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**Before the  
FEDERAL COMMUNICATIONS COMMISSION    FCC 95-310  
Washington, D.C.**

|                                       |   |                     |
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| In the Matter of                      | ) |                     |
|                                       | ) |                     |
| Rules and Regulations Implementing    | ) | CC Docket No. 92-90 |
| the Telephone Consumer Protection Act | ) |                     |
| of 1991                               | ) |                     |

**MEMORANDUM OPINION AND ORDER**

Adopted: July 26, 1995

Released: August 7, 1995

By the Commission:

**INTRODUCTION**

1. In the Report and Order in this docket,<sup>1</sup> the Commission amended its rules to establish procedures governing unwanted telephone solicitations. The Report and Order implemented rules to regulate the use of automatic telephone dialing systems, prerecorded or artificial voice messages, and telephone facsimile machines. Several parties have requested reconsideration or clarification of the rules governing telephone solicitations, the use of artificial or prerecorded messages for purposes of debt collection, and telephone facsimile machines.<sup>2</sup> As discussed below, we grant some reconsideration requests and deny others.

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<sup>1</sup> Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order (Report and Order), 7 FCC Rcd 8752 (1992).

<sup>2</sup> Petitions for reconsideration were filed by Consumer Electronics Group of the Electronic Industries Association and the Telecommunications Industry Association (CEG/EIA); the Direct Marketing Association (DMA); the Fair Fax Coalition (Coalition); Household International (Household); Olan Mills; Reese Brothers; Tandy Corporation (Tandy); US West Communications, Inc. (US West); and Xpedite Systems, Inc. (Xpedite). Comments were filed by Cable and Wireless Communications, Inc. (CWC); GTE Service Corporation (GTE); Motorola, Inc. (Motorola); the Newspaper Association of America (NAA); the Palm Beach Post; and the Nonprofit Group (comprised of the American Institute for Cancer Research, the California Consortium for the Prevention of Child Abuse, Federation on Child Abuse & Neglect, "Just Say No" International, Mothers Against Drunk Driving, and the Veterans Memorial Fund, Inc.). DMA and CEG/EIA filed Reply Comments. In addition, Alphanet Telecom Inc., Mr. Kenneth Dotson, Private Citizen, Inc. and Mr. Henry LeMieux filed ex parte comments in this proceeding.

## BACKGROUND

2. The Telephone Consumer Protection Act of 1991 (TCPA), Public Law 102-243 (1991), amended Title II of the Communications Act of 1934, 47 U.S.C. Section 201 et seq., by adding a new section, 47 U.S.C. Section 227. The TCPA imposes restrictions on the use of automatic telephone dialing systems, of artificial or prerecorded voice messages, and of telephone facsimile machines to send unsolicited advertisements. Specifically, the TCPA prohibits autodialed and prerecorded voice message calls to emergency lines, health care facilities or similar establishments, and numbers assigned to radio common carrier services or any service for which the called party is charged for the call, unless the call is made with the prior express consent of the called party or is made for emergency purposes.<sup>3</sup> The TCPA also prohibits artificial or prerecorded voice message calls to residences made without prior express consent, unless it is an emergency call or specifically exempted by the Commission.<sup>4</sup> Unsolicited advertisements may not be transmitted by telephone facsimile machines.<sup>5</sup> Those using telephone facsimile machines or transmitting artificial or prerecorded voice messages are subject to certain identification requirements.<sup>6</sup> Finally, the TCPA requires that the Commission consider several methods to accommodate telephone subscribers who do not wish to receive unsolicited advertisements, including live voice solicitations.<sup>7</sup> The statute also outlines various remedies for violations of the TCPA.<sup>8</sup>

3. In adopting rules to implement the TCPA, the Commission noted Congress' instruction 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."<sup>9</sup> Congress pointed out that in 1990, more than 30,000 telemarketing firms, employing more than 18 million Americans, generated more than \$400 billion in sales. But because unrestricted telemarketing can be an invasion of consumer privacy, and even a risk to public safety, Congress found that a federal law is necessary to control telemarketing practices.<sup>10</sup>

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<sup>3</sup> 47 U.S.C. § 227(b)(1)(A).

<sup>4</sup> Id. § 227(b)(1)(B).

<sup>5</sup> Id. § 227(b)(1)(C).

<sup>6</sup> Id. § 227(d)(1)(B).

<sup>7</sup> Id. § 227(c)(1)-(4).

<sup>8</sup> Id. §§ 227(b)(3) and (c)(5).

<sup>9</sup> TCPA at Section 2(9), reprinted at 7 FCC Red 2736, 2744.

<sup>10</sup> Id. at §§ 2(2), (3), (4), (5), (7).

4. In implementing the TCPA, the Commission adopted rules requiring commercial telemarketers to maintain lists of consumers who do not wish to be called.<sup>11</sup> The rules were made effective December 20, 1992. Telemarketers must develop and maintain written policies for maintaining their lists.<sup>12</sup> They must inform their employees of the list's existence and train them to use the lists.<sup>13</sup> Telemarketers must not call residential telephone subscribers before 8 a.m. or after 9 p.m.<sup>14</sup> Telemarketers must identify themselves to called parties.<sup>15</sup> Our rules also establish general prohibitions against autodialed calls being made without prior express consent to certain locations, including emergency lines or health care facilities,<sup>16</sup> against the use of prerecorded or artificial voice message calls to residences,<sup>17</sup> against line seizure by prerecorded messages,<sup>18</sup> and against the transmission of unsolicited advertisements by facsimile machines. Facsimile and prerecorded voice transmissions, as well as telephone facsimile machines, must meet specific identification requirements.<sup>19</sup> This order addresses arguments made by parties seeking reconsideration or clarification of various matters addressed in the Report and Order. It seeks to balance the concern that consumers' privacy be protected with the imperative that telemarketing practices not be unreasonably hindered.

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<sup>11</sup> 47 C.F.R. § 64.1200(e)(2).

<sup>12</sup> Id. § 64.1200(e)(2)(i).

<sup>13</sup> Id. § 64.1200(e)(2)(ii).

<sup>14</sup> Id. § 64.1200(e)(1).

<sup>15</sup> Id. § 64.1200(e)(2)(iv).

<sup>16</sup> Id. § 64.1200(a)(1)(i)-(iii).

<sup>17</sup> Id. § 64.1200(a)(2). On May 21, 1993, the Commission was enjoined from enforcing this section of the TCPA on the grounds that the section violates First Amendment protection of commercial speech and is therefore unconstitutional. Moser v. FCC, 826 F. Supp. 360 (Or. 1993). On February 6, 1995, the injunction was reversed on appeal on the grounds that the section did not violate First Amendment protection of commercial speech and was therefore constitutional. Moser v. FCC, 46 F.3d 970 (9th Cir. 1995). The injunction did not extend to any other TCPA provision.

<sup>18</sup> Id. §§ 64.1200(a)(4) and 68.318(c)(2).

<sup>19</sup> Id. §§ 64.1200(d) and 68.318(c)(3).

## DISCUSSION

### A. Rules for Making Telephone Solicitations

5. Telemarketer Identification. The TCPA directs the Commission to implement rules that address the needs of residential telephone subscribers to avoid receiving telephone solicitations to which they object.<sup>20</sup> The rules the Commission adopted require, among other things, that telemarketers identify themselves to called parties.<sup>21</sup>

6. Commenters request reconsideration of these rules, asserting that they burden both consumers and telemarketers. The DMA and the NAA contend that telemarketers should not be required to give a telephone number or address during a telephone solicitation, as provided under Section 64.1200(e)(2)(iv) of the Commission's rules and argue that the Commission should require such information only upon request by the residential subscriber.<sup>22</sup> DMA argues that reciting a telephone number or address in addition to the name of the caller and calling business, as required by the rules, places telemarketers at risk of liability if for some reason they do not or cannot deliver the required information before the call is completed.<sup>23</sup> DMA maintains that residents may simply ask if they would like to know a telemarketer's telephone number or address.<sup>24</sup>

7. Decision. We continue to believe that it is in the best interest of residential subscribers and telemarketers that full identification of the soliciting caller be provided in the course of a

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<sup>20</sup> 47 U.S.C. § 227(c)(1).

<sup>21</sup> 47 C.F.R. § 64.1200(e)(2)(iv) states in part:

A person or entity making a telephone solicitation must provide the called party with the name of the individual caller, the name of the person or entity on whose behalf the call is being made, and a telephone number or address at which the person or entity may be contacted.

<sup>22</sup> DMA Petition at 2-5; NAA Comments at 3.

<sup>23</sup> 47 C.F.R. § 64.1200(e)(2)(iv) of the rules states:

A person or entity making a telephone solicitation must provide the called party with the name of the individual caller, the name of the person or entity on whose behalf the call is being made, and a telephone number or address at which that person or entity may be contacted. If a person or entity makes a solicitation using an artificial or prerecorded voice message transmitted by an autodialer, the person or entity must provide a telephone number other than that of the autodialer or prerecorded message player that placed the call.

<sup>24</sup> DMA Petition at 3-4.

telephone solicitation. We do not agree with the commenters' contention that providing this information is burdensome to telemarketers, who in any event have an interest in providing at least enough information to link the telemarketer with the product or service offered. Residents should receive the information without having to demand it or to remember to ask for it. The burden of determining precisely which office within a telemarketing entity, or which office among several affiliated entities, has placed a call would otherwise fall to the resident. In the event that a call were placed to a subscriber who has requested not to be called, difficulties in obtaining the telemarketer's identification or telephone number would be an obstacle to swift resolution of the problem or to proving a violation of the TCPA. DMA's concern over telemarketers' ability to comply with the identification requirement in instances in which the call is terminated by the resident prior to completion of the identification announcement is not persuasive. As discussed above, the telemarketer bears the burden of ensuring that identification is given. We recognize that a resident's hang-up on a solicitation call could thwart telemarketer identification. Determinations of compliance will be made on a case by case basis, taking into account the telemarketer's efforts to ensure the information is included in a solicitation call. In sum, we find that the rule strikes the proper balance between the resident's interest in choosing whether to receive further solicitations from a telemarketer and the interest of telemarketers in soliciting by telephone. Thus, we will continue to require that a telephone solicitation include either a telephone number or mailing address at which the solicitor can be reached.

8. Subscriber Identification. Commission rules require that telemarketers record do-not-call requests by placing the subscriber's name and telephone number on the "do-not-call list."<sup>25</sup> NAA states that many residents do not wish to give their names when receiving telephone solicitations. It requests that in such instances telemarketers be allowed to record only a phone number and to make a notation when a resident does not wish to give a name to a telemarketer.

9. Section 64.1200(e)(2)(iii) contemplates that telemarketers request the called party's name when making a do-not-call notation.<sup>26</sup> The rule does not require the called party to provide a name. Interpreting the rule more narrowly would defeat the objective of protecting consumer privacy. Therefore, we do not believe it necessary to modify the requirement that solicitors record both a name and number. Telemarketers will not be in violation of the rule so long as they request the called party's name. Indeed, we expect telemarketers to respect the privacy of those who specifically refuse to give a name by simply making a notation to that effect.

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<sup>25</sup> 47 C.F.R. § 64.1200(e)(2)(iii) states:

If a person or entity making a telephone solicitation (or on whose behalf a solicitation is made) receives a request from a residential telephone subscriber not to receive calls from that person or entity, the person or entity must record the request and place the subscriber's name and telephone number on the do-not-call list at the time the request is made.

<sup>26</sup> Id.

Nevertheless, as a general rule telemarketers can avoid duplication or confusion in maintaining do-not-call lists if each telephone number is associated with a name to ensure accuracy. Recording callers' names will assist in proving violations of the TCPA, and we note that no consumers, or representative of consumers, shares NAA's concerns in the record before us.

**10. Calling Hours.** Under Commission rules, no telephone solicitation calls may be made prior to 8 a.m. or after 9 p.m.<sup>27</sup> The TCPA defines the term "telephone solicitation" as "the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, *but such term does not include a call or message (i) to any person with that person's prior express invitation or permission*[emphasis added]."<sup>28</sup> DMA, NAA, and the Palm Beach Post (the Post) ask the Commission to clarify that telemarketers may make calls outside the designated calling hours if they have obtained the prior express consent of the resident to do so, or if the resident so requests.<sup>29</sup> DMA points out that this definition is incorporated verbatim in Section 64.1200(f)(3) of the Commission's rules.<sup>30</sup>

**11. Decision.** As noted above, telephone solicitations, as defined in the TCPA and in our rules, do not include calls made with the prior express permission or invitation of a residential telephone subscriber.<sup>31</sup> Although the term "express permission or invitation" is not defined in statutory language or legislative history, there is no indication that Congress intended that calls be excepted from telephone solicitation restrictions unless the residential subscriber has (a) clearly stated that the telemarketer may call, and (b) clearly expressed an understanding that the telemarketer's subsequent call will be made for the purpose of encouraging the purchase or rental of, or investment in, property, goods or services. Accordingly, calls made before 8 a.m. or after 9 p.m. (local time at the called party's location) do not violate our rules if they are made with such prior express invitation or permission of the resident. If a resident withdraws express consent, any further solicitations to that resident by or on behalf of the same person or entity will be subject to our rules on telephone solicitations barring calls before 8 a.m. or after 9 p.m.<sup>32</sup>

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<sup>27</sup> 47 C.F.R. § 64.1200(e)(1) states that "[n]o person or entity shall initiate any telephone solicitation to a residential telephone subscriber (1) before the hour of 8 A.M. or after 9 P.M. (local time at the called party's location)...."

<sup>28</sup> 47 U.S.C. § 227(a)(3).

<sup>29</sup> DMA Petition at 7; NAA Comments at 3; NAA Reply Comments at 1.

<sup>30</sup> DMA Petition at 5-6.

<sup>31</sup> See 47 U.S.C. § 227(a)(3); 47 C.F.R. § 64.1200(f)(3).

<sup>32</sup> We emphasize that a request not to be called would also sever an established business relationship. Thus, such a request would obligate a person or entity in an established business relationship with the resident to comply with the rules on telephone solicitation. See 47 C.F.R.

**12. Tax-Exempt Nonprofit Organizations.** The term "telephone solicitation," as defined in the TCPA, does not include a call or message "by a tax-exempt nonprofit organization."<sup>33</sup> DMA, the Nonprofit Group, and Reese Brothers request clarification that the Commission's rules except from liability not only calls placed by tax-exempt nonprofit organizations, but also calls made on their behalf by independent telemarketers.<sup>34</sup> The Nonprofit Group and Reese Brothers urge the Commission to revise Section 64.1200(f)(3) of the rules to reflect this intent.<sup>35</sup> All three commenters maintain that there is no sound legal or public policy basis for creating a regulatory distinction between calls placed by the tax-exempt nonprofit organizations themselves and those placed by independent contractors on behalf of tax-exempt nonprofit organizations.<sup>36</sup> DMA states that the logic underlying placement of responsibility for compliance with the telemarketer is soundly based on agency principles, and should be applied to tax-exempt nonprofit organizations. It argues that disparate treatment for the two types of calls would lead to absurd results; tax-exempt nonprofit organizations would be subject to liability as principals for the acts of their agents, even though they would not be liable if they performed the same acts themselves.<sup>37</sup>

**13. Decision.** Our rules generally establish that the party on whose behalf a solicitation is made bears ultimate responsibility for any violations.<sup>38</sup> Calls placed by an agent of the telemarketer are treated as if the telemarketer itself placed the call. Accordingly, we revise our rules to clarify that telephone solicitations made by or on behalf of tax-exempt nonprofit organizations are not subject to our rules governing telephone solicitations.<sup>39</sup>

**14. Retention of Do-Not-Call Request Records.** Section 64.1200(e)(2)(vi) of the Commission's rules states that "[a] person or entity making telephone solicitations must maintain a do-not-call list for the purpose of any future telephone solicitations." DMA and Olan Mills urge the Commission to reconsider its requirement that telemarketers retain records of do-not-call requests permanently, and to require instead that such records be maintained for 5 years after such

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§ 64.1200(f)(3)(ii).

<sup>33</sup> 47 U.S.C. § 227(a)(3).

<sup>34</sup> DMA Petition at 8-11; Nonprofit Group at 2-5; Reese Brothers at 2-5.

<sup>35</sup> Reese Brothers suggests that the Commission revise § 64.1200(f)(3)(iii) to read "(3) The term 'telephone solicitation' ... does not include a call or message ... (iii) On behalf of a tax-exempt non-profit organization."

<sup>36</sup> DMA Petition at 10-11; Nonprofit Group at 2-5; Reese Brothers at 2-4.

<sup>37</sup> DMA Petition at 8-11.

<sup>38</sup> See 47 C.F.R. § 64.1200(e)(2)(iii).

<sup>39</sup> See Appendix, 47 C.F.R. § 64.1200(e)(2)(iii).

requests are made.<sup>40</sup> DMA asserts that the current requirement is overbroad. DMA, Olan Mills and NAA point out that telephone numbers recorded by telemarketers will be reassigned to other subscribers over time. DMA and Olan Mills assert that a subscriber with a newly assigned number may wish to receive solicitation calls, but because the number appears on a telemarketer's do-not-call list, solicitation calls from that telemarketer to the subscriber will be permanently prohibited.<sup>41</sup> DMA and Olan Mills suggest further that consumers will be misled into believing that the lists permanently reflect their wishes, even if they move (and presumably receive a new telephone number). Olan Mills states that the permanent retention requirement will force telemarketers to make test calls to eliminate "dead" numbers from their calling list.<sup>42</sup> Congressman Edward J. Markey of the House Subcommittee on Telecommunications and Finance, in a letter to Chairman Hundt, has urged that we keep the permanent retention requirement. The letter argues that sufficient alternatives already exist to assist telemarketers in updating their do-not-call lists, and that changing the permanent retention requirement will affect those subscribers who do not move or change phone numbers but still wish to avoid telephone solicitations.<sup>43</sup>

**15. Decision.** We will modify the requirement that a do-not-call request be honored indefinitely, to require that the request be honored for a period of 10 years. Our rules should reflect the fact that residential telephone numbers are recycled. We believe it is reasonable to expect telemarketers to honor do-not-call requests for a period of 10 years. While we acknowledge that a 10-year requirement has not been suggested by any of the parties, we believe that a five-year period, as proposed by DMA and Olan Mills, would not adequately account for the privacy needs of residential telephone subscribers. We also appreciate the concerns of Congressman Markey, but believe the modified 10-year retention requirement will best preserve the careful balance we seek to maintain between residential subscriber privacy and reasonable telemarketing practices. We will monitor the effectiveness of the 10-year retention requirement and readdress the issue if necessary at a later date. Our purpose in prescribing do-not-call lists is to ensure that a consumer's request not to be called is respected. A call made by a telemarketer solely to determine whether a subscriber wishes to receive a telephone solicitation is, in effect, a solicitation from that telemarketer, and accordingly would violate that subscriber's do-not-call request.

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<sup>40</sup> DMA Petition at 11-15; Olan Mills at 2-6; Post Reply Comments at 1 (records should be kept no more than 5 years).

<sup>41</sup> DMA Petition at 12-14; Olan Mills at 3-5; NAA at 2.

<sup>42</sup> DMA Petition at 13; Olan Mills at 3.

<sup>43</sup> Letter to Chairman Reed A. Hundt, FCC, from Hon. Edward J. Markey, Chairman, Subcommittee on Telecommunications and Finance, Committee on Energy and Commerce, July 14, 1994.

## B. Artificial or Prerecorded Voice Message Calls to Residences

16. Established Business Relationship Exemption and Debt Collection Calls. Section 227(b)(1)(C) of the Communications Act prohibits prerecorded or artificial voice messages to residences. The Commission may make exemptions to this prohibition, however, if it determines that the exempted calls "will not adversely affect the privacy rights that this section is intended to protect" and "do not include the transmission of any unsolicited advertisement."<sup>44</sup> The rules adopted in the Report and Order exempt from the general prohibition any prerecorded or artificial voice message calls from a person with whom the subscriber has an established business relationship.<sup>45</sup> Household points out that the vast majority of debt collection calls are originated by automatic telephone dialing machines; such machines may deliver "hold" messages after the subscriber answers the call but before a live operator takes control of the call.<sup>46</sup> Household asks the Commission to clarify that "the continued existence of an unpaid debt affords a creditor an 'existing business relationship' exemption for debt collection calls, despite any attempt by the debtor to 'terminate' or 'sever' the relationship for other purposes."<sup>47</sup>

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<sup>44</sup> 47 U.S.C. § 227(b)(2)(B)(ii). 47 C.F.R. § 64.1200(a)(2) states that no person may:

[i]nitiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by § 64.1200(c).

<sup>45</sup> 47 C.F.R. § 64.1200(c) states:

The term "telephone call" in § 64.1200(a)(2) shall not include a call or message by, or on behalf of, a caller:

- (1) that is not made for a commercial purpose;
- (2) that is made for a commercial purpose but does not include the transmission of any unsolicited advertisement;
- (3) to any person with whom the caller has an established business relationship at the time the call is made; or
- (4) which is a tax-exempt nonprofit organization.

47 C.F.R. § 64.1200(f)(4) defines an "established business relationship" as:

a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party

<sup>46</sup> Household at 5-7.

<sup>47</sup> Id. at 4.

17. Decision. As we stated in the Report and Order, prerecorded debt collection calls are adequately covered by exemptions adopted in our rules. Our rules explicitly exempt calls made *either* by a party with whom the subscriber has an established business relationship *or* calls that do not transmit an unsolicited advertisement and are made for a commercial purpose.<sup>48</sup> Household confuses the two exemptions. We have specifically noted that "prerecorded debt collection calls [are] exempt from the prohibitions on [prerecorded] calls to residences as . . . commercial calls . . . which do not transmit an unsolicited advertisement."<sup>49</sup> Nevertheless, the Report and Order explicitly states that subscribers who sever a business relationship are revoking consent *to any future solicitation*.<sup>50</sup> Because the termination of an established business relationship is significant only in the context of solicitation calls, that act of terminating such a relationship would not hinder or thwart creditors' attempts to reach debtors by telephone.

18. Creditor Identification. Household also requests clarification that "the creditor identification requirements of the [Fair Debt Collection Practices Act (FDCPA)]<sup>51</sup> are fully accommodated by an appropriate, limited exemption from the identification requirements of the regulations implementing [the] TCPA."<sup>52</sup> Debt collectors subject to the FDCPA are prohibited from conveying any information to third parties, even inadvertently, with respect to the existence of a debt.<sup>53</sup> The FDCPA requires a debt collector initiating a call answered by a third party to identify himself by name but not to disclose the name of his employer unless asked.<sup>54</sup>

19. Decision. The TCPA requires that calls dialed to numbers generated randomly or in sequence (autodialed) and delivered by artificial or prerecorded voice message must identify the caller ("business, individual, or other entity") and give a telephone number or address at which the caller can be reached.<sup>55</sup> Household correctly points out that debt collection calls "are not directed to randomly or sequentially generated telephone numbers, but instead are directed to the specifically programmed contact numbers for debtors."<sup>56</sup> As we stated in our Report and Order,

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<sup>48</sup> 47 C.F.R. § 64.1200(c).

<sup>49</sup> Report and Order at 8773, para. 39.

<sup>50</sup> Id. at 8766 n.47.

<sup>51</sup> 15 U.S.C. § 1692.

<sup>52</sup> Household at 8-9.

<sup>53</sup> 15 U.S.C. § 1629b-c.

<sup>54</sup> 15 U.S.C. § 1629b(1).

<sup>55</sup> 47 U.S.C. § 227(d)(3)(A).

<sup>56</sup> Household at 6.

such debt collection calls do not require an identification message.<sup>57</sup> We thus clarify that the rules do not require that debt collection employees give the names of their employers in a prerecorded message, which disclosure might otherwise reveal the purpose of the call to persons other than the debtor.<sup>58</sup>

### C. Telephone Facsimile Machines

**20. Responsibility for Compliance.** The TCPA defines the term "telephone facsimile machine" as "equipment which has the capacity (a) to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or (b) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper."<sup>59</sup> Pursuant to the TCPA, the Commission's rules require that any person who sends a telephone facsimile transmission must clearly mark the sender's identity, telephone number, and the date and time of transmission.<sup>60</sup> Telephone facsimile machines manufactured on or after the effective date of the rules (December 20, 1992) must clearly mark such identifying information on each transmission.<sup>61</sup> Tandy contends that manufacturers should not be required to take unreasonable steps to ensure that the required information is placed on all facsimile transmissions. It requests that the Commission clarify whether telephone facsimile machines must contain a disabling function so that the user can send no transmission without first programming identifying

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<sup>57</sup> Report and Order at 8733, para. 39.

<sup>58</sup> If an artificial or prerecorded voice message contains a telephone solicitation as defined in our rules, the caller must provide the name of the individual caller, the entity on whose behalf the solicitation is made, and a telephone number or address, as required under the rules for telephone solicitation. See 47 C.F.R. § 64.1200(e)(2)(iv); Report and Order at 8757, para. 9.

<sup>59</sup> 47 U.S.C. § 227(a)(2).

<sup>60</sup> 47 C.F.R. § 68.318(3) states that:

[i]t shall be unlawful for any person within the United States to use a computer or other electronic device to send any message via a telephone facsimile machine unless such message clearly contains, in a margin at the top or bottom of each transmitted page or on the first page of the transmission, the date and time it is sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual. Telephone facsimile machines manufactured on and after December 20, 1992 must clearly mark such identifying information on each transmitted message. See para. 25, infra.

<sup>61</sup> Id.

information into the machine.<sup>62</sup> Several commenters urge the Commission to clarify that manufacturers will not be held liable for a user's inadvertent or intentional failure to display identifying information on a facsimile message.<sup>63</sup>

21. Decision. We find that neither the TCPA nor our rules impose liability on manufacturers of telephone facsimile machines for the user's failure to input identifying information. Manufacturers and users are subject to separate and independent requirements. Persons sending telephone facsimile transmissions must mark any such transmission with identifying information (including date and time of transmission) and are liable if such information is not included in a telephone facsimile message.<sup>64</sup> Manufacturers must ensure that such machines are capable of clearly marking identifying information, and are liable if such machines cannot perform this function as manufactured. Neither the statutory language nor the legislative history give any indication that Congress intended by saying "clearly marks" that manufacturers must provide a "disabling" function that would prevent operation of a facsimile machine if a user does not input identifying information. Rather, the manufacturing requirement facilitates user compliance with the identification requirement by providing for "automatic" as opposed to manual identification on each facsimile transmission. From the user's perspective, this means that identifying information, once programmed into the device by the user, will be marked on any subsequent facsimile transmission without further manual input. Of course, manufacturers should enable users to change identifying information (e.g., to input sender's new telephone number or to change to/from daylight savings time).

22. Notwithstanding the fact that the manufacturing and user identification rules are separate requirements, we recognize that machines that are extremely difficult to program may discourage user compliance with Section 227(d)(1) of the Communications Act and decrease the likelihood that users will mark the required information. Accordingly, the Domestic Facilities Division of the Common Carrier Bureau has suggested language, in a Public Notice issued January 13, 1993, Mimeo No. 31328 (Domestic Facilities Division), to be included in the instructions required for all equipment registered under Part 68, including telephone facsimile machines. Programming user identification information should be reasonably simple to do and how to do it should be explained in the user instructions that accompany Part 68 registered equipment. We expect that manufacturers will give a reasonably clear explanation to users on how to program the machine to identify required transmission information in the telephone facsimile machine's instruction manual. Allegations of a manufacturer's violation of the requirements of the statute or the rules will be resolved on a case-by-case basis.

23. CEG/EIA suggests that any requirements for user instructions with telephone facsimile

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<sup>62</sup> Tandy at 4-6.

<sup>63</sup> CEG/EIA Petition at 15-16; Tandy at 5-6.

<sup>64</sup> 47 U.S.C. § 227(d)(1); see also 47 C.F.R. § 63.318(c)(3).

machines should be raised through notice and comment rulemaking procedures.<sup>65</sup> Our existing rules already require, however, that manufacturers give consumers instructions concerning installation of equipment registered under Part 68, and that descriptions of operation procedures also be included with all such equipment.<sup>66</sup> We reject CEG/EIA's contention that these requirements are not applicable to manufacturers of facsimile machines, or that they should be revisited in notice and comment rulemaking proceedings pursuant to this particular revision of our Part 68 rules. Significantly, we point out that the January 13 Public Notice suggests, rather than mandates, language for user instructions that would meet the identification requirements of the TCPA and our rules.

**24. Scope of Manufacturing Requirement.** CEG/EIA and Tandy request clarification that manufacturers need only provide the capability for users to input the date and time of transmission, and the sender's identity and phone number.<sup>67</sup> Tandy argues that the TCPA does not require that manufacturers include an internal clock that would permit facsimile machines to mark automatically the date and time on each transmission.<sup>68</sup>

**25. Decision.** Because identification of the sender of a facsimile transmission, as well as the date and time of transmission, may only be determined after purchase of a facsimile machine, it literally is not possible to manufacture devices that "automatically" place such information on a facsimile transmission without user input. We agree with Tandy and CEG/EIA that the only reasonable interpretation of the manufacturing requirement is that machines manufactured after the effective date must have the capability to mark identifying information clearly on each transmission. With respect to whether telephone facsimile machines must employ an internal clock in marking date and time information, Tandy correctly observes that there is no explicit requirement that facsimile machines manufactured after the effective date of the rules must contain an internal clock. The statute, however, is clear that manufacturers must ensure that such machines "clearly mark" identifying information, which includes the date and time the message is sent, regardless of the device used to provide this capability. It is not clear how this would be feasible absent an internal clock. As we noted above, the "automatic" marking capability facilitates user compliance with the identification requirement. Machines that require manual input of sender identification or the date and time for each transmission do not meet this requirement.

**26. Manufacturing Requirement - Transition Period.** Several commenters urge the

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<sup>65</sup> CEG/EIA Petition at 18.

<sup>66</sup> 47 C.F.R. § 68.218(b).

<sup>67</sup> CEG/EIA Petition at 15-17. Tandy at 4-6.

<sup>68</sup> Tandy at 3-7.

Commission to provide a transition period for complying with the manufacturing requirement.<sup>69</sup> CEG/EIA requested a stay of the Commission's rules regarding the manufacture of telephone facsimile machines, which we denied.<sup>70</sup> We addressed all substantive arguments in favor of a transition period for compliance with the manufacturing requirement (except with respect to computer facsimile boards<sup>71</sup>) in the Stay Order. Our experience in the two years since implementation of the rules offers no indication of any difficulties in compliance.<sup>72</sup> Accordingly, no further consideration of this matter is warranted.

**27. Computer or "Fax" Modem Boards.** CEG/EIA, Motorola, and Tandy request clarification that computer telephone facsimile modem boards or "fax modem boards" are not "telephone facsimile machines" as defined under the TCPA and are thus not subject to the manufacturing requirement.<sup>73</sup> Section 227(a)(2) of the Communications Act reads as follows: "The term 'telephone facsimile machine' means equipment which has the capacity (A) to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or (B) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper." This definition is incorporated in Section 68.1200(f)(2) of the Commission's rules. Fax boards enable personal computers to transmit messages to or receive messages from conventional telephone facsimile machines or other fax boards. The parties contend that fax boards do not fit within the statutory definition of "telephone facsimile machine" because fax boards only have electronic input and output, and thus do not have the capability to transcribe text onto or from paper. CEG/EIA and Motorola argue that a Commission decision that fax boards are telephone facsimile machines as defined in the TCPA should be preceded by notice and comment procedures because the issue was not addressed in the Report and Order or the record.<sup>74</sup>

**28. Decision.** Section 227 (b)(1)(c) of the Communications Act prohibits the use of a "telephone facsimile machine, computer, or other electronic device" to send unsolicited

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<sup>69</sup> 47 C.F.R. § 68.318(c)(3). See CEG/EIA Petition at 10-11; Motorola at 5-7; Tandy at 8-9.

<sup>70</sup> Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Order, 7 FCC Rcd 8660 (1992)(Stay Order).

<sup>71</sup> Computer facsimile boards enable personal computers to transmit messages to or receive messages from conventional telephone facsimile machines or other computer fax boards.

<sup>72</sup> Since the effective date of the rules, the Commission has received 252 applications to register telephone facsimile machines in compliance with Section 68.318(c)(3), 47 C.F.R. § 68.318(c)(3).

<sup>73</sup> CEG/EIA Petition at 17-18; Motorola at 3-5; Tandy at 7.

<sup>74</sup> CEG/EIA Petition at 17-18; Motorola at 5-6.

advertisements.<sup>75</sup> Section 227 (d)(1)(B) of the Communications Act prohibits the use of a "computer or other electronic device" to make any transmission without marking the date, time and identification of the entity or individual sending the message on the transmission.<sup>76</sup> Facsimile modem boards enable personal computers to transmit messages to or receive messages from conventional telephone facsimile machines or other computer fax modem boards. The Act thus clearly prohibits the use of fax modem boards to send unsolicited advertisements or to send any transmission that does not mark identifying information. Additionally, the statute requires any "telephone facsimile machine" manufactured one year after the enactment of the TCPA to mark automatically identifying information on all facsimile transmissions.<sup>77</sup>

29. Congress prohibited the transmission of "junk faxes" to facsimile machines so that costs of advertising could not be shifted to the recipients of facsimile advertisements.<sup>78</sup> Recipients of fax advertisements assume the cost of the paper used, the cost associated with the use of the facsimile machine and the costs associated with the time spent by the facsimile machine when receiving a facsimile advertisement during which the machine cannot be used by its owner to send or receive facsimile transmissions.<sup>79</sup> Fax modem boards are the functional equivalent of stand-alone facsimile machines. The costs associated with receiving facsimile advertisements on a facsimile machine apply whether the facsimile was transmitted from a facsimile machine or from a computer via a facsimile modem board. The purpose of the requirement that facsimile machines have the capability to identify automatically senders or facsimile messages is to ensure that the requirement that all facsimile transmissions have identifying information is not circumvented. Congress could not have intended to allow easy circumvention of its prohibition on facsimile advertisements by simply using a computer to send a facsimile rather than a stand-alone facsimile machine.

30. We therefore reject CEG/EIA's contention that a separate rulemaking is required to subject fax boards to the requirements of the TCPA. Throughout the instant proceeding, we have interpreted and applied the terms and definitions (*e.g.*, "established business relationship" and "prior express consent") set forth in the TCPA. The question of whether the definition of telephone facsimile machine includes fax boards is a matter of statutory interpretation that falls squarely within the scope of this proceeding. The statute is ambiguous with respect to this question and the legislative history provides no guidance. The manufacturing requirement in Section 227(d)(2) does not specifically address manufacturing of fax modem boards. Nevertheless, it is reasonable to conclude that Congress would not apply different manufacturing

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<sup>75</sup> 47 U.S.C. § 227(b)(1)(C).

<sup>76</sup> 47 U.S.C. § 227(d)(1)(B).

<sup>77</sup> 47 U.S.C. § 227(d)(2).

<sup>78</sup> See H.R. Report No. 317, 102d Cong., 1st Sess. 25 (1991).

<sup>79</sup> *Id.*

requirements to different devices whose users are subject to the same technical marking standards. Facsimile modem board manufacturers are clearly able to provide automatic identification capability in their devices.<sup>80</sup> There is no public policy served by interpreting the statutory ambiguity so as to *exclude* facsimile modem boards from the manufacturing requirement. We should resolve this issue in favor of a consistent approach for similar devices.

31. The Domestic Facilities Division indicated that manufacturing requirements would not be enforced against manufacturers of telephone facsimile machines pending Commission reconsideration proceedings.<sup>81</sup> We recognize that some manufacturers of facsimile modem boards, having been unaware of their responsibilities under the TCPA and our rules, are not prepared to comply immediately with our rules. We will refrain from enforcement of this requirement until 90 days after the effective date of this order to permit manufacturers to bring their equipment into compliance with our rules regarding telephone facsimile machines.

32. Enforcement Jurisdiction. Section 64.1200(a)(3) of our rules bans the transmission of any unsolicited advertisement to a telephone facsimile machine.<sup>82</sup> The Fair Fax Coalition ("Coalition") urges the Commission to delete this provision from its rules in order to "reserv[e] to the states, or to individuals, the rights of action specified under the law."<sup>83</sup> It argues that "Congress intended that Commission jurisdiction extend only to implementing regulations (such as the use of a national database) or technical regulations (such as those adopted by the Commission concerning automatic telephone dialing and the information required to be printed on each page of facsimile)."<sup>84</sup> As a result of including the ban in its rules, the Coalition contends that "the Commission confers upon itself exclusive jurisdiction over enforcement."<sup>85</sup>

33. Decision. We do not agree with the Coalition's interpretation of Section 64.1200(a)(3) of the TCPA. The TCPA clearly anticipates intervention and enforcement action by the Commission; it bars any civil action by a state against any defendant already named in a

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<sup>80</sup> Under Part 68 of the Commission's rules, all devices attached to the public telephone network must be registered with the Commission. Approximately 75 percent of facsimile modem boards registered with the Commission pursuant to Part 68 already provide the capability of automatically marking sender identification.

<sup>81</sup> See Public Notice, Mimeo No. 31328, January 13, 1993.

<sup>82</sup> 47 C.F.R. § 64.1200(a)(3) states that no person may "[u]se a telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine."

<sup>83</sup> Fair Fax Coalition Petition at 14.

<sup>84</sup> Id. at 12.

<sup>85</sup> Id. See Sections 227(b)(3), (c)(5) and (f)(1) of the Communications Act, 47 U.S.C. §§ 227(b)(3), (c)(5), (f)(1).

complaint by the Commission.<sup>86</sup> In addition, the TCPA grants the Commission the right to intervene in state actions against violators.<sup>87</sup> Thus, nothing in the statute suggests an intent to bar Commission action against those who violate the Act or our rules, nor has the petitioner indicated any statutory language or legislative history that supports their position. Nothing in the statute indicates an intent to limit Commission jurisdiction to enforce any specific section of the TCPA. Nor is there any evidence that states cannot enforce provisions against unsolicited facsimile advertisements absent a Commission complaint proceeding. We therefore reject the Coalition's contention that the Commission's jurisdiction is limited in the manner described or that the rule unwisely deprives states of enforcement capabilities.

**34. Unsolicited Facsimile Advertisements.** Some petitioners request clarification of whether responsibility for compliance with the ban on unsolicited facsimile advertising and with the facsimile identification requirement lies with the entity or entities on whose behalf such messages are sent or with service providers ("fax broadcasters").<sup>88</sup> Generally these commenters are fax broadcasters who disseminate facsimile messages for their clients. They favor excluding any fax broadcaster, whether or not a common carrier, from responsibility for compliance with the rules, and assigning ultimate responsibility to the author or originator of the facsimile message. The commenters contend that the Report and Order indicates only that "carriers" would not be held liable, and did not indicate whether service providers who are not carriers would also be exempt from such requirements.<sup>89</sup>

**35. Decision.** We clarify that the entity or entities on whose behalf facsimiles are transmitted are ultimately liable for compliance with the rule banning unsolicited facsimile advertisements, and that fax broadcasters are not liable for compliance with this rule. This interpretation is consistent with the TCPA's legislative history, and with our finding in the Report and Order that carriers will not be held liable for the transmission of a prohibited message.<sup>90</sup> We emphasize,

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<sup>86</sup> 47 U.S.C. § 227(f)(3), (7).

<sup>87</sup> 47 U.S.C. § 227(f)(3) (requiring states to notify the Commission prior to taking enforcement action, and granting the Commission the right to intervene in any such action).

<sup>88</sup> Coalition Petition at 6-10; GTE at 2-4; U S West at 2-7; Xpedite at 5-7. The term "fax broadcasters" is a term of art used by the commenters and others in the industry. The use of this term in this decision is not intended to refer to "broadcasters" as defined in the Communications Act of 1934, as amended.

<sup>89</sup> See Report and Order at 28-29.

<sup>90</sup> Report and Order at 29. S. Rep. No. 178, 102d Cong., 1st Sess. 9 (1991) states that:

regulations concerning the use of these machines apply to the persons initiating the telephone call or sending the message and do not apply to the common carrier or other entity that transmits the call or message and that is not the

however, that facsimile broadcast services must ensure that their own identifying information appears on fax broadcasts. We also point out that in cases where a facsimile is transmitted on behalf of multiple entities, the fax broadcaster must assure that each such entity is identified separately in accordance with the statutory requirement.

**36. Prior Express Permission or Invitation.** The Coalition, CWC, and Xpedite request a more precise definition of the term "prior express permission or invitation" as it applies in the context of unsolicited facsimile advertisements.<sup>91</sup> Specifically, CWC and Xpedite propose a four-pronged definition, in which invitation or permission would be demonstrated by: (1) an established business relationship; (2) publication or release of a facsimile telephone number; (3) refusal to contact a toll-free number to stop further transmissions; or (4) other action indicating a facsimile number for use in normal business communications.<sup>92</sup> They argue that both the Report and Order and the legislative history support such a definition insofar as a person has provided a facsimile number as one at which they wish to be reached.<sup>93</sup>

**37. Decision.** We are not persuaded that the definition of "prior express permission or invitation" proposed by CWC and Xpedite would clarify Commission or statutory intent. The Report and Order makes clear that the existence of an established business relationship establishes consent to receive telephone facsimile advertisement transmissions. We do not believe that the intent of the TCPA is to equate mere distribution or publication of a telephone facsimile number with prior express permission or invitation to receive such advertisements, as the Coalition's proposed definition suggests. For example, our rules require that telephone facsimiles be marked with the telephone number of the sender or the sending machine; a facsimile sender's release of a telephone facsimile number in order to comply with this regulation, however, could not reasonably be viewed as consent to receipt of future facsimile advertisements. Similarly, publication of one's fax number would not constitute prior express permission or invitation absent the recipient's express consent to use of the telephone facsimile number for the purpose of receiving an advertisement. Moreover, it is important to note that Sections 227(b)(1)(A) and (C) were intended to prohibit the imposition of costs on the recipients of calls.<sup>94</sup> Under the proposed definition, facsimile requests for permission to transmit would impose costs on facsimile recipients unless or until the recipient were able to ask that such transmissions be stopped. This kind of "negative option" (in which the sender presumes consent unless advised otherwise) is contrary to the statutory requirement for *prior* express permission or invitation. In addition, given the variety of circumstances in which such numbers may be distributed (business cards,

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originator controller of the content of the call or message.

<sup>91</sup> CEG/EIA Petition at 3-9; CWC at 3-4; Xpedite at 12-16.

<sup>92</sup> CWC at 4; Xpedite at 2-3.

<sup>93</sup> Report and Order at 18.

<sup>94</sup> See H. Rep. No. 317, 102d Cong., 1st Sess. at 10 and 25 (1991).

advertisements, directory listings, trade journals, or by membership in an association), we believe it is appropriate to treat the issue of consent in any complaint regarding unsolicited facsimile advertisements on a case-by-case basis. For these reasons, we reject the proposed definition.

**38. Identification requirements - Telephone number.** We reiterate our intent that residential subscribers may not be required to pay for procedures to protect them from unwanted solicitations.<sup>95</sup> Numbers provided for identification purposes in telephone solicitations may not be numbers that require the recipient of a solicitation to incur more than nominal costs for making a do-not-call request (*i.e.*, for which charges exceed costs for transmission of local or ordinary station-to-station long distance calls). In addition to prohibiting charges to protect residential privacy, the TCPA and our rules prohibit calls that impose costs on the called party (*e.g.*, calls to paging and cellular numbers, facsimile advertisements). We now modify the language of Sections 64.1200(e)(2)(iv) and 68.318(c)(3) of the Commission's rules to ensure that the intent of the TCPA and our rules is not thwarted.<sup>96</sup>

## CONCLUSION

**39.** In this Order, we resolve issues raised on reconsideration of the Report and Order. Specifically, we clarify that our rules will treat calls made on behalf of tax-exempt nonprofit organizations as calls made directly by those organizations. In addition, we amend the rules to require that do-not-call request records must be maintained for 10 years after a request is made. We clarify the application of our rules with respect to debt collection calls and the meaning of established business relationship. Moreover, we define the scope of our rules regarding the use of telephone facsimile machines, particularly with respect to the treatment of computer modem boards ("fax boards"), identification requirements, and facsimile service providers. Finally, we amend our rules to ensure that the costs of privacy protection are not borne by the residential subscriber. Our objective is to permit continued protection of consumer privacy interests while ensuring that compliance with our rules does not unduly burden businesses. In each instance, we have carefully balanced our mandate to protect consumers' privacy with the imperative that telemarketing practices not be unreasonably hindered.

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<sup>95</sup> Report and Order at 15 n.45.

<sup>96</sup> See Appendix. 47 C.F.R. §§ 64.1200(e)(2)(iv) and 68.318(c)(3).

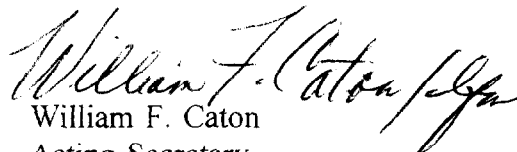
## ORDERING CLAUSES

40. Accordingly, IT IS ORDERED, that the petitions for reconsideration and/or clarification are DENIED in part and GRANTED in part, in accordance with this order.

41. IT IS FURTHER ORDERED, that within 90 days after the effective date of this order, telephone facsimile modem boards, which enable personal computers to transmit messages to or receive messages from conventional telephone facsimile machines or other computer fax boards, must be manufactured in compliance with the Commission's rules as set forth in this order.

42. IT IS FURTHER ORDERED, that the Commission's rules and regulations ARE AMENDED as set forth in the attached Appendix.

FEDERAL COMMUNICATIONS COMMISSION

  
William F. Caton  
Acting Secretary

## APPENDIX

Title 47 of the Code of Federal Regulations, parts 64 and 68, are amended as follows:

### § 64.1200 Delivery Restrictions

Section 64.1200(e) is revised to read:

(e) \* \* \*

(2) \* \* \*

(iv) Identification of telephone solicitor. A person or entity making a telephone solicitation must provide the called party with the name of the individual caller, the name of the person or entity on whose behalf the call is being made, and a telephone number or address at which the person or entity may be contacted. If a person or entity makes a solicitation using an artificial or prerecorded voice message transmitted by an autodialer, the person or entity must provide a telephone number other than that of the autodialer or prerecorded message player which placed the call. The telephone number provided may not be a 900 number or any other number for which charges exceed local or long distance transmission charges.

(v) \* \* \*

(vi) Maintenance of do-not-call lists. A person or entity making telephone solicitations must maintain a record of a caller's request not to receive future telephone solicitations. A do not call request must be honored for 10 years from the time the request is made.

(f) \* \* \*

(3) \* \* \*

(iii) By or on behalf of a tax-exempt nonprofit organization.

### § 68.318 Additional limitations.

Section 68.318 is revised to read:

\* \* \* \* \*

(c) \* \* \*

(3) Telephone facsimile machines; identification of the sender of the message. It shall be unlawful for any person within the United States to use a computer or other electronic device to send any message via a telephone facsimile unless such message clearly contains, in a margin at the top or bottom of each transmitted page or on the first page of the transmission, the date and time it is sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual. The telephone number provided may not be a 900 number or any other number for which charges exceed local or long distance transmission charges. Telephone facsimile machines manufactured on and after December 20, 1992 must clearly mark such identifying information on each transmitted message. Facsimile modem boards manufactured on and after [insert date] must comply with the requirements of this section.