



May 21, 2010

Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
FCC Headquarters
445 12th Street, SW
Room TW-A325
Washington, DC 20554

**Re: Notice of Proposed Rulemaking - Telephone Consumer Protection Act
(CG Docket No. 02-278)**

Dear Ms. Dortch:

The American Financial Services Association (“AFSA”) is grateful for the opportunity to comment on the Notice of Proposed Rulemaking (“NPR”) amending the Telephone Consumer Protection Act (“TCPA”) rules. AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. Its 350 members include consumer and commercial finance companies, auto finance/leasing companies, mortgage lenders, credit card issuers, industrial banks and industry suppliers.

Rulemaking Should Be Limited to Telemarketers

In outlining the need for and objectives of the proposed rules in the NPR, the Federal Communications Commission (“FCC”) identifies four areas that the proposed rules are intended to address. These are to: (1) conform the FCC’s rules to the Federal Trade Commission’s (“FTC”) Telemarketing Sales Rule (“TSR”) by prohibiting the use of prerecorded messages **in telemarketing sales** calls unless the seller or telemarketer has obtained the consumer’s prior express written consent, (2) conform the FCC rules to the FTC TSR by exempting certain healthcare related calls, (3) conform the FCC rules to the FTC TSR by requiring that **prerecorded telemarketing calls** delivered to residential subscribers include an automated, interactive opt-out mechanism; and (4) conform the FCC rules to the FTC TSR by adopting a "per campaign standard" for measuring the call abandonment rate.

While AFSA believes that the FCC's overarching objective of conforming the TCPA rules to the FTC's TSR as applicable is beneficial, it is critical to recognize that the purpose for the FCC's proposed amendments to the TCPA do not mirror the purpose for the FTC's amendments to the TSR and significantly expand the requirements. The amendments to the TSR specifically regulate telemarketers and sellers making calls to "induce the purchase of any good or service," while the FCC's NPR would regulate all entities that fall under the jurisdiction of the FCC. Most importantly, elements of the FCC's NPR would regulate *all* types of telephone calls and not just those with a sales purpose. AFSA members are not exempt from the FTC's jurisdiction and have been following the TSR as it was amended in 2008. Accordingly, if the FCC's NPR did no more than achieve consistency with the FTC's TSR, AFSA would not object. However, AFSA strongly believes that the NPR is inappropriately overbroad in its proposed application and likely effect. The FCC, as the FTC did, should limit its rulemaking to apply exclusively to telemarketers and sellers and their practices in making calls to induce the purchase of goods or services.

The TSR is very clearly limited to telemarketers and sellers, and the specific practices that have been determined to be abusive and in violation of the rule. The TSR, as amended, states that it is an abusive telemarketing act or practice for any seller or telemarketer to initiate any outbound telephone call that delivers a prerecorded sales message unless the call is exempted by the call abandonment safe harbor. The TSR does not address or limit the use of automatic telephone dialing systems in any way. Accordingly, AFSA strongly believes that the NPR is inappropriately overbroad in its proposed application and likely effect. In particular, the NPR does not offer a meaningful justification for restricting non-sales calls to cell phones that are placed using an automatic telephone dialing system or prerecorded message, especially if the called party is not charged for the call. The FTC's TSR does not regulate those calls, so the FCC would not achieve one of its principle objectives of providing for additional consistency or harmonization through this proposal. In fact, as discussed below, there is ample reason for treating sales and non-sales calls differently in this context. To reflect that, AFSA proposes alternate wording set forth below for Section 64.1200(a)(1)(v) relating to the use of an automotive telephone dialing systems or artificial or prerecorded voice, as well as a new section (vi) to accomplish the intended purpose of conforming the FCC rulemaking to the TSR, while still protecting the privacy rights of consumers in a manner consistent with what the FCC previously adopted:

- (v) For purposes of paragraph (a)(1) of this Section, a person or entity that initiates a telephone call that includes or introduces an unsolicited advertisement or constitutes a telephone solicitation shall be deemed to

have obtained prior express written consent upon obtaining from the recipient of the call an express agreement, in writing, that:

(A) * * *

(B) * * *

(C) * * *

(D) * * *

- (vi) For purposes of paragraph (a)(1)(iii) of this Section, telephone calls for which the called party is not charged for the call are exempt from the requirement to obtain the prior express written consent of the called party in either of the following circumstances: (A) the call is not made for a commercial purpose; or (B) the call is made for a commercial purpose but does not include or introduce an unsolicited advertisement or constitute a telephone solicitation.

The biggest concern that AFSA has with the FCC's NPR is its proposal to subject *all* types of calls to cell phones to the standards established for telemarketing calls. For nearly two decades, the FCC and the FTC have recognized that consumers view sales calls differently from non-sales calls that relate to an existing relationship. For instance, the FCC's January 2008 Declaratory Ruling stated that calls "regarding debt collection or to recover payments are not subject to the TCPA's separate restrictions on 'telephone solicitations.'"¹ In its 1992 Order, the FCC wrote, "that an express exemption for debt collection calls to residences was unnecessary as such calls fall within the exemptions adopted for commercial calls which do not transmit an unsolicited advertisement..."²

The FCC's proposed amendment to its regulation of prerecorded messages to residential lines respects this distinction. The proposed amendment to the regulation of calls to cell phones does not. Moreover, as explained below, we believe that imposing a requirement intended to apply to telemarketers and sellers in connection with telemarketing calls to all calls made using an automatic telephone dialing system or artificial or prerecorded voice would detrimentally impact consumers. In our proposed regulatory language above, we attempt to restore the proper balance between protecting consumers from unwanted sales calls and allowing companies to communicate with their customers for non-sales purposes. Our proposal incorporates language from the FCC's regulation of prerecorded messages to residential lines to promote the consistency and harmonization desired by the FCC.

¹ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Request of ACA International for Clarification and a Declaratory Ruling*, CG Docket No. 02-278.

² *1992 TCPA Order*, 7 FCC Rcd at 8773.

AFSA agrees with the proposed revisions to Section 64.1200(a)(2) relating to telephone calls to residential lines and believes that it accomplishes the intended purpose of imposing the same prior express written consent requirements on non-exempt telephone calls (including those made by telemarketers and sellers for telemarketing purposes) as set forth in the TSR.

Proposed Revisions Hurt Consumers

AFSA understands the frustration that consumers feel upon receiving multiple prerecorded telemarketing calls and appreciates the FCC's and the FTC's efforts to protect consumers in this area. However, requiring non-telemarketing entities, such as lenders, to obtain express written consent from their customers to contact their customers using a prerecorded or autodialed call to their wireless telephone number, which they have provided to the lender in the context of their relationship, does not further the fundamental intent of limiting so-called telemarketing "robocalls" and ultimately would harm consumers.

It is important for the FCC to keep in mind that many, and possibly in the near-future a majority, of customers are not reachable on a landline. The environment today is much different than when the TCPA was enacted almost two decades ago. Cell phone usage was at only a few percent in 1990. The very first mobile call in the UK did not even occur until 1985. Furthermore, demonstrating how different technology was when the TCPA was passed, is the fact that 1991 was the year that the new World Wide Web project was publicized.

According to CTIA, the international association for the wireless telecommunications industry, wireless penetration is currently at 91% in the U.S. and in 2008, 22.7% of U.S. households were wireless-only.³ In other words, **almost a quarter of the households in the U.S. are only reachable by a call to a wireless number.** The Center for Disease Control and Prevention's ("CDC") National Center for Health Statistics ("NCHS"), found that the percentage of households that are wireless-only has been steadily increasing. In fact, the 2.7% increase from the first six months of 2008 is the largest six month increase observed since the NCHS began collecting data on wireless only households in 2003. Among households with both landline and wireless telephones, 24.4% received all or almost all calls on the wireless telephones. These wireless-mostly households made up 14.5% of all households in 2008.⁴ Together, the wireless-mostly and wireless-only households make up almost 40% of U.S. households.

³ CTIA. *Wireless Quick Facts*. <http://www.ctia.org/advocacy/research/index.cfm/AID/10323lease/wireless200905.htm#Tables>

The number of wireless-only and wireless-mostly households will likely to continue to increase exponentially.

Congress enacted the TCPA to protect consumers' privacy interests, not to create unnecessary barriers to account-servicing calls where those privacy interests are not implicated. The FCC itself has previously acknowledged, "...calls solely for the purpose of debt collection are not telephone solicitations."⁵ Additionally, the TCPA provides an exception for calls that are not made for a commercial purpose.⁶ Calls made to existing customers, for the commercial purpose of servicing a customer's account with a lender, but do not include or introduce an unsolicited advertisement or constitute a telephone solicitation do not adversely affect the privacy rights that the TCPA is intended to protect. The potential adverse consequences to consumers of expanding application of the NPR beyond telemarketers and their practices are clear. Placing additional and unnecessary communication barriers between financial institutions and customers at a time when more frequent and open communication is needed to solve and/or mitigate problems, such as repossessions, foreclosures and potential fraudulent account activity, is counterproductive and could negatively impact not only the customer, but the economy as a whole.

Account Information

If the proposed changes to the TCPA are implemented, important account information may not reach consumers in a timely manner, which may give rise to unintended and avoidable exposure for the customer. For example, a lender may need to call a customer when the lender suspects fraudulent use of an account. Sending a prerecorded or autodialed message to the customer's wireless number (particularly if that is the only number that has been provided to the lender by the consumer) could help the customer avoid identity theft by informing the customer quickly of unusual or fraudulent activity on his credit lines.

Additionally, prerecorded and/or autodialed messages help customers manage their accounts by giving customers real-time knowledge of transactions posted by joint or authorized users. This information can help customers limit various fees, such as overdrawn, over limit, or past due fees, by allowing them to react right away. For instance, if a customer receives a phone call immediately after he goes over his credit card limit, he will know that he cannot use that card again without generating additional fees before making a payment on the card. If he had not received that call, he may not

⁵ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Request of ACA International for Clarification and a Declaratory Ruling*, CG Docket No. 02-278.

⁶ AFSA understands that calls for the purpose of servicing a loan or collecting a debt made using an artificial or prerecorded voice are permitted under the exception in subsection 227(b)(1) of the TCPA for non-commercial calls.

have realized that he was over his credit limit, and might have used the card several more times, incurring several additional fees.

Lastly, lenders work closely with law enforcement to protect consumers. Limiting lenders' ability to rapidly and broadly communicate with their customers could potentially derail many beneficial alerts and triggers that would otherwise protect consumers and aid law enforcement. Seconds matter when dealing with identity theft and fraud. In fact, many security statutes require lenders to send notices to a massive number of people and specifically allow those notices to be sent telephonically.

Loan Modifications

Limiting contact between customers and their lenders by requiring written consent to use autodialers or prerecorded messages to call wireless numbers seems contradictory at a time when the federal government wants the maximum number loan modifications made to avoid foreclosures.

If the NPR goes into effect as proposed, customers may not obtain information that would help them modify their loans. The ability to use autodialers or prerecorded messages to call customers at a wireless numbers is vital to making loan modifications for customers. The economy is still in a critical state, and if lenders are prohibited from using autodialers or prerecorded messages to contact their customers, lenders may not be able to reach consumers in an efficient and timely manner to engage in meaningful loss mitigation efforts, including loan modifications and community outreach programs. The ability to maintain contact between a customer and lender is an important element of homeownership preservation and is critically important in the current economic state; as such contact may help to avoid a foreclosure. The Obama administration, Congress and financial services regulators are all stressing the importance of loan modifications. Loan modifications are key to the Obama Administration's Making Home Affordable program. Congress has passed legislation with the goal of increasing loan modifications and regulators have repeatedly stressed the importance of work-outs to the entities that they regulate. However, if the customer cannot be reached by the lender or servicer quickly and efficiently, the lender or servicer may not be able to work with the customer in time to modify the loan. As a result, the customer could unnecessarily lose her house. Autodialers and prerecorded messages are needed to reach the maximum number of consumers quickly and efficiently. It is in everyone's interest to make the communication between lender and borrower as easy as possible.

AFSA understands that the NPR does not prevent lenders from contacting customers via wireless telephones outright, but requires the presence of "written prior express

consent.” However, AFSA notes that the FCC should clearly understand and seriously consider the massive operational and financial efforts that will be required of lenders to proactively seek and obtain such written consent. Many institutions will undoubtedly determine the associated costs to be prohibitive. Furthermore, even if lenders were to undertake such efforts to obtain written consent, the likelihood of successfully obtaining a significant number of consents is probably quite remote. This very well may be the result of any of a number of reasons, including (a) customers may intentionally avoid contact with their lenders or servicers, or may have moved, particularly if they think they are in the process of losing their home or (b) customers may just ignore the requests for consent, not understanding why the lender needs the additional consent, especially in circumstances where the customer provided the phone number. If the lender does not get consent, and the customer does not have an accurate address or landline, the lender will have no way to reach the customer. As stated above, the potential adverse consequences of this proposal to consumers, as well as to the ongoing relationship between consumers and their lenders, are significant. Further, since many lenders have already obtained customer consent either through the credit application or subsequent communication with the customer, the requirement to obtain additional written consent would be extraordinarily inefficient and would ultimately increase the cost of credit in general.

If the final rule applies to all types of calls made to cell phones, mortgage servicers would face a significant challenge in satisfying outreach requirements mandated by the Treasury Department under the Making Home Affordable Program. On March 24, 2010, Treasury issued Supplemental Directive 10-02, which requires mortgage servicers participating in the program to satisfy a new “Reasonable Effort” solicitation standard before servicers may refer any loan to foreclosure or conduct a scheduled foreclosure sale. In order to satisfy the first prong of the “Reasonable Effort” standard, servicers must make a minimum of four telephone calls to the last known phone numbers of record, at different times of day, within a 30 day period of time. One of the numbers of record may include cell phone numbers; in some cases, the only number the servicer has for the borrower may be a cell phone number. In addition, servicers rely upon technology to handle the call volume and to establish the appropriate call times. States have also begun to impose notice requirements before foreclosure. For example, House Bill 2626 amends Arizona law to require a lender to attempt to contact the borrower to explore options to avoid foreclosure at least 30 days before the notice of a trustee’s sale is recorded if a mortgage is secured by the borrower’s principal residence. To satisfy these outreach efforts, it is likely that calls made to borrowers may use technology that could be prohibited under the FCC’s NPR. A broad interpretation or application of the NPR places servicers in the untenable position of choosing between conflicting requirements of the FCC’s rule or Treasury’s program mandate and state law.

The additional and unintended result of broad application of the NPR may be that consumers with lower income, or certain protected classes of consumers, will not receive the benefit of the outreach efforts or programs designed to help them stay in their homes because they have only cell phones. According to statistics released by the CDC, of those classified as “poor”, 36.3% have only cell phones; of those classified as “near poor,” 29% have only cell phones. This is in contrast to the 19.6% with cell phones only that are classified as “not poor.”⁷ The CDC survey also revealed that for the time period July to December 2009, 30.4% of Hispanics had only mobile phones, compared with 25% of non-Hispanic blacks and 21 % of non-Hispanic whites.⁸ Thus, the proposed rule, if adopted, will have significant negative consequences.

Operational Challenges

The costs and practicalities of introducing operational changes that would be required of lenders to comply with the new rules would be unreasonable, difficult, and cause the creditor to incur an expense that would likely be passed on to the consumers at a time when they can least afford more costly credit. Present business service and pricing models assume operating efficiencies made possible by autodialers and prerecorded messages. Less efficient solutions will result in higher costs. Moreover, AFSA believes it is blatantly unreasonable to impose additional requirements designed to limit telemarketing and sales calls onto lenders as preconditions to permit them to contact consumers regarding outstanding debt obligations or critical account servicing issues. Finally, some financial institutions, particularly small lenders, do not have the financial resources to make the changes the rule would require. If the NPR went into effect largely as proposed, lenders would be required to make unplanned capital purchases likely beyond their capability, which could cause them to fail.

Consumer Protections

There are a number of protections already available for non-solicitation messages. Under the Fair Debt Collection Practices Act (“FDCPA”) and state law equivalents, there is a cease and desist right for consumers who affirmatively choose not to be contacted about an outstanding debt obligation. Additionally, consumers have protection under the bankruptcy code and by signing up on the National Do Not Call Registry. AFSA believes these protections more than adequately protect consumers’ rights in the context of

⁷⁷ See, CDC Survey, Table 2g, available at:

http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201005_tables.htm#T3.

⁸ See, CDC Survey, Table 2a, available at:

http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201005_tables.htm#T2.

existing commercial relationships and are the appropriate legal mechanisms for such purpose.

Definition of Autodialers

Another reason AFSA believes the FCC should limit the rulemaking to telemarketing calls is that the broad definition of autodialers will prevent customers from being reached in an efficient, safe, and cost-effective manner. The definition of “automatic telephone dialing systems” or “autodialers” includes equipment that “has the capacity – (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers,”⁹ so a call from any modern telephone, even if hand-dialed, would fall under this definition.

When a financial institution is attempting to reach a broad group of customers in order to make a commercial call, the use of equipment that dials a number provided to the institution by the called party leads to efficiency and better coverage for the consumer. There is no threat to the public safety in dialing a known number provided by a customer through an efficient process and it does not inappropriately shift costs from the financial institution to the customer. If the concern in using a predictive dialer is in abandoned calls, the FCC could determine that call abandonment or caller identification requirements similar to those imposed on telemarketers may be feasible for the non-telemarketing caller that uses a predictive dialer as an efficient and cost effective tool to contact known customers. It is not as likely that financial institutions that use predictive dialers to call customers abandon calls, as the purpose for making the call is to make a commercial call related to the specific account or loan to impart or discuss specific information.

Alternatives

AFSA respectfully suggests that the FCC clarify that collection or servicing of a debt by making autodialer or prerecorded calls to wireless telephone numbers where the called party is not charged does not adversely impact the privacy rights of consumers whose interests the TCPA is intended to protect and therefore communication is permissible in any form, including prerecorded message and autodialed calls.

AFSA also respectfully suggests that if the FCC is not willing to make the other changes to the NPR suggested above, the FCC could consider the following changes to the NPR:

⁹ Telephone Consumer Protection Act 47 U.S.C. § 227

- Delete proposed paragraph (a)(2)(v)(B). This proposed paragraph might prohibit creditors from seeking written consent in credit applications and contracts for financial services, or might even prevent creditors from seeking written consent at the time a consumer enters into a credit transaction. If creditors are limited in the manner in which written consent can be requested, this would: 1) directly contradict the FCC's January 4, 2008 opinion which concluded that written consent secured in a credit application satisfies the consent requirements of Section 64.1200(a)(1); 2) possibly require creditors who had previously received written consent from consumers in a credit application or a contract to limit or end communications to those consumers while the creditors attempt to secure written consent again; and 3) further limit communication between creditors and consumers, exacerbating the problems described above.
- Delete proposed paragraph (a)(2)(v)(D). As proposed, this paragraph only allows consumers to consent to contact on cell phone numbers that they have at the time consent is given. For their convenience, consumers may wish to give consent to be contacted on numbers they acquire in the future. Consumers should be permitted to decide if they wish to consent to be contacted on after-acquired numbers.

Conclusion

For all of the foregoing reasons, AFSA strongly believes the FCC should expressly limit the application of the NPR and its efforts to conform the TCPA to the FTC's TSR to telemarketers and telemarketing activity, and establish a carve-out for all purposes to account-servicing activity undertaken to wireless phones at no charge to the consumer in connection with a pre-existing business relationship and commercial purpose where no unsolicited advertisement or telephone solicitation is included or introduced do not adversely affect the privacy rights that the TCPA is intended to protect. AFSA appreciates this opportunity to present its views.

Please do not hesitate to contact me at 202-296-5544 if you have any questions about our comments or if we can provide further assistance with respect to the NPR.

Sincerely,



Bill Himpler
Executive Vice President
American Financial Services Association

APPENDIX I

Answers to Specific Questions

4. *Consistent with Congress’s directive in the Do Not Call Improvement Act of 2007 (DNCIA) to “maximize consistency” of the Commission’s TCPA rules with the FTC’s Telemarketing Sales Rule, the Commission seeks comment on whether it should revise §§ 64.1200(a)(1) and 64.1200(a)(2) of its rules to provide that, for all calls, prior express consent to receive prerecorded telemarketing messages must be obtained in writing. The Commission seeks comment on these proposed revisions and specific related issues in the discussion that follows.*

The FCC should revise §§ 64.1200(a)(1) and 64.1200(a)(2) of its rules to provide that, for all calls, prior express consent to receive prerecorded telemarketing messages must be obtained in writing. However, The FCC, as the FTC did, should limit its rulemaking to apply exclusively to telemarketers and sellers and their practices in making calls to induce the purchase of goods or services.

5. *As an initial matter, the Commission seeks comment on its authority to adopt a prior written consent requirement similar to the FTC’s. Specifically, while the term “prior express consent” appears in both subsections 227(b)(1)(A) and (b)(1)(B) of the Communications Act, the statute is silent regarding the precise form of such consent (i.e., oral or written). Certain statements in the legislative history, however, suggest that Congress may have contemplated that consent may be obtained orally or in writing.*

As the FCC acknowledges, the TCPA does not specify whether “prior express consent” need be given orally or in writing. As the FCC notes in footnote 55, “the bill, as reported, would allow automated calls, including prerecorded messages, to be sent so long as the called party gives his or her prior express consent either orally or in writing.”¹⁰ In the same footnote, the FCC states that the examples provided by Congress refer to informational messages, not telemarketing messages. AFSA agrees that it may be appropriate for the FCC to require written consent for autodialed or prerecorded telemarketing calls, but it is not appropriate for other types of calls, as Congress clearly understood.

6. *Given that such a rule change would permit a telemarketer wishing to deliver prerecorded telemarketing messages to residential subscribers to obtain agreements*

¹⁰ Telephone Consumer Protection Act, Federal Communications Commission, FCC 10-18

from the subscribers by any electronic means authorized by the E-SIGN Act (including, for example, e-mail, Web form, telephone key press, or voice recording), the Commission seeks comment on whether Congressional concerns expressed nearly two decades ago regarding the potential burdens of a written consent requirement remain relevant today in light of the multitude of quick and cost effective options now available for obtaining written consent, other than via traditional pen and paper. The Commission also notes that section 227(b)(2)(B) of the Communications Act, in authorizing the Commission to adopt exemptions from the prerecorded message prohibition, states that it may do so “subject to such conditions as the Commission may prescribe.” This statement suggests that Congress intended the Commission to exercise discretion in establishing the parameters of any exemption from the prohibition on prerecorded messages. The Commission seeks comment on whether the discretion afforded it in this subsection extends to establishing a written consent requirement. The Commission also seeks comment on how best to reconcile the congressional objective to maximize consistency between the FTC’s rule and the Commission’s rule with the statements referenced above in the TCPA’s legislative history reflecting the concern that written consent may prove unduly burdensome to telemarketers and to subscribers who wish to receive telephone solicitations. The Commission seeks comment on whether the convenience afforded by the E-SIGN Act addresses these concerns.

If the FCC does limit its rulemaking to apply exclusively to telemarketers and sellers and their practices in making calls to induce the purchase of goods or services, AFSA believes that it is appropriate to impose a written consent requirement that takes advantage of the convenience afforded by the E-SIGN Act.

7. As noted above, when written consent is required under the Commission’s current rules (because the called party’s number is listed on the national do-not-call registry), the seller or telemarketer must obtain a signed, written agreement between the subscriber and seller stating that the subscriber agrees to be contacted by that seller and including the telephone number to which the calls may be placed. If the Commission were to adopt a written consent requirement for placing prerecorded telemarketing calls to unregistered subscribers, it seeks comment on whether it also should adapt existing § 64.1200(c)(2)(ii) of its rules (governing the content of written consent agreements) to apply specifically to prerecorded telemarketing calls, as the FTC has done in its Telemarketing Sales Rule. The Commission tentatively concludes that requiring a written agreement evidencing consent to receive prerecorded messages in particular, such as that required by the FTC, may help to ensure that consumers are adequately apprised of the specific nature of the consent that is being requested and, in particular, of the fact that they will receive prerecorded message calls as a consequence of their agreement.

Again, if the final rule is limited to telemarketers and sellers and their practices in making calls to induce the purchase of goods or services, AFSA agrees that requiring a written agreement evidencing consent to receive prerecorded messages may help ensure that consumers are adequately apprised of the specific nature of the consent that is being requested and of the fact that they will receive prerecorded message calls as a consequence of their agreement.

However, calls which are made to existing customers, for the commercial purpose of servicing a customer's account with a lender, but do not include or introduce an unsolicited advertisement or constitute a telephone solicitation do not adversely affect the privacy rights that the TCPA is intended to protect and should not be included in this rulemaking. The potential adverse consequences to consumers of expanding application of the NPR beyond telemarketers and their practices are clear. Placing incremental communication barriers between financial institutions and customers at a time when more frequent and open communication is needed to solve problems, such as repossessions and foreclosures, is counterproductive and could negatively impact not only the customer, but the economy as a whole.

It is important that customers be allowed to give consent orally to their lenders. Often, customers want to change their number over the phone. Not being able to do so, and requiring that customers inform creditors of telephone number changes in writing, could severely inconvenience those customers.

If the proposed changes to the TCPA are implemented, customers may not get important account information in a timely manner or obtain information that would help them modify their loan. Additionally, the costs and practicalities of introducing operational changes that would be required of lenders to comply with the new rules would be unreasonable, difficult, and cause the creditor to incur an expense that would likely be passed on to the consumers at a time when they can least afford more costly credit.

8. Assuming the Commission has legal authority to adopt a written consent requirement, it seeks comment on whether it should adopt the same requirement both for calls governed by section 227(b)(1)(A) of the Communications Act (generally prohibiting automated or artificial or prerecorded message calls without prior express consent to emergency lines, health care facilities, and cellular services), and for calls governed by section 227(b)(1)(B) of the Communications Act (generally prohibiting prerecorded message calls without prior express consent to residential telephone lines). Because

the two provisions include an identically worded exception for calls made with the “prior express consent of the called party,” the Commission tentatively concludes that any written consent requirement adopted should apply to both provisions. The Commission seeks comment on this tentative conclusion.

Unless the final rule is limited to telemarketers and sellers and their practices in making calls to induce the purchase of goods or services, AFSA does not believe that the FCC should adopt a written consent requirement for calls governed by section 227(b)(1)(A) of the Communications Act for the reasons listed above. Congress enacted the TCPA to protect consumers’ privacy interests, not to create unnecessary barriers to account-servicing calls where those privacy interests are not implicated.

The ability to use autodialers or prerecorded messages to call customers at a wireless number is vital to making loan modifications for customers. The economy is still in a critical state, and if lenders are prohibited from using autodialers or prerecorded messages to contact their customers, lenders may not be able to reach consumers in an efficient and timely manner to engage in meaningful loss mitigation efforts, including loan modifications and community outreach programs.

Present business service and pricing models assume operating efficiencies made possible by autodialers and prerecorded messages. Less efficient solutions will result in higher costs. Moreover, AFSA believes it is blatantly unreasonable to impose additional requirements designed to limit telemarketing and sales calls onto lenders as preconditions to permit them to contact consumers regarding outstanding debt obligations or critical account servicing issues.

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

AFSA members currently operate under the standard for autodialed calls to wireless phones discussed in the FCC’s January 2008 Declaratory Ruling, which states:

Although the TCPA generally prohibits autodialed calls to wireless phones, it also provides an exception for autodialed and prerecorded message calls for emergency purposes or made with the prior express consent of the called party.

Because we find that autodialed and prerecorded message calls to wireless numbers provided by the called party in connection with an existing debt are made with the “prior express consent” of the called party, we clarify that such calls are permissible. We conclude that the provision of a cell phone number to a creditor, e.g., as part of a credit application, reasonably evidences prior express consent by the cell phone subscriber to be contacted at that number regarding the debt. In the 1992 TCPA Order, the Commission determined that “persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary.” The legislative history in the TCPA provides support for this interpretation.¹¹

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

As previously stated, AFSA supports the FCC’s efforts to harmonize its prior consent requirement with the FTC’s to reduce the potential for industry and consumer confusion surrounding a telemarketer’s obligations. However, the NPR does not merely harmonize the prior consent requirements, but imposes a new and very onerous obligation on all entities, not just telemarketers or sellers. These proposed rules would not serve to protect consumers, but would hurt consumers’ ability to receive important communications from their lenders.

It is important that consumers be allowed to give consent orally. Often, customers want to change their number over the phone. Not being able to do so, and requiring that customers inform creditors of telephone number changes in writing, could severely inconvenience those customers.

19. Finally, the Commission tentatively concludes that conforming its rule governing prerecorded message calls to established business customers to the FTC’s may reduce

¹¹ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Request of ACA International for a Declaratory Ruling*, 23 FCC Rcd 559, 563 (January 2008)

the potential for industry and consumer confusion surrounding a telemarketer's authority to place unsolicited prerecorded message calls to established customers to the extent that similarly situated entities would no longer be subject to different requirements depending upon whether an entity is subject to the FTC's rule or to the Commission's. The Commission seeks comment on this tentative conclusion.

AFSA agrees that the FCC should conform its rule governing prerecorded message calls to established business customers to the FTC's may reduce the potential for industry and consumer confusion surrounding a telemarketer's authority to place unsolicited prerecorded message calls to established customers to the extent that similarly situated entities would no longer be subject to different requirements depending upon whether an entity is subject to the FTC's rule or to the FCC's. However, the NPR does not mirror the FTC's rules, but significantly expands the requirements imposed on businesses trying to contact their customers.