate calls."[77]

Unfortunately, the Commission muddied the waters when it remarked that section 227(e)(1) was "ambiguous" as to whether the states may regulate interstate telemarketing calls.[78] And instead of resolving that ambiguity, the Commission relied on it to adopt its narrow conflict preemption approach. In fact, there is no ambiguity; section 227(e)(1) plainly reflects Congress's desire in 1991 to remain faithful to the basic design of the Communications Act, *i.e.*, it clarifies that the TCPA (a) expands *federal* power over intrastate calls, (b) restricts, but does not eliminate, *state* authority over such calls, and (c) *does not grant to the states any authority over interstate calls*. Specifically, section 227(e)(1) provides that (with some exceptions) "nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive *intrastate* requirements or regulations on, or which prohibits" the use of certain telemarketing practices.[79] Like section 2(b)'s original reservation to the states of authority over *intrastate* communications, however, section 227(e)(1) accords the states no authority whatsoever over *interstate* calls. While there should be no question on this point, states

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[76] *Id.* n.267.

[77] *Id.*

[78] *Id.* ¶ 82.

[79] 47 U.S.C. § 227(e)(1) (emphasis added).

have seized upon the alleged ambiguity to argue that they do, in fact, have authority to regulate interstate telemarketing.[80]

***The Commission's OSPA Decision*:** The *Report and Order* fails to point out that the Commission has previously had occasion to apply the jurisdictional provisions of section 2 to very similar factual circumstances. In its *OSPA* decision,[81] the Commission addressed the question whether a state commission could regulate interstate calls to operator service providers ("OSPs") in view of the Communications Act's conferral on the FCC of exclusive authority over interstate communications. The Commission held that such state regulation was barred by section 2(a). Because the *OSPA* issue so directly parallels the current question, the decision requires close analysis.

At the heart of the *OSPA* dispute was a Tennessee statute enacted in March 1990 purporting to govern the provision of both intrastate and interstate operator-assisted calls. In the Commission's words, the Tennessee statute sought to "establish the terms and conditions under which interstate operator services may be offered in the state[] – establishing specific requirements for OSPs before they complete interstate calls."[82] Those requirements included, in some circumstances, identifying the carrier providing the service, the costs of providing the

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[80] For example, in the *Freeeats.com* docket, the North Dakota Attorney General argues that section 227(e)(1) *does* expand state authority over interstate calls. Specifically, North Dakota claims that the "TCPA savings clause, by its plain language, *broadens* the jurisdiction of the States." North Dakota Comments on FreeEats.com's Petition at 17. As to intrastate calls, the argument goes, the states may either impose "more restrictive" requirements *or* "prohibit those practices outright," while as to interstate calls only a complete ban is authorized. That interpretation flies in the face of both common sense and the legislative history of the TCPA. There is no conceivable reason why Congress would authorize states to regulate *intrastate* telemarketing practices up to the point of banning them altogether, while at the same time authorizing a ban on, but not regulation of, *interstate* telemarketing practices. The only logical and reasonable reading of the statute is that the modifier "intrastate" applies to both regulation and prohibition by the states. Other states' comments have similarly misinterpreted section 227(e)(1). *See, e.g.*, Indiana Comments in Opposition to CBA Petition at 14-15 (Feb. 2, 2005); Wisconsin Comments in Opposition to CBA Petition at 3-4 (Feb. 2, 2005). The Commission needs to clarify once and for all that the states' interpretation of section 227(e)(1) is baseless.

[81] *See OSPA*, 6 F.C.C. Rcd. 4475 (1991).

[82] *OSPA* ¶ 12.

service, and the caller's right to be transferred without charge to any other carrier offering operator-assisted services.

In October 1990, the federal Telephone Consumer Services Improvement Act of 1990 (TOCSIA) became law.[83] TOCSIA required the FCC to conduct a rulemaking to establish rules ensuring that consumers would be fully informed in using operator services to place interstate calls. Under TOCSIA, OSPs must, for example, identify themselves before the consumer incurs any charges, permit the consumer to then terminate the call at no charge, and disclose all charges upon request.[84] The Tennessee statute was thus more restrictive than TOCSIA in some respects.

OSPA petitioned the FCC for a declaratory ruling that the Tennessee statute was invalid on the ground that the Commission has exclusive jurisdiction over interstate communications.[85] The Commission agreed. Its *OSPA* analysis began with the observation that under section 2(a) of the Communications Act "the Commission has plenary and comprehensive jurisdiction over interstate and foreign communications" that is "exclusive of state authority."[86] The Commission further found that "[w]here Congress has given this Commission exclusive authority over interstate and foreign communications, we need not demonstrate that 'state regulation of interstate communications would impose some burden on interstate commerce or would frustrate some particular policy goal of Congress of this Commission.'"[87] And the Commission squarely rejected Tennessee's argument that "the [FCC] does not have exclusive jurisdiction over interstate operator services because states have authority to protect consumers against unfair,

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83 47 U.S.C. § 226.

84 *OSPA* ¶ 3.

85 *Id.* ¶ 4.

86 *Id.* ¶ 10.

87 *Id.* ¶ 10 n. 19, quoting *Chesapeake and Potomac Telephone Company of Maryland*, 2 F.C.C. Rcd. 3528 (1987).

deceptive, and fraudulent practices."[88] According to the Commission, "[o]nly Section 2(b)(1) of the Act limits the authority of the Commission, and that section reserves to the state authority over *intrastate* communications, not *interstate* communications."[89] The Commission concluded that "the Communications Act precludes application of the Tennessee statute to interstate operator services."[90]

Applying the Communications Act and OSPA to the TCPA: Petitioners respectfully submit that the Commission has complicated the issue of federal versus state authority over interstate telemarketing. Under a straightforward reading of section 2 of the Communications Act and Commission precedent interpreting it, the states simply have no authority in that area.

OSPA confirms how this straightforward application of the Communications Act should proceed. That case, like the present circumstances, involved calls between consumers and out-of-state service providers. The Commission there concluded that such calls fall within section 3(e)'s definition of "interstate communications" as "communication . . . from any state, territory or possession of the United States or the District of Columbia to any other state, territory or possession of the United States or the District of Columbia."[91] Of course, that conclusion is even more obvious in the present situation, because Congress amended section 2(b) at the time it enacted the TCPA, thus confirming unequivocally that the subject matter of the TCPA falls within section 2.[92]

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88 *Id.* ¶¶ 8-12.

89 *Id.* ¶ 11.

90 *Id.* ¶ 12. Notably, the Commission also accepted OSPA's alternative argument that TOCSIA "occupies the field of interstate operator services regulation to the exclusion of state regulation." *Id.* ¶ 13. The Commission further found that "Congress intended to, and did, create a comprehensive legislative solution to any problems in the interstate OSP industry – a federal solution that precludes a potpourri of differing state requirements." *Id.* ¶ 14.

91 *OSPA* ¶ 6 n.7.

92 *See supra* at 3 n.6.

As *OSPA* demonstrates, where section 2(a) applies on its face, the only question is whether the statute means what it says. Both this Commission and the courts have repeatedly affirmed that it does.[93] Accordingly, the states have no more jurisdiction over interstate calls between telemarketers and consumers than they do over interstate calls between OSPs and consumers. Indeed, that is precisely what the FCC staff concluded in a 1998 opinion letter that relied primarily on *OSPA* to find that Maryland had no authority to regulate interstate telemarketing calls.[94] While that letter is not binding on the Commission, it obviously reflected the staff's position at that time and did, in fact, reach the same conclusion that Petitioners believe the Commission should reach here.

OSPA is also instructive because it correctly concludes that the states' interest in consumer protection[95] does not trump the federal statutory and regulatory regime. In *OSPA*, as here, Congress intended to create a "federal solution" to any problems of interstate telemarketing – "a federal solution that precludes a potpourri of differing state requirements."[96] Moreover, as further set forth below, that argument is even stronger here because – unlike in *OSPA* – Congress specifically provided for thoroughgoing *state* (as well as federal) enforcement of that "federal solution."[97]

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93 *See supra* at 33-34.

94 *See* Letter from Geraldine A. Matise, FCC, to Ronald A. Guns, Maryland House of Delegates (January 26, 1998) (relying on *OSPA* and concluding that the "Communications Act . . . precludes Maryland from regulating or restricting interstate commercial telemarketing calls" because "[u]nder the Supremacy Clause, a state may not regulate conduct in an area of interstate commerce intended by the Congress for exclusive federal regulation").

95 *OSPA* ¶ 12.

96 *Id.* ¶ 14.

97 *See* 47 U.S.C. § 227(f)(1).

III. Acknowledging That the FCC has Exclusive Jurisdiction Over Interstate Telemarketing Calls Will Not Impair State Consumer Protection Activities.

States protest that they will be unable to protect their residents if they are foreclosed by the TCPA from regulating interstate telemarketing calls.[98] Not so. As set forth above,[99] as to *intrastate* communications, section 227(e)(1) expressly preserves the state's authority to both adopt and enforce even measures more restrictive than those of the TCPA. And as to *interstate* communications, section 227(f) allows state attorneys general the right to go to federal court to enforce the TCPA in federal court and to seek either equitable relief or monetary damages.[100] Recognizing that Congress has conferred on the FCC exclusive *regulatory* authority over interstate communications requires only that *the rule of decision with respect to alleged violations of telemarketing regulation be governed by the federal rules*. The states have enforcement authority with respect to those rules.

It must also be emphasized that the TCPA also specifically preserves the right of state attorneys general to proceed in state court against telemarketers (whether intrastate or interstate) "on the basis of an alleged violation of any *general* civil or criminal statute of such State,"[101] *e.g.*, on the basis of a state statute that is applicable to all persons and entities located or conducting activities in the state. *The TCPA in no way interferes with state police powers or long-arm statutes, which are used to protect consumers generally against fraud.* Fraud committed on an interstate telephone call is still punishable as a fraud, and state authority to

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98 *See, e.g.,* North Dakota Freeeats.com Comments at 6.

99 *See supra* at 35-36.

100 47 U.S.C. § 227(f)(1) & (2).

101 47 U.S.C. § 227(f)(6) (emphasis added).

prohibit and punish fraudulent activity under its general civil and criminal laws remains fully intact.[102]

Indeed, the consumer protections under the TCPA are even stronger than those in *OSPA*, where this Commission rejected a similar state consumer protection argument. The Commission noted that a provision of the Act (like TCPA section 227(e)(1)), allowed states to enforce against OSPs "such preexisting state remedies as tort, breach of contract, negligence, fraud, and misrepresentation – remedies generally applicable to all corporations operating in the state, not just telecommunications carriers."[103]

The Commission again drew a bright line between federal and state authority in its recent *Truth-in-Billing Order*, in which the Commission preempted "state regulation prohibiting or requiring . . . line items" on wireless bills, but made clear that "the neutral application of state contractual or consumer fraud laws" was not preempted.[104] Notably, the Commission also concluded tentatively that in order "to eliminate the inconsistent state regulation . . . spreading across the country" as a result of its prior pronouncement allowing states to enact truth-in-billing regulations more specific than the federal rules, it should reverse that pronouncement. [105] Furthermore, the Commission sought comment on whether states should instead be permitted to enforce the Commission's rules. Here, where the TCPA has an explicit savings clause for states' "general civil or criminal statute[s]" and already provides for state enforcement of the federal

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[102] States have always relied on such laws, and continue to use them to protect their consumers against interstate fraud conducted over the telephone. For example, the New York Attorney General recently initiated a lawsuit against a Rhode Island-based telemarketing company for operating fraudulent fund-raising campaigns in New York. *See* http://www.oag.state.ny.us/press/2005/feb/feb22a_05.html.

[103] *OSPA* ¶ 11, citing 47 U.S.C. § 414.

[104] *See Truth-in-Billing and Billing Format*, Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking, CG Docket No. 04-208 (¶¶ 32-33) (rel. March 18, 2005) (*Truth-in-Billing Order*).

[105] *Id.* ¶¶ 51-52.

rules, preservation of the states' significant role in protecting consumers is plain from the face of the statute. Accordingly, the states' arguments regarding their inability to protect consumers are totally misplaced.

In sum, it is important to understand that petitioners do *not* maintain that Congress – in giving the Commission exclusive *regulatory* authority over interstate communications – left state attorneys general unable to do their jobs. On the contrary, the statute specifically provides for state enforcement of both the TCPA itself and state laws of general applicability, to the constitutional limits of state long-arm statutes.

IV. The Commission Has The Power To Bar State Regulation Of Interstate Telemarketing.

Even if the Commission does not conclude that the Act expressly grants it exclusive jurisdiction over interstate telemarketing, it nonetheless has the power to categorically preempt state regulation of interstate telemarketing communications. It need not – and should not – perpetuate an unworkable system of dual sovereignty in that area. Rather, this Commission should exercise its authority categorically to prohibit state regulation of interstate telemarketing.

The Supreme Court has specifically recognized that "in a situation where state law is claimed to be pre-empted by federal regulation, a 'narrow focus on Congress's intent to supersede state law [is] misdirected,' *for '[a] pre-emptive regulation's force does not depend on express congressional authorization to displace state law.'*"[106] Instead, "'a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation' and hence render unenforceable state or local laws that are otherwise not inconsistent with federal

[106] *City of New York v. FCC*, 486 U.S. 57, 64 (1988), *quoting Fidelity Federal Savings & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 154 (1982) (emphasis added).

law."[107] "[T]he inquiry becomes whether the federal agency has properly exercised its own delegated authority."[108] In *City of New York v. FCC*, the Supreme Court upheld the Commission's decision to preempt local franchising authorities from promulgating technical standards governing cable service. The Court did not disagree with the localities that *Congress* had not preempted local technical standards, but found that the localities had disregarded the "Commission's own power to pre-empt."[109]

Nothing in section 227 prevents the Commission from exercising that power here. In particular, while section 227(e)(1) is captioned "State law not preempted," it actually provides only that "nothing *in this section* or in the regulations prescribed under this section shall preempt any State law . . ."[110] By its plain language, section 227(e)(1) thus does *not* prevent the Commission from acting to preempt state regulation of interstate telemarketing.

State arguments that the Commission may not preempt "unless Congress . . . grants to the FCC the statutory power to preempt" are simply wrong.[111] This Commission has frequently exercised its authority to preempt broad categories of state regulation and has been repeatedly affirmed by the courts.[112] Indeed, the Commission has recently exercised its preemptive power to bar states from applying any "traditional 'telephone company' regulations" to Vonage's

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[107] *Id*. at 63-64 (1988), *quoting Louisiana Public Service Comm'n*, 476 U.S. at 368-69.

[108] *City of New York*, 486 U.S. at 64.

[109] *Id*. at 69.

[110] 47 U.S.C. § 227(e)(1) (emphasis added).

[111] *See, e.g.,* North Dakota Reply Comment on FreeEats.com's Petition for Expedited Declaratory Ruling at 6 (Nov. 11, 2004).

[112] *See, e.g., Computer & Communications Industry Ass'n v. FCC* ("*CCIA*"), 693 F.2d 198, 214-15 (D.C. Cir. 1982) (upholding Commission's preclusion of state regulation of customer premises equipment (CPE) that was incompatible with the federal objective of developing a competitive CPE market); *California v. FCC*, 75 F.3d 1350, 1360 (9th Cir. 1996) (upholding Commission preemption of state call blocking regulations inconsistent with federal regulatory goals).

DigitalVoice and similar VOIP services.[113] In its *Vonage Order*, the Commission did not suggest that state regulation is preempted by a specific congressional pronouncement; rather, the Commission concluded that applying traditional regulation to Vonage's service would "directly conflict[]with [the *Commission's*] pro-competitive deregulatory rules and policies." *Id*. at ¶ 20. Similarly, the Commission should conclude here that state regulation of interstate telemarketing is inconsistent with the sound, pro-competitive policy of prohibiting multiple, inconsistent regulation.

[113] *Vonage Order*, ¶ 1.

CONCLUSION

For all of these reasons, the Commission should issue a declaratory ruling that:

(1) The FCC has exclusive regulatory jurisdiction over interstate telemarketing. States have no authority to regulate interstate telemarketing activities.

(2) State telemarketing-related laws and regulations are applicable only to intrastate, not interstate, telemarketing and may not be enforced against persons or entities that make interstate calls.

(3) Section 227(e)(1) preserves states' authority to regulate intrastate telemarketing calls, but does not grant to the states any regulatory jurisdiction over interstate telemarketing.

Respectfully submitted,[*]

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