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Rules and Regulations Implementing the	) Docket Nos. CG 02-278, DA 05 1346,
Telephone Consumer Protection Act of 1991	) DA 05-1347, DA 04-3185, DA 04-3187,
	) DA 04-3835, DA 04-3836, DA 04-3837,
	) DA 05-342
	)

Comments of the World Privacy Forum

July 29, 2005

Pursuant to the notice published by the Federal Communications Commission on

June 29, 2005 regarding the notice of proposed rulemaking and the petition for declaratory

ruling on the Rules and Regulations Implementing the Telephone Consumer Protection Act

of 1991 (TCPA), the World Privacy Forum submits the following comments.[1]

I.   Introduction

The Commission should deny the Joint Petitioners'[2] request to preempt state anti-

telemarketing laws. State anti-telemarketing laws were enacted by state legislators to protect

individuals from abusive calling practices and from "bad actors" in the telemarketing

industry. These state laws represent a body of regulation deeply informed by regional

variations in business practice, culture, and population factors.

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[1] Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 70 Fed. Reg. 37318 (June 29, 2005). Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 70 Fed. Reg. 37317 (June 29, 2005).
[2] *See* Joint Petition for Declaratory Ruling that the FCC has Exclusive Regulatory Jurisdiction over Interstate Telemarketing, *In the Matter of Alliance Contact Servs., et al.* 3, CG Docket No. 02-278 (filed Apr. 29, 2005).

This variation exists within a reasonable and important dual regulatory framework; states form the loci and laboratory for the innovation, vitality, and flexibility that is the heart of U.S. industry and commerce. While it is possible to discuss many aspects of the state-federal dual regulatory framework in differing contexts, these comments focus on just one aspect of the dual framework. That is, the specific ways technological change has altered the parameters and fundamental applicability of some old arguments in favor of preemption. While technology is certainly not the only force that bends the course of business, it is nevertheless from time to time a catalyst for profound change within sectors and industries. Such is the current case with telemarketing.

Telemarketing, once thought of as dozens of employees calling on analog telephones from a "boiler room," has been radically transformed by the arrival of converged digital tools. The horse and buggy is as far away from a modern car as boiler rooms are from modern telemarketing. Telemarketing has made the shift from analog to digital architectures, with the consequence that many tasks -- from placing outbound calls to following up on leads to complying with complex and varied regulations – have been completely automated or incorporated into simple graphical interfaces.

Because of these changes, telemarketers – including those working in small businesses -- are not put at a disadvantage by having to comply with differing state laws. In fact, as a result of the new convergence, businesses that have invested in the new forms of converged compliance software and other tools have noted concomitant increases in profits and efficiency, as well as reaching compliance goals. [3] The arguments based on the idea that

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[3] *See, e.g.:* Peoria Kia in Phoenix, Arizona stated that the Call Command compliance software "was instrumental" in helping them become the number one car dealership in the world within 6 months of installing the product. RBC Liberty Insurance saved "$59.5 million in potential fines in the first quarter of 2005 and more than $140 million in fines in 2004," as quoted in "We Can't Take Your Call -- RBC Liberty addresses

the complexity of compliance with the current dual regulatory system is unbearable and

unreasonable do not have resonance within the reigning structure of the new architectures

that have sprung up specifically to deal with these and other challenges.

II. It is easier for businesses to comply with a dual-regulatory structure today than at any other time in history due to advances and innovations in telecommunications and marketing technologies: compliance has become automated, it is accomplished in real time, and it is increasingly applied to an integrated list of email, voice, and other communications.

    A. **Integrated digital communications with a compliance add-on or overlay is the current norm: fax, email, direct mail, and voice communications are all managed from a central point.**

The boiler room has long since migrated to computer telephony automation to "CRM"

and now beyond. The current cycle is that large yet distributed infrastructures that combine

inbound and outbound communications of all varieties (inbound/outbound voice, fax, email)

are overlaid with a variety of compliance packages to allow companies to seamlessly

comply with regulations no matter what medium the company is working with, whether it

be a catalog mailing or marketing email or outbound telemarketing phone call.

This type of converged system requires a supporting digital and network architecture.

The structure of the underlying system can range from larger (A Cisco Systems product, for

example) to smaller (A Vanillasoft product, for example) to those hosted by a third party

(for example, Salesforce.com). For the purposes of revealing specifics about the nature of

the convergence and the advancement of the technology, beginning with the larger

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state and federal Do Not Call compliance with Gryphon Call Advisor solution." Phil Britt, 01 July 2005, Insurance + Technology. For Peoria Kia, see "Peoria Kia Becomes No. 1 Kia Dealership in the World, Increases Be-Back Ratio by 75% with CallCommand's CallStream, 06 January 2005, Business Wire.

structures, it is instructional to look at Cisco's descriptions about its converged marketing CRM options:

> "*Cisco IP Contact Center (IPCC) Enterprise Edition delivers intelligent contact routing, call treatment, network-to-desktop computer-telephony integration (CTI), and multichannel contact management over an IP infrastructure. By combining multichannel automatic call distributor (ACD) functionality with IP telephony in a unified solution, Cisco IPCC Enterprise (formerly Cisco IP Contact Center) enables companies to rapidly deploy a distributed contact center infrastructure. Distinctive features include the following: single implementation for multichannel ACD, IVR, CTI and outbound; distributed architecture supporting hundreds of locations; centralized management, scripting and reporting for multiple sites across the entire enterprise; flexible queuing options, including queuing and treatment at the edge of the network; and a linear scaling model to support thousands of agents.*"[4]

Microsoft also has a product in this area, Uniframe, which it describes as:

> "*Microsoft and CosmoCom have collaborated to create UniFrame, an integrated combination of Microsoft Customer Care Framework (CCF) and CosmoCall Universe. By creating UniFrame, Microsoft and CosmoCom have already done much of the work for a modern call center. What remains is mainly connecting CCF to the specific line of business (LOB) applications in the customer IT environment, connecting CCF to the self-service Web portal as required, and to incorporate the hooks for UniFrame's live Internet and e-mail contact management into the self-service Web portal. UniFrame facilitates inbound call screen-pops for agents that are essentially the same for telephone calls, live Internet sessions and e-mail messages. Interaction history of all channels is created automatically and stored either in the LOB CRMs or in Universe's own interaction history module, CosmoTracker offers the ability for outbound calls via any channel to be launched with a single click on the contact's phone number, e-mail address or SIP address. Historical data from the*

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[4] IP Contact Center Technology Pioneer Award, 1 March 2005, Telemarketing & Call Center Solutions.

contact center is fully mapped into the CCF abstraction layer, providing a source of unified reports that contact center managers will find invaluable in assessing the overall performance of their operations." [5]

In the mid-range market there are products such as Aspect Communications Amcat Contact Center Suite that is focused on converged communication in a variety of marketing settings.[6] For small businesses, there are hosted offerings at a low monthly cost (Salesforce.com prices begin at under $50 per month) and there are also virtual call center technologies employing VOIP that allow cost saving and competitiveness in the converged environment. (See discussion, D).

With multiple channels of digitized communication being funneled through one point, compliance changes: It becomes automated, it is applied evenly across all mediums, and very complex tasks can be managed to a highly granular level by software applications. Even the most complex compliance "patchwork" can be programmed into the current converged systems and can be tweaked by the companies managing the systems. Hosted systems can be layered with other software applications to provide robust compliance.

B. **The telemarketing compliance picture has advanced from simple compliance to "real time" compliance.**

Real time compliance is a concept that has been in place for several years. [7] The old method of compliance meant that a phone list was "scrubbed" by manually or electronically checking it against a Do Not Call list and then placing a call or sending a scrubbed list to a

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[5] *See* <http://www.cosmocom.com and http://www.microsoft.com>.
[6] *See* <http://www.aspect.com>, *E.g, "Aspect Paves Convergence Path for Contact Centers with Release of Aspect Uniphi Suite v6.1."*July 2005.
"
[7] *See "*Do-not-call questions linger at state, national levels." Jeter, Lynne, 21 February 2005, Mississippi Business Journal.

machine. List scrubbing is viewed at this point as an older methodology, one which is rapidly being replaced with real time compliance.

Real time compliance is quite different from manual or electronic scrubbing in that outgoing phone calls to Do Not Call list members (state and federal) are instantaneously, physically blocked by a match processing software application. There is no prior list scrubbing; instead, the matching is done on demand, or, in "real time," as the phone calls are placed.

There are a variety of real time compliance software applications. These applications can typically also generate a variety of XML data streams that allow for further call management. The compliance also applies to dropped call rules, cell phone number rules, and so forth. After the basic architecture in place, compliance parameters are essentially programmed in and altered and updated as needed.

As an example, Call Compliance Inc. sells TeleBlock, one of the current crop of real time compliance products. The company guarantees its product to a standard of 100 percent compliance. The owner of Call compliance described the real time blocking mechanisms in an article:

> "*When the user makes a phone call, the central office at say MCI or Quest will look up the number against various state and federal databases to determine whether or not that call should be allowed. In real time, we block those outgoing calls.*" [8]

The article in which Call Compliance was quoted also noted that every month, "TeleBlock processes more than 100 million calls." [9] Other real time compliance tools

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[8] *Id.*
[9] *Id.*

exist; for example Authtel has a product, among other companies (See discussion at C).

The power of these software compliance tools and mechanisms should not be underestimated. They have made a pronounced positive difference for businesses and have enabled them to easily comply with a dual regulatory mechanism, with all its nuances, often in real time.

C. **Businesses have robust options to choose from in compliance technologies.**

Businesses have a variety of compliance tools to choose from within a variety of price ranges. As appropriate, market competition in this area has produced innovation. Real time compliance options are now a reality, as discussed in (B). The current growth edge is to define how real time looks for each compliance package. Some compliance packages are available on an on-demand, pay-as-you-go basis, a benefit for small to mid-size businesses with sporadic telemarketing campaigns. Other compliance packages focus specifically on telemarketers' needs. For example, one particular compliance software package focuses on telemarketing compliance with a dual regulatory system, in this case a product by Gryphon:

> "*Exemption Advisor is a powerful addition to the Gryphon Networks Compliance Suite of outbound calling technologies. It significantly increases the effectiveness of sales campaigns while providing comprehensive management of federal, state and internal do-not-call lists. Gryphon Networks Exemption Advisor automatically identifies dialed numbers that qualify as an exemption under state and federal DNC rules, dramatically reducing the amount of time, resources and expertise involved with checking millions of transactions against internal customer data. Exemption Advisor ensures that only lawful calls are placed to numbers otherwise restricted by their presence on state or federal do-not-call lists.*

Its distinct feature is that Gryphon Exemption Advisor is the first technology to enter the market that entirely automates the exemption management process for the calling agent through the telephone."[10]

Gryphon is one among a number of compliance options companies have. No part of these comments are meant to advocate for any one company or compliance package; rather the focus is to document how robust the compliance options are today and how thoroughly these compliance tools have automated compliance mechanisms, even the most complex.

The following list is a selection of representative compliance products of varying price. It is not a complete list, but it will give the Commission a flavor of the number of options available to telemarketers. [11]

Akonix Compliance Manager (IM) [12]

Amcat Intel NetMerge[13]

AuthLINX by Authtel [14]

Callcommand CallScan [15] (Low-cost, on-demand "telemarketing compliance in a box." Also wireless compliance.)

Call compliance Teleblock , Dialblock [16]

Contact Center Compliance [17] (DNC Scrub).

Gryphon Networks (Exemption Advisor, Call Advisor, Call Search, Phone Check, etc.) [18]

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[10] *See* < http://www.gryphonnetworks.com>.
[11] The list was created from original research, Web site materials of the companies, comparing Hoover's Industry and Company profiles, and was also informed by Compliance Technologies And Services Roundup, 01 May 2005, Customer Interaction Solutions.
[12] *See* <http://www.akonix.com>.
[13] *See* <http://www.amcat.com>. *See e.g.* case studies 1calldirect, Allserve Systems, Club Intrawest <http://www.amcat.com/casestudies/search.asp>.
[14] *See* <http://www.authtel.com> *See e.g.* "C4" compliance methodology.
[15] *See* < http://www.callcommand.com>
[16] *See* < http://www.callcompliance.com>
[17] *See* < http://www.dnc.com>.
[18] *See* < http://www.gryphonnetworks.com>.

Harte-Hanks Advanced Data Quality Interface and **Harte-Hanks SuppressMAX** [19]

Innovative Marketing Strategies / Epixtar [20]

Noble systems Atoms contact center suite [21]

Possible Now (DNC Solution, Telemarketers Registration Support Service, etc.) [22]

SER solutions (Call Processing System)

Sivox Technologies (RealCall, RealScreen) [23]

StrataSoft [24] (StrataDial.VC2 Virtual Contact Center, layers with Call Compliance Teleblock.)

Vanilla Soft [25] (Hosted, partners with Call Compliance Teleblock)

Voice log [26] (Virtual record, etc.)

D. **Small businesses have not been left behind by the changes in telemarketing; in fact, small business has benefited from the shift from analog to digital, including in areas of compliance.**

Telemarketing technology packages, thanks to competition in the convergence and

compliance area of direct marketing, allow for the creation of centralized, remote gateways

for communications – including telemarketing calls – that travel over less expensive Internet

Protocol connections, thus providing small businesses with potentially pronounced cost

savings as they are freed from the necessity of purchasing or leasing T1 lines for routing. [27]

Products can be layered or combined to create virtual call centers that are networked from

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[19] *See* http://www.harte-hanks.com/.
[20] *See* < http://www.ims-ca.com>.
[21] *See* <http://www.noblesys.com>.
[22] *See* <http://www.dncsolution.com>.
[23] *See* <http://www.sivox.com>.
[24] *See* <http://www.stratasoft.com>.
[25] <http://www.vanillasoft.com>.
[26] *See* <http://www.voicelog.com>.
[27] An example of this sort of product is IP Network InterQueue by Avecomm <http://www.avecomm.com>.

many different locations, which allow small businesses to hire competitively. Products can also be layered to add real time compliance to lower-cost small business applications.

A case in point: a small technology company in Louisiana, Vanillasoft, creates a low-cost, hosted, combined sales and compliance product that offers real time compliance. The product can make 50 to 60 sales calls an hour, offers real time compliance with state and federal do-not-call lists, and the price ranges from $65 to $179 a month to operate. [28]

A product that is marketed specifically as a low cost compliance package for small businesss is Call Command, which the company dubs as "telemarketing compliance in a box." [29]

"CallScan On Demand is positioned as a low-cost, easy-to-implement way of assuring compliance with FTC, FCC, state agencies and even company-specific list regulations regarding donot-call (DNC) legislation. Daily call volume makes it virtually impossible for most dealers to ensure full compliance from sales people and service advisors. Yet noncompliance can mean hefty fines and possible lawsuits. CallScan On Demand ensures compliance and provides protection with a complete reporting and monitoring system; all without the cost of additional hardware, software or the necessity to switch phone service providers."[30]

Another example of the cost savings a digitized architecture has brought to small business is Five9's Virtual Contact Center. This virtual contact center architecture does not apparently offer compliance, however the idea is to layer the product with a compliance add-on.

"Five9 Virtual Contact Center is a hosted contact center ASP with all of its customers

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[28] "N.O.-based VanillaSoft's expansion plans spur interest from Canadians."
Santora, Tommy. 2 May 2005,New Orleans CityBusiness.
[29] Compliance Technologies And Services Roundup, 01 May 2005. Customer Interaction Solutions.
[30] *Id.*

running VoIP completely independent of a traditional telecom company and without any ties to a PSTN-based infrastructure. Virtual Contact Center is built from the ground up to eliminate third-party license fees and to ensure costs are kept low. Along with its VoIP functionality, the Virtual Contact Center offers the following: ACD; predictive dialer; CRM; IVR; CTI; remote agent capabilities; skills-based routing; recording; silent monitoring; real-time reporting; chat; and centralized management for multisite and offshore contact centers." [31]

Another case in point is Freedom Dodge in Lexington, Kentucky, a car dealership. With its size, it was not a good candidate to purchase a large-scale, in-house system. This dealership was fully able in the current environment to find a workable and affordable option and subsequently plug-in an automated solution for compliance when the company began having problems with dialing cell phone numbers due to challenges brought on by number portability challenges. A software compliance solution enabled the company to identify numbers that belonged to cell phones, and thus avoid making calls to those numbers. [32]

Another option that exists for small business is the hosted option, which frees small businesses from needing to purchase large software packages. Examples include the previously discussed Vanillasoft. Salesforce.com, NetSuite, and RightNow are other companies in this area. Salesforce.com states that it will host and automate CRM for a company beginning at $65 a month, or conversely will host a 5-member team for under $1,000 per year. [33]

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[31] *See* <http://www.five9.com>.
[32] Cincinnati (Business Wire) - June 14, 2005.
[33] *See* <http://salesforce.com>. Prices based on July, 2005 Web site copy.

Yet despite the advances in compliance options for small business previously noted, in its petition, the Joint Petitioners stated that state-level compliance was particularly onerous for smaller companies. The petitioners named Telelytics, a California-based company, as a prime example of this challenge:

"State enforcement efforts and the risks of non-compliance are particularly onerous for smaller companies that lack the resources to litigate the issue of federal authority over interstate telemarketing. For example, Telelytics' previously-filed letter in Docket 02-278 points out that it has been contacted by numerous states seeking to enforce state laws purporting to regulate interstate telemarketing, notwithstanding Telelytics' compliance with the federal rules. 56 The states uniformly refuse to "give effect to the preemptive effect" of the federal rules, and "all but dare telemarketers to pursue the case-by-case option" established by the Report and Order." [34]

It is arguable that Telelytics has been contacted by several states not because it cannot effectively litigate the broader issue of federal authority due to its size, but rather because Telelytics may have acted inappropriately. While small companies such as Freedom Dodge are seeing benefits from adopting compliance technologies, Telelytics has experienced enforcement actions.

Telelytics is, according to its own Web site materials, up to date with digital calling technologies and real-time feedback, technologies similar to those other companies have employed to increase productivity and sales and to achieve compliance. On its Web site, Telelytics boasts about its digital network:

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[34] *See* Joint Petition for Declaratory Ruling that the FCC has Exclusive Regulatory Jurisdiction over Interstate Telemarketing, *In the Matter of Alliance Contact Servs., et al.* 3, CG Docket No. 02-278 (filed Apr. 29, 2005) P. 32.

"Easy to Use

You want to get your jobs started quickly and easily. You want to know how your job is progressing and get results at your fingertips. Telelytics has the answer with an easy-to-use, web-based interface to submit your job and monitor its progress. With Telelytics, you don't have to navigate confusing telephone menus. If you can surf the Internet, you can set up a Voice Broadcast job. And your results are one click away in real time." [35]

Telelytics also states that its digital service is the "next new thing" in telemarketing:

"Voice Broadcast - The Next New Thing

...

Voice Broadcasting delivers your audio message to a voice mail or answering machine. You upload your message and a phone list via our website. Then Telelytics broadcasts your message to thousands, or even millions, of answering machines. You only pay for the messages that were successfully delivered. A well crafted message can command 10 TIMES THE RESPONSE RATE of the more traditional (and ignored) mass mailing." [36]

If Telelytics can track phone responses from millions of answering machines, then surely it could also track state law? Telelytics is registered in the Colorado Do Not Call list,

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[35] *See* < http://www.telelytics.com/services/>.
[36] *See* <http://www.telelytics.com/>.

with its first registration dated August 17, 2004. [37] This registration demonstrates that Telelytics was at least aware of the need to comply with variances in state laws in 2004.

Yet April 29, 2005, Attorney General Roy Cooper of North Carolina announced an action against Telelytics in the amount of $10,000 for violations of North Carolina's Do Not Call list. [38] Prior to this time, North Dakota Attorney General Wayne Stenehjem brought an action against Telelytics December 10, 2003 for violating state law on pre-recorded messages. Telelytics settled and paid a fee of $1,000. [39]

The Joint Petitioners have not demonstrated that Telelytics was harmed by non-compliance solely due to overly aggressive compliance actions by the states. Telelytics' documented non-compliant behavior in the North Dakota and North Carolina and its concomitant access to advanced technologies are factors that need to be taken into consideration when considering the example of Telelytics.

III.   Conclusion

New technology architectures and programs allow businesses from large to mid-size to small to comply with a dual regulatory structure better and more easily now than at any other point in the past. The Commission should expressly declare that the TCPA does not preempt state laws regulating telemarketing.

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[37] *See* Colorado Do Not Call list <
http://www.coloradonocall.org/index.cfm?fuseaction=ViewRegisteredTelemarketers&Letter=T>.
[38] "Do Not Call Enforcement Paying Off says Attorney General Cooper," Press Release, 29 April 2005, North Carolina Department of Justice. <
http://www.ncdoj.com/pressroom/pressroom_pressreleases.jsp?count=5&start_current=11&current=true >.
[39] *See* < http://www.ndgop.com/gop_news/news_detail.asp?ID=513>.

Respectfully submitted,

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