FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act Regarding the Petition for Declaratory Ruling Filed by SGS North America, Inc.	)))))	CG Docket No. 02-278 DA 18-1290

Comments of

National Consumer Law Center
on behalf of its low-income clients
and
Consumer Federation of America
Consumer Reports
National Association of Consumer Advocates

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In Opposition to the Petition for Declaratory Ruling Filed by SGS North America, Inc.

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Comments

Pursuant to the Public Notice[1] issued by the Consumer and Governmental Affairs Bureau, the **National Consumer Law Center** (NCLC)[2] files these comments on behalf of its low-income clients and **Consumer Federation of America, Consumer Reports** and the **National Association of Consumer Advocates.** We respectfully oppose, in all respects, the requests made by SGS North America Inc. (SGS) in its petition.[3]

I. The Rules Are Clear Already—Nothing Further is Required of the FCC.

In its Petition, SGS first seeks a ruling that a commercial call that was made for the purpose of selling or leasing goods or service is not covered by the telemarketing rules of the Telephone Consumer Protection Act (TCPA)[4] because the words used in the call did not themselves promote the sale or lease. If unsuccessful in that quest, SGS then seeks retroactive relief from liability for its "dual purpose" calls based on its claim of "confusion regarding the scope and meaning of telemarketing."

Respectfully, we believe that the Commission should do neither. The TCPA, and the FCC's rules governing telemarketing, are already quite clear. The regulation states—

> (12) The term telemarketing means 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.

47 C.F.R. § 64.1200 (Emphasis added)

There is no ambiguity in this rule. It is clearly up to the reviewing court to inquire into and determine whether the call or message was made for telemarketing *purposes*. It is hard to conceive of a way to comply with the requirement to evaluate the "purpose" of the message by only reviewing the words in "the four corners" of the message itself. Indeed the explicit language in the rule tracks the language defining "telephone solicitation" in the statute at 47 U.S.C. § 227(a)(4), which also

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[1] *See* https://ecfsapi.fcc.gov/file/12212239203475/DA-18-1290A1.pdf

[2] The National Consumer Law Center is a nonprofit corporation founded in 1969 to assist legal services, consumer law attorneys, consumer advocates and public policy makers in using the powerful and complex tools of consumer law for just and fair treatment for all in the economic marketplace.

[3] *See* https://ecfsapi.fcc.gov/file/121726169703/SGS%20--%20FCC%20Petition%20for%20Declaratory%20Ruling.pdf

[4] 47 U.S.C. §227.

requires an inquiry into the purpose of the message. With this language, Congress was clearly signaling that the TCPA's protections against telemarketing calls are intended to cover not just messages which are on their face for the purposes of soliciting business, but also any message which has as its underlying purpose, the pursuit of business.

The context for the passage of the TCPA is important to keep in mind here, especially when the Commission is dealing with telemarketing robocalls. TCPA was created to deal with the scourge of unwanted—and unconsented-to—robocalls, because they are an invasion of privacy. As was forcefully stated by Senator Hollings, the sponsor of the TCPA, "[c]omputerized calls are the scourge of modern civilization. They wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of bed; they hound us until we want to rip the telephone right out of the wall."[5] As a result, Congress passed the TCPA to deal with these telephonic intrusions:

> The Committee believes that Federal legislation is necessary to protect the public from automated telephone calls. These calls can be an invasion of privacy, an impediment to interstate commerce, and a disruption to essential public safety services.[6]

There is no reason for the Commission to clarify anything, and there is certainly no justification for granting a telemarketer a retroactive waiver after a reviewing court has found it responsible for making telemarketing calls without the required prior express written consent. SGS seeks protection from the FCC *after* a federal district court found not only that these calls appear to be telemarketing calls as defined by the TCPA rules, but also that SGS had not taken care to ensure that it had the required express written consent for those calls before SGS made the calls.[7] Indeed, the trial court confirmed the lack of ambiguity regarding the nature of SGS' calls to consumers:

> The Defendant argues that a common sense view of the phone calls indicates they were for customer service purposes. SGS further argues that "[the] cases establish

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[5] 137 Cong. Rec. S16204, S16205 (Nov. 7, 1991).

[6] S. Rep. 102-178, at 5 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1972–1973. *See also* the congressional findings accompanying the TCPA, which repeatedly stress the purpose of protecting consumers' privacy:

> (5) Unrestricted telemarketing, however, can be an *intrusive invasion* of privacy and, when an emergency or medical assistance telephone line is seized, a risk to public safety.
>
> (6) Many consumers are outraged over the proliferation of *intrusive, nuisance calls to their homes from telemarketers*.

Pub. L. 102–243, § 2, 105 Stat. 2394 (1991) (emphasis added) (found as a note to 47 U.S.C.A. § 227).

[7] Carroll v. SGS N. Am., Inc., 2017 WL 4183098, at *4 (M.D. La. Sept. 21, 2017).

> the need for a close nexus between the communication and the actual promotion of 'goods' or 'services' in exchange for money."[43] Based on the evidence contained in the record and the relevant jurisprudence, the Court finds that the purpose for the phone calls was dual—customer service and to solicit future sales and revenues. The Defendant presented no evidence that Carroll provided prior express written consent to receive telemarketing and advertising calls. The Court finds that Carroll has presented summary judgment evidence of his TCPA claim. Accordingly, the Defendant's *Motion for Summary Judgment* on Carroll's TCPA claim is Denied.[8]

Cases involving junk faxes have also made it clear that whether a fax amounts to an "unsolicited advertisement" cannot be determined from the four corners of the fax itself, but must take into account factors such as the sender's identity and motives.[9] For example, fax messages that promote goods or services at no cost—such as free magazine subscriptions, catalogs, consultations, or seminars—are unsolicited advertisements because they often serve as part of an overall marketing campaign.[10] Such faxes all have dual purposes—the free service or invitation, plus the underlying sales campaign—yet courts have had no trouble concluding that they are unsolicited advertisements. These decisions are particularly germane here because courts have reached these conclusions even though the TCPA's definition of "unsolicited advertisement," unlike the definition of "telemarketing," does not explicitly refer to the purpose of the transmission. It should be even clearer that, where a definition that explicitly refers to the purpose of a call, the call's purpose should be considered. As the Fourth Circuit recently stated in *Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC*, holding that a fax that offered a free product was not thereby excluded from the TCPA's junk fax restrictions, "[t]here is no need to 'harmonize' a rule whose meaning is plain."[11]

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[8] Carroll v. SGS N. Am., Inc., 2017 WL 4183098, at *4 (M.D. La. Sept. 21, 2017) (emphasis added).

[9] *See, e.g.*, Physicians Healthsource, Inc. v. Stryker Sales Corp., 65 F. Supp. 3d 482, 492–493 (W.D. Mich. 2015) (court can consider more than fax itself in determining whether invitation to "free" dinner and seminar is an advertisement; fact question whether occasional references to defendant's products during seminar were for purpose of promoting sales).

[10] *See, e.g.*, 71 Fed. Reg. 25,967, 25,973 (May 3, 2006); Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC, 883 F.3d 459, 467–68 (4th Cir.), *cert. granted in part*, 139 S. Ct. 478 (2018) (granting *cert.* on whether Hobbs Act requires courts to accept FCC interpretations of TCPA); Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharm., Inc., 847 F.3d 92 (2d Cir. 2017) (reversing district court's ruling that faxed invitation to attend free dinner to learn about diagnosing a medical condition was not an advertisement; sender, a pharmaceutical company, was developing a drug for the condition when it did not yet have FDA approval to market it).

[11] Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC, 883 F.3d 459, 466 (4th Cir.), *cert. granted in part*, 139 S. Ct. 478 (2018) (granting *cert.* on whether Hobbs Act requires courts to accept FCC interpretations of TCPA).

II. A Retroactive Waiver Is Completely Inappropriate in this Situation.

The language in the rule defining "telemarketing" requires an inquiry into the "purpose" of the messages. The trial court in this case did just that after evaluating the facts and applying the law to those facts, it held that the purpose of the calls was also "to solicit future sales and revenues."[12] This careful analysis of the facts of a dispute is the job of the courts, not the Federal Communications Commission.

The FCC is not a fact-finding body. It does not take evidence, review transcripts, hear testimony, and evaluate the facts based on conflicting evidence presented by adversary parties. The FCC does not have capacity to do a deep dive into the evidence presented by the litigants. And, at this point in a litigated case, after a federal district court has gone through that process and found against a party (and for consumers exercising their explicit rights under the TCPA), such an exercise would be highly unusual, and most likely illegal. There is no authority allowing the FCC to act as a *de novo* appeals court to a litigant unhappy with the result of the fact findings of a federal district court.

Conclusion

If the FCC were to entertain a retroactive waiver in a case such as this, that would open wide the doors to an astonishing escalation in unwanted, unconsented-to, telemarketing calls to the American public. Callers would only need to mask the true purpose of the calls behind a "customer-service" goal ("How was our service today?" "Have we satisfied all of your needs?"), and the requirement for prior express written consent would be completely unraveled. We urge the FCC to deny the both of the petitioner's requests.

Respectfully submitted:

This the 24th day of January, 2019.

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[12] Carroll v. SGS N. Am., Inc., 2017 WL 4183098, at *4 (M.D. La. Sept. 21, 2017).