National Retail Federation®
The Voice of Retail Worldwide

May 21, 2010

Federal Communications Commission
445 12th St., SW.
Room TW–A325
Washington, DC 20554

RE: CG Docket No. 02–278; FCC 10–18

The National Retail Federation ("NRF") files these comments with respect to the Commission's Notice of Proposed rulemaking (CG Docket No. 02-278) with respect to the Telephone Consumer Protection Act ("TCPA"). As the world's largest retail trade association and the voice of retail worldwide, the **National Retail Federation**'s membership includes retailers of all sizes, formats and channels of distribution as well as chain restaurants and industry partners. In the U.S., NRF represents the breadth and diversity of an industry with more than 1.6 million American companies that employ nearly 25 million workers and generated 2009 sales of $2.3 trillion.

Our members regularly contact their customers by telephone both live and by recording. Many of these communications are informally pre-arranged. Some are for varying degrees of unexpected or exigent circumstances. We are extremely concerned that the Commission's proposed rule would make such communications either more difficult or impossible, and undermine business and customer satisfaction.

For nearly twenty years, NRF and its members have participated in FCC and FTC rulemakings and workshops implementing the TCPA and the Telephone Sales Rules. We have witnessed the growth of the Do Not Call concept from a business by business opt-out to the construction of a master list designed to allow consumers to screen nearly all marketing calls. The change from the former to the latter was driven, in part, by increases in the sophistication of telephonic devices and the increased reliance upon them by consumers as well as by business for communications. The greater ease with which marketing calls could be made increased their frequency, and helped drive the desire for a mechanism that more easily allowed consumers to "opt-out" of most marketing calls, while preserving such communications with those whom they had implicitly demonstrated a desire to communicate. Thus, while most calls came to be blocked by inclusion on a master Do Not Call list, calls from businesses with whom customers had an "established business relationship" (under the FTC's

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interpretation) could continue to be made and received, until a reasonable period of time had elapsed or the customer elected to terminate the relationship. The evolution of laws and rules to reflect technological and usage trends allowed a very effective and nuanced balance to be achieved.

With respect to cell phones, comparable technological and usage changes have occurred over the past twenty years. When the TCPA was enacted, cell phones were large, clunky, costly devices with limited utility. Cell phone users were assessed a healthy charge for each call made or received. Because of their potential ability to run-up such charges on thousands of phones per hour, Congress created and the FCC implemented a ban on businesses making collections calls to cell phones from autodialers, absent prior express consent. Since the lion's share of the cost of such calls were on the side of the contacted consumers and most of the benefits were on the side of the businesses calling, the FCC chose to adopt a very expansive definition of "autodialers," including those devices which merely had the potential to be used for automated dialing. As mentioned, during that same two decades, the nature of cell phones and their usage has changed dramatically. Incremental charges to make or receive telephone calls have been largely supplanted by flat monthly payment plans that offer practically unlimited conversation. The equipment used by businesses to make calls has also been refined so that the autodialer function may deliver a live operator within seconds after virtually every call is connected.

The Commission now proposes to update how prior express consent must be captured and to reconcile its rules with those of the Federal Trade Commission for marketing. Unfortunately, in doing so the FCC is maintaining the very expansive definition of autodialers and is requiring a very explicit capture of prior express consent for ALL recorded calls to cell phones, regardless of whether they are marketing calls and regardless of the fact that consumers generally do not pay incrementally for the cost of calls to cell phones as they did in 1991. The net effect of the proposed changes is that, in the course of "harmonizing" the two agencies' rules, desired, non-marketing calls permitted under the FTC's Do Not Call list would be prohibited under the proposed FCC rule if they happened to be received on a cell phone (even a ported land line number), unless the customer had filed a prior express consent with the caller's business.

As a result, the proposed restriction would restrain the ability of business to deliver critical information to consumers, which would deny consumers relevant and often important information. Below is a list of the very legitimate, and consumer friendly reasons that retailers may use auto-dialers and/or prerecorded messages to contact customers:

1. **Schedule appointment times or provide information related to the provision of goods or services.** Retailers call or deliver prerecorded (or text) messages to inform customers of important information such as: (1) delivery dates; (2) in-store appointment times; (3) installation or repair appointments; (4) product recalls; and (5) to provide information about special order or services. Many customers prefer and indeed expect to get these messages on their cell phone from a merchant or other service provider (e.g. an 800# called for repairs) even if they have not given

prior, express consent to be contacted about the service. Other non-retail service providers such as physicians'' offices also deliver emergency messages to clients.

2. **Respond to a consumer's request.** Consumers often provide their mobile number as their preferred contact information, which businesses use to respond to consumer inquiries. It has long been recognized that when consumers provide a telephone number, they consent to be called at that number. Airlines routinely provide notice of flight delays or schedule changes, but may not have gathered prior express consent to phone the precise number provided by their customers.

3. **Deliver legally required notifications.** Businesses use these technologies to deliver notifications required by law. For instance, the majority of states require an entity to provide notification of a breach of security to residents whose data is implicated. Many states permit notice by telephone. Notification via delivery of a prerecorded message or autodialed number is an efficient and timely means for providing this notice.

4. **Collect consumer debt.** Retailers and their bank partners, as creditors, rely on these technologies to contact consumers concerning debts. Often a cell phone is a customers only phone contact, or the only one provided when opening an account.

5. **Provide fraud alerts.** Many consumers subscribe to services that alert them of suspicious or unauthorized activity that occurs with respect to their financial accounts. These alerts provide consumers with notifications and help consumers safeguard against identity theft and other unscrupulous acts.

These problems could be resolved if the Commission were to restrict the applicability of the expanded rule solely to marketing calls and/or if it were to administratively limit its definition of autodialers for these purposes to those devices that were specifically used to randomly dial numbers and not to devices used to assist in the placement of calls that otherwise comply with the restrictions adopted by the Federal Trade Commission in the harmonized Do Not Call rules.

Thank you for the consideration of our views, we would be pleased to answer any questions.

Sincerely,

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