

“communication” service, and therefore there was no mandate that it be regulated. None of the commenters who argue this point describe a change in circumstances that would warrant reevaluating the Commission’s earlier determination and risk disturbing the competitive balance the Commission deemed appropriate in 1980. In addition, it is not the equipment itself that states are considering regulating; it is the use of such equipment that has caught the attention of some state legislatures. We believe it is preferable at this time to regulate the use of predictive dialers under the TCPA’s specific authority to regulate telemarketing practices. Therefore, we decline to preempt state laws governing the use of predictive dialers and abandoned calls or to regulate predictive dialers as CPE.

“War Dialing”

98. In the 2002 Notice, the Commission sought comment on the practice of using autodialers to dial large blocks of telephone numbers in order to identify lines that belong to telephone facsimile machines. Of those commenters who weighed in on “war dialing” (using automated equipment to dial telephone numbers, generally sequentially, and software to determine whether each number is associated with a fax line or voice line), there was unanimous support for a ban on the practice. Commenters explained that ringing a telephone for the purpose of determining whether the number is associated with a fax or voice line is an invasion of consumers’ privacy interests and should be prohibited. Moreover, they asserted there is no free speech issue when the caller has no intention of speaking with the called party. The TCPA prohibits the transmission of unsolicited facsimile advertisements absent the consent of the recipient. The Commission agrees that because the purpose of “war dialing” is to identify those numbers associated with facsimile machines, the practice serves few, if any, legitimate business interests and is an intrusive invasion of consumers’ privacy. Therefore, the Commission adopts a rule that prohibits the practice of using any technology to dial any telephone number for the purpose of determining whether the line is a fax or voice line.

Artificial or Prerecorded Voice Messages

Offers for Free Goods or Services; Information-Only Messages

99. Congress found that “residential telephone subscribers consider

automated or prerecorded telephone calls * * * to be a nuisance and an invasion of privacy.” TCPA, Section 2(10), *reprinted in* 7 FCC Rcd at 2744. It also found that “[b]anning such automated or prerecorded telephone calls to the home, except when the receiving party consents to receiving the call or when such calls are necessary in an emergency situation affecting the health and safety of the consumer, is the only effective means of protecting telephone consumers from this nuisance and privacy invasion.” TCPA, Section 2(12), *reprinted in* 7 FCC Rcd at 2744–45. Congress determined that such prerecorded messages cause greater harm to consumers’ privacy than telephone solicitations by live telemarketers. The record reveals that consumers feel powerless to stop prerecorded messages largely because they are often delivered to answering machines and because they do not always provide a means to request placement on a do-not-call list.

100. Additionally, the term “unsolicited advertisement” means “any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person’s prior express invitation or permission.” 47 U.S.C. 227(a)(4); 47 CFR 64.1200(f)(5). The TCPA’s definition does not require a sale to be made during the call in order for the message to be considered an advertisement. Offers for free goods or services that are part of an overall marketing campaign to sell property, goods, or services constitute “advertising the commercial availability or quality of any property, goods, or services.” See 47 U.S.C. 227(a)(4). Therefore, the Commission finds that prerecorded messages containing free offers and information about goods and services that are commercially available are prohibited to residential telephone subscribers, if not otherwise exempted. For example, a prerecorded message that contains language describing a new product, a vacation destination, or a company that will be in “your area” to perform home repairs, and asks the consumer to call a toll-free number to “learn more,” is an “unsolicited advertisement” under the TCPA if sent without the called party’s express invitation or permission. See 47 U.S.C. 227(a)(4). However, as long as the message is limited to identification information only, such as name and telephone number, it will not be considered an “unsolicited advertisement” under our rules.

101. In addition, we amend the prerecorded message rule at 47 CFR

64.1200(c)(2) so that the prohibition expressly applies to messages that constitute “telephone solicitations,” as well as to those that include or introduce an “unsolicited advertisement.” The current rule exempts from the prohibition any call that is made for a commercial purpose but does not include the transmission of any unsolicited advertisement. See 47 CFR 64.1200(c)(2). We amend the rule to exempt a call that is made for a commercial purpose but does not include or introduce an unsolicited advertisement or constitute a telephone solicitation. See amended rule at 47 CFR 64.1200(a)(2)(iii). We agree with those commenters who suggest that application of the prerecorded message rule should turn, not on the caller’s characterization of the call, but on the purpose of the message. Amending the rule to apply to messages that constitute “telephone solicitations,” is consistent with the goals of the TCPA and addresses the concerns raised by commenters about purported “free offers.” In addition, we believe the amended rule will afford consumers a greater measure of protection from unlawful prerecorded messages and better inform the business community about the general prohibition on such messages.

102. The so-called “dual purpose” calls described in the record—calls from mortgage brokers to their clients notifying them of lower interest rates, calls from phone companies to customers regarding new calling plans, or calls from credit card companies offering overdraft protection to existing customers—would, in most instances, constitute “unsolicited advertisements,” regardless of the customer service element to the call. The Commission explained in the 2002 Notice that such messages may inquire about a customer’s satisfaction with a product already purchased, but are motivated in part by the desire to sell ultimately additional goods or services. 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. Similarly, a message that seeks people to help sell or market a business’ products, constitutes an advertisement if the individuals called are encouraged to purchase, rent, or invest in property, goods, or services, during or after the call. However, the Commission points out that, if the message is delivered by a company that has an established business relationship with the recipient, it would be permitted under our rules.