use must be discontinued on short notice. In order to minimize the impact of our action, including the impact on small business entities, we provide a two year period, from publication of this *Order* in the **Federal Register**, for implementing the 811 code. Based on the record before us, we believe two years from publication of this *Order* in the **Federal Register** is a reasonable time period for implementation of 811. The alternative of not providing for a transition period was considered but rejected because we believe a transition period is necessary to provide all telecommunications carriers, including wireline, wireless, and payphone service providers, sufficient time to make the necessary network modifications or upgrades, as well as integrate existing One Call notification systems, thus minimizing any adverse or unfair impact on smaller entities. In addition, this transition period will give carriers time to clear this number of any other existing uses, provide customer education, and ensure that there is no unreasonably abrupt disruption of the existing uses.

I. Publication of FRFA

67. The Commission will send a copy of the *Order*, including this FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *Order* and FRFA (or summaries thereof) will also be published in the **Federal Register**.

IV. Ordering Clauses

68. Pursuant to the authority contained in sections 1, 4(i), 4(j), 201–205, 214, 254, and 403 of the Communications Act of 1934, as amended, this *Sixth Report and Order* is adopted.

69. Pursuant to section 251(e)(3) of the Communications Act of 1934, as amended, 47 U.S.C. 251(e)(3), 811 is assigned as the national abbreviated dialing code to be used exclusively for access to Once Call Centers, effective May 13, 2005.

70. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, shall send a copy of this *Order,* including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

71. The Commission will not send a copy of this Order pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A), because no rules were adopted or changed.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 05–7179 Filed 4–12–05; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 64

[CG Docket No. 02–278; FCC 05–28]

Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991

AGENCY: Federal Communications Commission.

ACTION: Final rule; petition for reconsideration; clarification.

SUMMARY: This document addresses certain issues raised in petitions for reconsideration of regarding the national do-not-call registry and the Commission's other telemarketing rules implementing the Telephone Consumer Protection Act (TCPA).

DATES: Effective May 13, 2005.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Erica McMahon, Consumer & Governmental Affairs Bureau, (202) 418–2512.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Second Order on Reconsideration,* CG Docket No. 02–278, FCC 05–28, adopted February 10, 2005, and released February 18, 2005 (*Order*). The *Order* addresses issues arising from *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* Report and Order, (*2003 TCPA Order*), CG Docket No. 02–278, FCC 03–153, released July 3, 2003; published at 68 FR 44144, July 25, 2003. This document does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. In addition, it does not contain new or modified ''information collection burden for small business concerns with fewer than 25 employees,'' pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4). Copies of any subsequently filed documents in this matter will be available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, Room CY–A257, 445 12th Street, SW., Washington, DC 20054. The complete text of this decision may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc. (BCPI), Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554. Customers may contact BCPI, Inc. at its Web site: *http://www.bcpiweb.com* or call 1–800–378–3160. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice) or (202) 418–0432 (TTY). The *Order* can also be downloaded in Word and Portable Document Format (PDF) at *http://www.fcc.gov/cgb/policy*.

Synopsis

In the *2003 TCPA Order,* the Commission adopted a national do-not-call registry, in conjunction with the FTC, to provide residential consumers with a one-step option to prohibit unwanted telephone solicitations. Telemarketers are prohibited from contacting those consumers that register their telephone numbers on the national list, unless the call falls within a recognized exemption. We explained that calls that do not fall within the definition of ''telephone solicitation'' as defined in section 227(a)(3) are not restricted by the national do-not-call list. These may include surveys, market research, political and religious speech calls. The national do-not-call rules also do not prohibit calls by or on behalf of tax-exempt nonprofit organizations, calls to persons with whom the seller or telemarketer has an established business relationship, calls to businesses, and calls to persons with whom the marketer has a ''personal relationship.''

A number of petitioners raise questions related to the administration and operation of the national do-not-call registry. The DMA requests that the Commission review the national do-not-call registry set up by the FTC and reconsider our rules to impose more reasonable security procedures for the registry. In addition, the DMA asks the FCC to require the DNC list administrator to provide a mechanism by which callers can download the national list without wireless numbers. Several other petitioners request that the Commission reconsider the extent to which states may apply their do-not-call requirements to interstate telemarketers. We note that, since the close of the filing period for petitions for reconsideration, the Commission has received several petitions for declaratory ruling seeking preemption of state telemarketing laws. The

Commission intends to address the issue of preemption separately in the future.

The Commission also received petitions asking whether certain entities or certain types of calls are subject to the national do-not-call rules. The National Association of Realtors (NAR) asks us to clarify that the do-not-call rules do not apply to certain practices that are ''unique to the real estate industry.'' Specifically, NAR argues that calls from real estate agents to individuals who have advertised their properties as ''For Sale By Owner'' fall outside the scope of the do-not-call rules. In addition, NAR requests that the Commission clarify that the rules permit real estate professionals to call individuals whose listing with another agent has lapsed. Independent Insurance Agents ask the Commission to reconsider our determinations that insurance agents are subject to the TCPA and that there should be no exemption for calls made based on referrals. The State and Regional Newspaper Association asks the Commission to reconsider its treatment of newspapers under the do-not-call rules in view of the constitutional protection newspapers are accorded.

As discussed below, we dismiss the foregoing petitions to the extent they seek reconsideration of the rules establishing the national do-not-call registry. Many of the same issues regarding the do-not-call registry were raised during the original proceeding and were addressed in the *2003 TCPA Order*. In conjunction with the FTC, we will continue to monitor closely the operation of the list to ensure its continued effectiveness. We are not persuaded by the State & Regional Newspaper Association that we need to revisit our rules. The State and Regional Newspaper Associations argue that the Commission cannot justify application of the new telemarketing rules under the ''limited constitutional analysis'' offered in the 2003 TCPA Order. They argue instead that, pursuant to a line of judicial decisions involving licensing schemes for the distribution of newspapers, the Commission's rules must be justified under the standards ''applicable to fully protected speech.''

In February 2004, the United States Court of Appeals for the 10th Circuit held that the Commission's ''opt-in telemarketing regulation[s] that provide a mechanism for consumers to restrict commercial sales calls but do not provide a similar mechanism to limit charitable or political calls'' are ''consistent with First Amendment requirements.'' Thus, our do-not-call rules are constitutional.

We recognize, however, that no party to that case specifically raised the issue of the standard of First Amendment protection afforded the distribution of newspapers before the court. After careful review of the State Newspaper Association's argument, however, we conclude that it is incorrect. To be sure, the right to distribute newspapers is afforded First Amendment protection. But a call from a telemarketer to an unwilling listener in their home for the purpose of selling a newspaper subscription remains speech which does ''no more than propose a commercial transaction.''

Although the State Newspaper Association cites to a number of decisions noting that newspapers have been afforded First Amendment protection in the distribution of their newspapers, these cases typically deal with licensing cases that vest ''unbridled discretion'' in a government official over whether to permit or deny distribution of the publication at all. By contrast, our rules simply permit a private individual, not a government official, to decide whether or not to entertain a subscription request in their home. Indeed, the Supreme Court upheld a statute that directed the Postmaster General to send an order directing a mail sender to delete the name of an addressee if that addressee requests the removal of his name from the sender's mailing list: The Court has traditionally respected the right of a householder to bar, by order or notice, solicitors, hawkers, and peddlers from his property. In this case the mailer's right to communicate is circumscribed only by an affirmative act of the addressee giving notice that he wishes no further mailings from that mailer * * * In effect, Congress has erected a wall—or more accurately permits a citizen to erect a wall—that no advertiser may penetrate without his acquiescence.

The do not call rules directly advance the government's substantial interests in guarding against fraudulent and abusive solicitations and facilitating the protection of consumer privacy in the home even when the product sought to be sold is a newspaper. We therefore reject the State Newspaper Association's constitutional arguments.

In addition, we disagree with the DMA that the rules should be revised to expressly exempt calls to business numbers. The *2003 TCPA Order* provided that the national do-not-call registry applies to calls to ''residential subscribers'' and does not preclude calls to businesses. To the extent that some business numbers have been inadvertently registered on the national registry, calls made to such numbers will not be considered violations of our rules. We also decline to exempt from the do-not-call rules those calls made to ''home-based businesses'; rather, we will review such calls as they are brought to our attention to determine whether or not the call was made to a residential subscriber.

We also find no basis to further exempt certain entities or calls from the national do-not-call rules. The TCPA defines a 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 does not include a call or message to any person with that person's prior express invitation or permission; to any person with whom the caller has an established business relationship; or by a tax-exempt nonprofit organization.'' As with any entity making calls that constitute ''telephone solicitations,'' a real estate agent, insurance agent, or newspaper is precluded from calling consumers registered on the national do-not-call list, unless the calls would fall within one of the specific exemptions provided in the statute and rules. Therefore, we clarify that a telephone solicitation would include calls by real estate agents to property owners for the purpose of offering their services to the owner, whether the property listing has lapsed or not. In addition, a person who, after seeing an advertisement in a newspaper, calls the advertiser to offer advertising space in the same or different publication, is making a telephone solicitation to that advertiser. We find, however, that calls by real estate agents who represent only the potential buyer to someone who has advertised their property for sale, do not constitute telephone solicitations, so long as the purpose of the call is to discuss a potential sale of the property to the represented buyer. The callers, in such circumstances, are not encouraging the called party to purchase, rent or invest in property, as contemplated by the definition of ''telephone solicitation.'' They are instead calling in response to an offer to purchase something from the called party. Similarly, a recruiter calling to discuss potential employment or service in the military with a consumer is not making a ''telephone solicitation'' to the extent the called party will not be asked during or after the call to purchase, rent or invest in property, goods or services. A caller responding to a classified ad would not be making a telephone solicitation, provided the purpose of the

call was to inquire about or offer to purchase the product or service advertised, rather than to encourage the advertiser to purchase, rent or invest in property, goods or services. In addition, as explained in the *2003 TCPA Order*, calls constituting telephone solicitations to persons based on referrals are nevertheless subject to the do-not-call rules, if not otherwise exempted.

Finally, we deny Insurance Agents' petition to the extent it requests that we amend our safe harbor provision to account for ''good faith calls'' that violate the rules and to accommodate call back technologies that have the potential to run afoul of the rules. We believe the existing safe harbor provision sufficiently addresses calls made in error by telemarketers that have made a good faith effort to comply with the rules. Consistent with the FTC, we concluded that a seller or telemarketer will not be liable for violating the national do-not-call rules if it can demonstrate that it has met certain standards, including using a process to prevent telemarketing to any telephone number on the national do-not-call registry using a version of the registry obtained from the registry administrator no more than 31 days prior to the date any call is made.

Common Carrier Notifications

The Commission's rules require that, beginning January 1, 2004, common carriers shall ''when providing local exchange service, provide an annual notice, via an insert in the subscriber's bill, of the right to give or revoke a notification of an objection to receiving telephone solicitations pursuant to the national do-not-call database maintained by the Federal government and the methods by which such rights may be exercised by the subscriber.'' This notice must be clear and conspicuous and include, at a minimum, the Internet address and toll-free number that residential telephone subscribers may use to register on the national database. Verizon asks the Commission to reconsider this requirement, arguing that an annual notice is expensive and unnecessary. Alternatively, Verizon asks the Commission to clarify that other forms of notification, such as messages on telephone bills or in telephone directories, satisfy the TCPA requirement and at a much lower cost than bill inserts.

The TCPA provides that if the Commission adopts a national do-not-call database, such regulations shall ''require each common carrier providing telephone exchange service * * * to inform subscribers for telephone exchange service of the opportunity to provide notification * * * that such subscriber objects to receiving telephone solicitations.'' In implementing this provision, the Commission adopted a rule requiring such notice to be made on an annual basis. While many residential subscribers have already placed their numbers on the national do-not-call registry, others may wish to do so in the future or may need to place a different number on the registry because of a move or change in service. Still others may decide subsequently to remove their numbers from the registry. Therefore, we disagree with Verizon that such annual notification, which includes the registry's toll-free telephone number and Internet address established by the FTC, is unnecessary.

Upon further consideration, we will allow common carriers to provide the notice required by 47 U.S.C. 227(c)(3)(B) through either a bill insert or a separate message on the bill itself. Such notice may also appear on an Internet bill that the subscriber has opted to receive. We believe that bill messages may be a less expensive and an efficient alternative to a separate page in the bill for some carriers, and will nevertheless comply with the TCPA. We emphasize, however, that the notice, whether appearing on the actual bill or on a separate page in the bill, must be clear and conspicuous and include, at a minimum, the Internet address and toll-free number that residential telephone subscribers may use to register on or remove their numbers from the national database.

Company-Specific Do-Not-Call Lists

In the *2003 TCPA Order*, the Commission determined that company-specific do-not-call lists should be retained in order to provide consumers with an additional option for managing telemarketing calls. In addition, we concluded that the retention period for records of those consumers requesting not to be called should be reduced from ten years to five years. Petitioner Biggerstaff seeks clarification on how the five-year retention requirement applies to do-not-call requests made prior to the effective date of the amended rule. He argues that in fairness to consumers, any do-not-call request made prior to the effective date of the new rule must be honored by the telemarketer or seller for the original ten-year period. SBC and MCI disagree and urge the Commission to clarify that telemarketers are required to honor company-specific do-not-call requests for five years from the date any request is made, including those requests made prior to the Commission's ruling. Petitioner Brown asks the Commission to reduce the period of time by which a telemarketer must honor company-specific do-not-call requests from 30 days to 24 hours. We conclude that any do-not-call request made of a particular company must be honored for a period of five years from the date the request is made, whether the request was made prior to the effective date of the amended rule or after the rule went into effect. Telemarketers may remove those numbers from their company-specific do-not-call lists that have been on their lists for a period of five years or longer. As explained in the *2003 TCPA Order*, we believe a five-year retention period reasonably balances any administrative burden on consumers in requesting not to be called with the interests of telemarketers in contacting consumers. The shorter retention period increases the accuracy of companies' do-not-call databases while the national do-not-call registry option mitigates the burden on those consumers who may find company-specific do-not-call requests overly burdensome. We also believe that having two different retention periods—one for requests made prior to the effective date of the amended rule and one for requests made after—will lead to confusion among consumers and increase administrative burdens on telemarketers.

In addition, we decline to amend the timeframe by which telemarketers must honor do-not-call requests. In concluding that telemarketers must honor such requests within 30 days, we considered both the large databases of such requests maintained by some entities and the limitations on certain small businesses. We also determined that telemarketers with the capability to honor company-specific do-not-call requests in less than thirty days must do so. We continue to believe that this requirement adequately balances the privacy interests of those consumers that have requested not to be called with the interests of the telemarketing industry. We also decline to amend our determination regarding the hours a telemarketer must be available to record do-not-call requests from consumers making inbound calls to that telemarketer. In the *2003 TCPA Order*, we concluded that the number supplied by the telemarketer must permit an individual to make a do-not-call request during the hours of 9 a.m. and 5 p.m. Monday through Friday. Telemarketers are already required to record do-not-call requests at the time the request is made, such as during a live solicitation call. Thus, we believe that in those instances where the consumer must

instead contact the telemarketer at the telemarketer's number, it is reasonable to do so during ''normal'' business hours when most consumers are likely to call.

Finally, the rules as adopted in July of 2003 contain a minor error in wording which is being corrected by this *Order*. In § 64.1200(d)(6), the word ''caller's'' should be replaced with the word ''consumer's.'' We correct the sentence to read: ''A person or entity making calls for telemarketing purposes must maintain a record of a consumer's request not to receive further telemarketing calls.''

Established Business Relationship Exemption

The TCPA expressly exempts calls to persons with whom the caller has an ''established business relationship'' (EBR) from the restrictions on telephone solicitations. Congress determined that such an exemption was necessary to allow companies to communicate by telephone with their existing customers. Consistent with the FTC, we modified the definition of established business relationship so that the relationship, once begun, exists for 18 months in the case of purchases or transactions and three months in the case of inquiries or applications, unless the consumer ''terminates'' it by, for example, making a company-specific do-not-call request. ACLI asks the Commission to clarify that an ''established business relationship'' exists: (1) Between a person and his or her insurer as long as there is an insurance policy or annuity in force between the company and the person; and (2) between the person and his or her insurance agent, as long as there is an insurance policy or annuity in force that was placed by that insurance agent. ACLI indicates that the definition of ''established business relationship'' is vague as applied to the life insurance industry and does not take into account the unique aspects of the relationship between policyholders, insurers, their agents and licensed insurance professionals. ACLI maintains that insurance policies and annuities purchased by consumers represent long-term obligations of the companies that provide those policies. ACLI indicates that an insurance policy or annuity remains in force between the parties beyond the initial policy placement or renewal. Thus, ACLI contends that an EBR exists during the life of the policy even without an additional purchase, transaction or inquiry by the policyholder.

Petitioner Dowler similarly requests that the Commission clarify that an EBR exists between a mortgage broker and a consumer throughout the term of any loan that originates with the broker. Without clarification from the Commission, Dowler contends that the mortgage broker's EBR with the consumer would end 18 months after the original transaction with the broker, even though the broker established the initial relationship with the consumer. Dowler recommends that the Commission expand the rules so that an EBR exists between the broker and borrower during the length of the originating loan transaction and extends 18 months beyond the conclusion of the loan contract.

Although petitions from ACLI and Dowler were filed late, we take this opportunity to clarify application of the EBR time limitations. We agree with petitioners that a unique relationship exists between consumers and entities that enter into financial contracts or agreements. Financial ''contracts'' often remain in force even if the consumer is not required to make regular payments or transactions. In passing the recent Fair and Accurate Credit Transactions Act of 2003 (FACT Act), Congress provided that a ''pre-existing business relationship'' includes a ''financial contract between a person and a consumer which is in force'' or a ''financial transaction (including holding an active account or a policy in force or having another continuing relationship).'' We similarly clarify that the existence of financial agreements, including bank accounts, credit cards, loans, insurance policies and mortgages, constitute ongoing relationships that should permit a company to contact the consumer to, for example, notify them of changes in terms of a contract or offer new products and services that may benefit them. Consumers should not be surprised to receive a call from a bank at which they have an account, even if they have not transacted any business on that account for over 18 months. They also are likely to expect to receive calls from insurance companies with whom they hold an insurance policy or from lenders with whom they secured a mortgage. Similarly, a publication that a consumer agrees to subscribe to for a specified period of time, has an EBR with the consumer for the duration of the subscription. Thus, during the time a financial contract remains in force between a company and a consumer, there exists an established business relationship, which will permit that company to call the consumer during the period of the ''contract.'' Once any account is closed or any ''contract'' has terminated, the bank, lender, or other entity will have an additional 18 months from the last transaction to contact the consumer before the EBR is terminated for purposes of telemarketing calls. However, we emphasize that a consumer may terminate the EBR for purposes of telemarketing calls at any time by making a do-not-call request. Once the consumer makes a company-specific do-not-call request, the company may not call the consumer again to make a telephone solicitation regardless of whether the consumer continues to do business with the company.

In addition, we clarify that intermediaries, such as insurance agents and mortgage brokers, may call those consumers with whom they have arranged an insurance policy or mortgage for a period of 18 months from the time the transaction is completed, *i.e.*, the broker/agent arranged the mortgage or insurance deal. We agree that brokers and agents often play an important role in these types of financial transactions and that, in many circumstances, the consumer would expect to receive a call from them within a reasonable period of time of the transaction. However, we believe that to allow a broker to make a telephone solicitation to a consumer for the duration of the loan or term of the policy would conflict with the do-not-call rules' purpose in protecting consumer privacy rights. In addition, a broker or agent may obtain the consumer's express written permission to call beyond the 18-month period at the time of the transaction.

Tax-Exempt Nonprofit Organization Exemption

The term ''telephone solicitation,'' as defined in the TCPA, does not include a call or message ''by a tax-exempt nonprofit organization.'' The Commission concluded, as part of its *1995 TCPA Reconsideration Order*, published at 60 FR 42068, August 15, 1995, that calls placed by an agent of the telemarketer are treated as if the telemarketer itself placed the call. In the *2003 TCPA Order*, the Commission reaffirmed this conclusion, finding that charitable and other nonprofit entities with limited expertise, resources and infrastructure, might find it advantageous to contract out its fundraising efforts. We determined that a tax-exempt nonprofit organization that conducts its own fundraising campaign or hires a professional fundraiser to do it, will not be subject to the restrictions on telephone solicitations. We also determined, however, that when a for-profit organization is delivering its own commercial message as part of a telemarketing campaign, even if

accompanied by a donation to a charitable organization or referral to a tax-exempt nonprofit organization, that call is not by or on behalf of a tax-exempt nonprofit organization and is therefore subject to the ''telephone solicitation'' rules.

Several petitioners ask the Commission to reconsider the rules regarding calls by and on behalf of tax-exempt nonprofit organizations. DialAmerica requests that we clarify that its ''Sponsor Program'' is exempt from the national do-not-call registry because the calls it makes are on behalf of a tax-exempt nonprofit entity, and not on behalf of a for-profit seller. Petitioner Biggerstaff, on the other hand, asks us to reconsider our determination regarding calls made *by or on behalf of* tax-exempt nonprofit organizations, arguing that exempting calls from the definition of ''telephone solicitation,'' when they are made by a for-profit telemarketer on behalf of the nonprofit, violates Congressional intent and the plain language of the statute. We now reaffirm our determination regarding for-profit companies that call to encourage the purchase of goods or services, yet donate some of the proceeds to a nonprofit organization. In circumstances where telephone calls are initiated by a for-profit entity to offer its own, or another for-profit entity's products for sale—even if a tax-exempt nonprofit will receive a portion of the sale's proceeds—such calls are telephone solicitations as defined by the TCPA. We distinguish these types of calls from those initiated, directed and controlled by a tax-exempt nonprofit for its own fundraising purposes. We believe that to exempt for-profit organizations merely because a tax-exempt nonprofit organization is involved in the telemarketing program would undermine the purpose of the do-not-call registry. Thus, we decline to exempt DialAmerica's Sponsor Program from the national do-not-call registry.

We emphasize that a tax-exempt nonprofit organization that simply contracts out its fundraising efforts will not be subject to the restrictions on telephone solicitations. Although Petitioner Biggerstaff describes certain entities that purport to be calling on behalf of tax-exempt nonprofits to evade the rules, the record does not warrant reversing this determination. Instead, we will address such potential violations on a case-by-case basis through the Commission's enforcement process.

Predictive Dialers and Abandoned Calls

Under the Commission's rules, telemarketers must ensure that any technology used to dial telephone numbers abandons no more than three percent of calls answered by a person, measured over a 30-day period. A call will be considered abandoned if it is not transferred to a live sales agent within two seconds of the recipient's completed greeting. When a call is abandoned within the three percent maximum allowed, a telemarketer must deliver a prerecorded identification message containing only the telemarketer's name, telephone number, and notification that the call is for ''telemarketing purposes.'' Several petitioners and commenters raise issues related to the use of predictive dialers and the Commission's call abandonment rules. InfoCision requests that the Commission reconsider the call abandonment rate of three percent and instead adopt a five percent abandonment rate. Petitioner Brown asks us to revise the rules to prohibit the abandonment of any call which is answered by a person. Beautyrock urges the Commission to act to ensure that the FTC's rules on abandoned calls are consistent with the FCC's.

We conclude that petitioners raise no new facts suggesting the call abandonment rules should be amended or that the identification message requirement should be eliminated. We therefore dismiss such petitions to the extent they seek such action. In addition, while we do not have the authority to change the FTC's rules, we have forwarded a report to Congress which outlines the inconsistencies between the agencies' sets of rules.

The record before us revealed that consumers often face ''dead air'' calls and repeated hang-ups resulting from the use of predictive dialers. In addition to requiring that telemarketers limit the number of such abandoned calls to three percent of calls answered by a person, the Commission required that telemarketers deliver a prerecorded message when abandoning a call so that consumers will know who is calling them. We emphasized that the message must be limited to name and telephone number, along with a notice that the call is for ''telemarketing purposes.'' We cautioned that the message may not be used to deliver an unsolicited advertisement, and that additional information in the prerecorded message constituting an unsolicited advertisement would be a violation of our rules. We agree with the DMA that words other than ''telemarketing purposes'' may convey the purpose of the call. However, we disagree that language such as ''Hi, this is Company A, calling today to sell you our services'' does not constitute an unsolicited advertisement and conclude that such statement would run afoul of the rules. Therefore, we strongly encourage telemarketers to use the words ''telemarketing purposes'' when delivering a prerecorded identification message for an abandoned call in order to avoid delivering an unsolicited advertisement in the message.

Artificial or Prerecorded Voice Messages

The TCPA prohibits telephone calls to residences using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is for emergency purposes or is specifically exempted under Commission rules. The TCPA permits the Commission to exempt calls that are non-commercial and commercial calls which do not adversely affect the privacy rights of the called party and which do not transmit an unsolicited advertisement. Since 1992, the Commission's rules have exempted from the prohibition ''a call or message * * * that is made for a commercial purpose but does not include the transmission of any unsolicited advertisement.'' The Commission made clear in the *2003 TCPA Order* that offers for free goods or services that are part of an overall marketing campaign to sell property, goods, or services are subject to the restrictions on unsolicited advertisements. We also determined that if the call is intended to offer property, goods, or services for sale either during the call, or in the future (such as in response to a message that provides a toll-free number), that call is an advertisement.

Debt Collection Calls

The Commission's rules require that all prerecorded messages identify the name of the business, individual or other entity that is responsible for initiating the call, along with the telephone number of such business, other entity, or individual. The prerecorded message must contain, at a minimum, the legal name under which the business, individual or entity calling is registered to operate. The rule also requires that the telephone number stated in the message be one that a consumer can use during normal business hours to ask not to be called again. ACA International (ACA) requests clarification that the amended identification requirements for prerecorded messages do not apply to calls made for debt collection purposes. ACA states that the Commission's identification requirement as applied to debt collection calls directly conflicts

with section 805(b) of the Fair Debt Collection Practices Act (FDCPA), which prohibits the disclosure of the existence of a debt to persons other than the debtor. ACA maintains that the FDCPA expressly prohibits debt collectors from communicating any information to third parties, even inadvertently, with respect to the existence of a debt. ACA states that the requirement that a debt collector transmit its registered name at the beginning of the prerecorded message potentially would trigger liability under the third party disclosure prohibition of the FDCPA. In the alternative, ACA requests that the Commission clarify that debt collectors are not required to identify their state-registered name in prerecorded messages if such identification conflicts with Federal or State laws.

In the *1995 TCPA Reconsideration Order*, the Commission concluded that the rules did 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. Although we believe that it is generally in the best interest of residential subscribers that full identification of the caller be provided during any prerecorded message call, the FDCPA clearly prohibits the disclosure by debt collectors of any information regarding the existence of a debt. It requires a 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. We therefore clarify that as long as the call is made for the purpose of debt collection and is not ''for the purpose of encouraging the purchase or rental of, or investment in, property, goods or services * * *,'' the debt collector is not required to identify its state-registered name in prerecorded messages if such identification conflicts with Federal or State laws. In such circumstances where a conflict would exist, we find that the caller may instead identify himself by individual name. We continue to require any debt collector to state clearly the telephone number (other than that of the autodialer or prerecorded message player that placed the call) of such business, other entity, or individual.

''Information-Only'' Calls

The American Resort Development Association (ARDA) asks the Commission to permit entities to make prerecorded, ''information-only'' calls to numbers that are not on the national do-not-call list or a company-specific do-not-call list. ARDA explains that timeshare providers use such messages to describe promotional opportunities, but that consumers are not encouraged to purchase anything on the phone. If the consumer returns the call to learn more, the operator informs the consumer about promotional activities at a nearby resort. ARDA contends that prohibiting such prerecorded message calls is not necessary to safeguard consumers' privacy or prevent unscrupulous conduct. ARDA further argues that the Commission's determination regarding such messages violates the First Amendment rights of consumers who wish to receive such calls. Shields opposes ARDA's petition, maintaining that a prerecorded call, the ultimate purpose of which is to further a commercial enterprise, is a telemarketing call.

We decline to grant ARDA's petition to exempt prerecorded messages regarding timeshare opportunities. The messages ARDA describes that purport to deliver ''information only'' are clearly part of a marketing campaign to encourage consumers to invest in a commercial product. As we stated in the *2003 TCPA Order*, the fact that a sale is not completed during the call or message does not mean the message does not constitute a telephone solicitation or unsolicited advertisement. Messages that describe a new product, a vacation destination, or a company that will be in ''your area'' to perform home repairs nevertheless are part of an effort to sell goods and services, even if a sale is not made during the call. In addition, as discussed above, messages that promote goods or services at no cost are nevertheless unsolicited advertisements because they describe the ''quality of any property, goods or services.'' ARDA points out that consumers who receive prerecorded messages must return the calls if they wish to learn more, to complete the sale, or simply to ask to be placed on a do-not-call list. As noted in the *2003 TCPA Order*, such messages were determined by Congress to be more intrusive to consumer privacy than live solicitation calls. The record before us shows that consumers are, in fact, often more frustrated by prerecorded messages. The DMA indicates that they should be used only in limited circumstances, as consumers are often offended by such messages. Thus, we reiterate that prerecorded messages that contain either a telephone solicitation or introduce an unsolicited advertisement are prohibited without the prior express consent of the called party.

We disagree with Petitioner Strang that entities sending lawful prerecorded messages must obtain the ''prior express consent'' of the called party in writing. Unlike the national do-not-call registry, through which consumers have indicated that they do not wish to receive telemarketing calls (by registering on the list), we find no evidence in the record suggesting that consent should be in writing when sending prerecorded messages to consumers not registered on the national do-not-call list. In the case of the national do-not-call registry, we concluded that sellers may contact those consumers on the list if they have obtained the prior express permission of the consumers. Such express permission must be evidenced only by a signed, written agreement between the consumer and the seller. Absent a consumer's listing on the do-not-call registry, such prior express consent to deliver a lawful prerecorded message may be obtained orally. As with the sending of unsolicited facsimile advertisements, telemarketers delivering prerecorded messages must be prepared to provide clear and convincing evidence that they received prior express consent from the called party.

We also decline to reconsider the requirement for businesses to use their legal name to identify themselves when they use prerecorded messages. We believe that the use of ''d/b/a'' (''doing business as'') alone in many instances may make it difficult to identify the company calling. However, as we stated in the *2003 TCPA Order*, the rule does not prohibit the use of ''d/b/a'' information, provided that the legal name of the business is also provided.

Radio Station and Television Broadcaster Messages

In the *2003 TCPA Order*, we addressed prerecorded messages sent by radio stations or television broadcasters that encourage telephone subscribers to tune in at a particular time for a chance to win a prize or similar opportunity. We concluded that if the purpose of the message is merely to invite a consumer to listen to or view a broadcast, such message is permitted under the rules as a commercial call that ''does not include or introduce an unsolicited advertisement or constitute a telephone solicitation.'' We also noted, however, that if the message encourages consumers to listen to or watch programming that is retransmitted broadcast programming for which consumers must pay (*e.g.*, cable, digital satellite, etc.), such messages would be considered ''unsolicited advertisements'' for purposes of our rules. Such messages would be part of an overall marketing campaign to encourage the purchase of goods or

services or that describe the commercial availability or quality of any goods or services and would be considered ''unsolicited advertisements'' as defined by the TCPA.

Petitioner Biggerstaff requests that the Commission reconsider its determination that certain radio and television broadcast messages are not considered ''unsolicited advertisements'' under the restrictions on prerecorded messages. Biggerstaff contends specifically that radio and television broadcasts are entertainment and news ''services,'' as well as ''advertisement delivery services.'' Biggerstaff further maintains that there is no basis for treating such broadcasters differently from others providing similar services, such as cable networks, Web sites, newspapers or publishers.

We decline to reverse our conclusion regarding radio station and television broadcaster messages. As explained in the *2003 TCPA Order*, if the purpose of the message is merely to invite a consumer to listen to or view a broadcast, such message is permitted under the current rules as ''a commercial call that does not include or introduce an unsolicited advertisement or constitute a telephone solicitation.''

Wireless Telephone Numbers

In the *2003 TCPA Order*, we affirmed that it is unlawful to make any call using an automatic telephone dialing system or an artificial or prerecorded message to any wireless telephone number. We stated that both the statute and our rules prohibit these calls, with limited exceptions, ''to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other common carrier service, or any service for which the called party is charged.'' In addition, we determined not to prohibit all live solicitations to wireless numbers, but noted that the TCPA already prohibits such calls to wireless numbers using an autodialer.

As noted above, section 227(b)(1)(A)(iii) of the TCPA refers to calls made to any telephone number ''assigned to'' cellular telephone service or any service for which the called party is charged for the call. Verizon Wireless explains that according to numbering guidelines and the Commission's rules, numbers ported to another carrier are treated as ''assigned numbers'' that are then reported to the Commission for utilization purposes by the donating carrier, not by the receiving carrier. According to Verizon Wireless, a number that is ported to another carrier is still assigned to the original carrier for purposes of numbering and local number portability. Verizon Wireless asks us to clarify that, under the TCPA, the number is ''assigned to'' a wireless service based on the identity of a customer's new service, rather than the identity of the original carrier.

We agree with those petitioners who point out that permitting autodialed and prerecorded voice messages to wireless telephone numbers that have been ported from wireline carriers would defeat the underlying purpose of the prohibition—to protect wireless subscribers from the cost and interference associated with such calls. To apply the Commission's definition of ''assigned numbers'' for number utilization purposes to the TCPA's rules on calls to wireless numbers would lead to an unintended result. Telemarketers would be prohibited from placing autodialed and prerecorded message calls to wireless numbers generally, but permitted to place such calls to certain subscribers simply because they have ported their numbers from wireline service to wireless service. In addition, we believe we made clear in the *2003 TCPA Order* that, even with the advent of local number portability, we expect telemarketers to make use of the tools available in the marketplace to avoid making autodialed and prerecorded message calls to wireless numbers. Thus, we affirm that a telephone number is assigned to a cellular telephone service, for purposes of the TCPA, if the number is currently being used in connection with that service.

We also agree with the DMA that a call placed to a wireline number that is then forwarded, at the subscriber's sole discretion and request, to a wireless number or service, does not violate the ban on autodialed and prerecorded message calls to wireless numbers. Action on the part of any residential subscriber to forward certain calls from their wireline device to their wireless telephones does not subject telemarketers to liability under the TCPA.

Caller Identification Rules

The DMA asks the Commission to further examine and perhaps revise our caller identification (caller ID) requirements, indicating that it is not clear that Automatic Number Identification (ANI) will pass to ordinary residential subscriber lines. Brown petitions the Commission to require telemarketers, when transmitting caller ID, to provide a telephone number, which the consumer may call at no toll charge.

We decline to reconsider the caller ID requirements and dismiss both the DMA's and Brown's petitions. We continue to believe that the caller ID rules allow consumers to screen out unwanted calls and to identify companies that they wish to ask not to call again. In addition, as discussed in the *2003 TCPA Order*, we believe that telemarketers can comply with the requirements. Under the rules, telemarketers are required to transmit caller ID information, which must include either ANI or Calling Party Number (CPN). We explained that CPN can include any number associated with the telemarketer or party on whose behalf the call is made, that allows the consumer to identify the caller. This includes a number assigned to the telemarketer by its carrier, the specific number from which a sales representative placed a call, the number for the party on whose behalf the telemarketer is making the call, or the seller's customer service number. Any number supplied must permit an individual to make a do-not-call request during regular business hours for the duration of the telemarketing campaign.

Private Right of Action

The TCPA provides consumers with a private right of action in State court for any violation of the TCPA's prohibitions on the use of automatic dialing systems, artificial or prerecorded voice messages, and unsolicited facsimile advertisements. Several petitioners request that the Commission clarify the parameters of the private right of action.

The Commission declines to make any determination about the specific contours of the TCPA's private right of action. Congress provided consumers with a private right of action, ''if otherwise permitted by the laws or rules of court of a State.'' As we stated in the *2003 TCPA Order*, this language suggests that Congress contemplated that such legal action was a matter for consumers to pursue in appropriate State courts, subject to those State courts' rules. We continue to believe that it is for Congress, not the Commission, either to clarify or limit this right of action.

Regulatory Flexibility Act Analysis

We note that no FRFA is necessary for the *Second Order on Reconsideration*. In this *Order*, we are not making any changes to the Commission's rules; rather, we are clarifying the existing rules. In addition, there were no objections to the FRFA regarding the Commission's telemarketing rules.

Congressional Review Act

The Commission will send a copy of this *Second Order on Reconsideration* in a report to be sent to Congress and

the General Accounting Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

Ordering Clauses

Pursuant to sections 1–4, 227, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 151–154, 227, and 303(r); and § 1.429 of the Commission's Rules, 47 CFR 1.429, this *Second Order on Reconsideration* in CG Docket No. 02–278 is adopted as set forth herein, and part 64 of the Commission's rules, 47 CFR 64.1200 is amended as set forth in the Rule Changes.

This *Second Order on Reconsideration* shall become effective May 13, 2005.

The petitions for reconsideration and/or clarification of the telemarketing rules in CG Docket No. 02–278 are denied in part and granted in part, as set forth herein. As noted above, the Commission intends to address the issue of preemption separately in the future. MedStaffing Inc.'s *Petition for Declaratory Ruling* is granted to the extent stated herein. Petitions not filed within 30 days of the Report and Order's publication by American Council of Life Insurers, Consumer Bankers Association, Clifford Dowler, and RDI Marketing are dismissed.

List of Subjects in 47 CFR Part 64

Telephone.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Rule Changes

■ For reasons discussed in the preamble, the Commission amends part 64 of the Code of Federal Regulations as follows:

PART 64—MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

■ 1. The authority citation for part 64 continues to read as follows:

Authority: 47 U.S.C. 154, 254(k); secs. 403 (b)(2)(B), (C), Public Law 104–104, 110 Stat. 56. Interpret or apply 47 U.S.C. 201, 218, 225, 226, 228, and 254(k) unless otherwise noted.

■ 2. Section 64.1200 is amended by revising paragraph (d)(6) to read as follows:

§ 64.1200 Delivery restrictions.

* * * * *

(d) * * *

(6) *Maintenance of do-not-call lists.* A person or entity making calls for telemarketing purposes must maintain a record of a consumer's request not to receive further telemarketing calls. A do-not-call request must be honored for 5 years from the time the request is made.

* * * * *

[FR Doc. 05–7346 Filed 4–12–05; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 05–764, MB Docket No. 02–266, RM–10557]

Radio Broadcasting Services; Chillicothe, Dublin, Hillsboro, and Marion, OH

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document grants a rulemaking petition to reallot, downgrade, and change the community of license for Station WMRN–FM from Channel 295B at Marion, OH, to Channel 294B1 at Dublin, OH, as a first local service. To accommodate this action, the document also reallots, downgrades, and changes the community of license for Station WSRW–FM from Channel 294B at Hillsboro, OH, to Channel 293A at Chillicothe, OH. Finally, the document denies objections raised by Infinity Broadcasting Operations, the Committee for Competitive Columbus Radio, and Sandyworld, Inc. *See* 67 F.R. 57780, September 12, 2002. *See also* **SUPPLEMENTARY INFORMATION.**

DATES: Effective May 9, 2005.

FOR FURTHER INFORMATION CONTACT: Andrew J. Rhodes, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Report and Order*, MB Docket 02–266, adopted March 23, 2005, and released March 25, 2005. The full text of this decision is available for inspection and copying during normal business hours in the FCC's Reference Information Center at Portals II, CY–A257, 445 12th Street, SW., Washington, DC. The complete text of this decision may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 1–800–378–3160 or *http://www.BCPIWEB.com*. The Commission will send a copy of the *Report and Order* in this proceeding in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

The reference coordinates for Channel 294B1 at Dublin, OH are 40–09–20 and 82–54–12. The reference coordinates for Channel 293A at Chillicothe, OH are 39–17–31 and 82–51–38.

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

■ Part 73 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 73–RADIO BROADCAST SERVICES

■ 1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334 and 336.

§ 73.202 [Amended]

■ 2. Section 73.202(b), the Table of FM Allotments under Ohio, is amended by adding Channel 293A at Chillicothe, adding Dublin, Channel 294B1, removing Channel 294B at Hillsboro, and removing Channel 295B at Marion.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 05–7071 Filed 4–12–05; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 05–763; MB Docket No. 04–219; RM–10986]

Radio Broadcasting Services; Evergreen, AL, and Shalimar, FL

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document substitutes Channel 227C2 for Channel 227C1 at Evergreen, Alabama, reallots Channel 227C2 to Shalimar, Florida, and modifies the Station WPGG license to specify operation on Channel 227C2 at Shalimar. The reference coordinates for the Channel 227C2 allotment at Shalimar, Florida, are 30–23–36 and 86–29–45. *See* 69 FR 35562, June 25, 2004. With this action, the proceeding is terminated.

DATES: Effective May 9, 2005.

FOR FURTHER INFORMATION CONTACT: Robert Hayne, Media Bureau (202) 418–2177.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Report and Order in MB Docket No. 04–219 adopted March 23, 2005, and released March 25, 2005. The