

# Consumer Action

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Federal Communications Commission  
Office of the Secretary

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MAY 21, 1992

Ms. Donna R. Searcy, Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

Re: In the Matter of: The Telephone Consumer Protection Act of 1991  
(CC Docket No. 92-90)

Dear Ms. Searcy:

Enclosed please find the original and 11 copies of Consumer Action's Opening Comments in the above-referenced proceeding.

Please send me the service list for this proceeding of the parties that file opening comments.

Should any questions arise in connection with this matter, please contact me at (415) 777-9648.

Very truly yours,



Ken McEldowney  
Executive Director

Enclosures

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MAY 22 1992

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C.

Federal Communications Commission  
Office of the Secretary

In the Matter of )  
 )  
The Telephone Consumer Protection Act of 1991 ) CC Docket No. 92-90  
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CONSUMER ACTION'S OPENING COMMENTS

I. INTRODUCTION

Consumer Action (CA) welcomes the opportunity to comment on the FCC's proposed regulations issued to implement the Telephone Consumer Protection Act of 1991 (TCPA).

CA is a San Francisco-based, membership-supported, consumer education and advocacy organization that focuses on the telephone and banking problems of low income and limited-English-speaking consumers. Through our multi-lingual complaint switchboard and educational efforts with our network of more than 1,000 community service agencies throughout California, we believe that we have a good understanding of the telemarketing problems faced by consumers.

Our primary concern is that if the Commission permits too many exceptions to the requirements of the TCPA the spirit of the law will not be upheld. The nation's consumers expect that the TCPA will enable them to avoid frequent interruptions from telemarketers. Millions of phone customers will be sorely disappointed if these rules are adopted as proposed.

The focus of the act is not on telemarketing fraud but on how consumers can regain control over their phones and protect their privacy. Intrusive telemarketing calls are a major source of concern for consumers. The TCPA holds out to consumers the promise that such calls can be stopped. The goal of the FCC regulations should be the same as the goal of the legislation: how best to accomplish this end.

Consumer Action believes that the FCC should authorize the creation of a National Telemarketing Center (NTC) database that would contain the names and phone numbers of consumers who do not wish to receive any kind of telephone solicitations.

## II. NATIONAL TELEMARKETING CENTER

The Center itself would be authorized by the FCC but run by a board made up of industry and consumer representatives. Telemarketers would be required to submit their lists to the NTC. The Center would purge from these lists all names found in its National Telemarketing Database. National, state and area code specific lists could be submitted. The cost of such searches would be borne by the company submitting the list. There would be no charge to the consumer to be included in the database. Standardized notification language and forms would be developed by the Center for use in determining which consumers desired not to receive telemarketing calls.

Such an industry/consumer-run Center would allow the intent of the legislation to be honored without continuous FCC involvement or the use of tax monies.

CA believes that such a national database would also be advantageous to companies engaged in telemarketing. It avoids the added costs and problems of dealing with separate state databases or lists that are developed by separate companies that may use inconsistent standards. A company using only lists cleared through the Center's database would be considered to be in compliance with that part of the TCPA.

## III. SPECIFIC COMMENTS PERTAINING TO THE PROPOSED RULE MAKING

### "C. EXCEPTIONS TO PROHIBITED USES OF AUTO DIALERS"

9. CA is extremely concerned that exemptions in this area be kept as narrow as possible. Consumers' privacy concerns are quite broad and do not extend solely to calls that are of a commercial nature. It is the unwanted call itself that is the problem. In addition, the proposed exemptions provide opportunities for "creative" telemarketers to escape the spirit of the legislation and the implementing regulations.

CA proposes that any exemptions should be authorized for a period of two years and not be made permanent until after a full study of their impact. The FCC should determine that proposed exemptions have not created problems that would be seen as contrary to the spirit of the TCPA.

10. At the present time CA does not believe that there have been excessive numbers of auto dialed non-commercial calls and so an exception in this area might not create a problem as long as it was time-limited to allow the Commission an opportunity to further study this area, and did not include calls for debt collection purposes. However, to allow such an exemption for any period requires a clear express definition of "non-commercial calls." CA suggests that a non-commercial call exemption be limited to calls by civic institutions, and local, state and federal governments; and that under no circumstances could such a call be one that seeks money from the party called.

In addition, as we will repeat throughout this testimony, CA believes that *any* exemptions to the auto dialer prohibition should specify that the organization must first inform anyone it plans to call through an auto dialer of its intention to use such a mechanism; individuals objecting to receipt of such calls must be removed from the list of people to be called. These two conditions would not apply to "emergency calls."

11. The examples that are given pertaining to non-commercial calls are dealing with a fairly narrow area—calls from an entity to people with whom there is a pre-existing relationship, and which do not transmit an unsolicited advertisement. We have no problem with a narrowly written exemption being allowed to permit auto dialed, non-commercial calls to people with whom the caller has a pre-existing relationship. We are, however, concerned that the definition of pre-existing relationship be clarified so that businesses and consumers are clear as to what conduct does and does not create such a relationship. We also believe that the term “unsolicited advertisement” should be clarified to read: “any unsolicited advertisement or unsolicited invitation to purchase or try out an item or service available for sale.”

Here, too, CA believes that *any* exemptions, except for emergency calls, to the auto dialer prohibition—including those for non-commercial calls—should specify that the organization must first inform anyone it plans to call through an auto dialer of its intention to use such a mechanism; individuals objecting to receipt of such calls must be removed from the list of people to be called.

12. The issue of the treatment of non-profit organizations is an extremely significant one. As the Commission’s discussion notes, “...the TCPA includes an exception to the definition of ‘telephone solicitation’ for live operator calls by a tax-exempt nonprofit organization. The TCPA does not specify whether such an exemption applies to auto dialer calls.” It is Consumer Action’s position that this exemption should definitely *not* apply to calls from non-profit organizations using auto dialers.

There are two issues here. First, the question of the nuisance and invasion of privacy inherent in any call through an auto dialer. As Congress noted in its findings, “(10) Evidence compiled by the Congress indicates that residential telephone subscribers consider automated or prerecorded telephone calls, *regardless of the con-*

*tent or the initiator of the message, to be a nuisance and an invasion of privacy.”* [Emphasis added] The fact is that auto dialer calls from a non-profit can be just as annoying, and as much an invasion of privacy, as calls from any other organization. There are a great many non-profit organizations in this country, many of the size and funding to support massive telephone solicitation campaigns utilizing auto dialers, campaigns that could invade the privacy of a great many consumers.

Congress made its reluctance to approve any auto dialer calls to residential customers quite plain when it limited them solely to calls for “emergency purposes” or calls exempted by the Commission. It is clear that Congress could specify no acceptable examples for such calls; in leaving the door open to exemptions it noted that such exemptions should “not adversely affect the privacy rights that this section is intended to protect.” It is our position that opening the door to any auto dialer calls on behalf of non-profits will certainly have an adverse impact on privacy. This is especially true because the proposed exemption does not even distinguish between those agencies calling members or people with whom they have had a relationship, and calls to strangers. As the Commission notes in #13, “cold contacts” generate many consumer complaints. This statement also should apply to cold calls from non-profit organizations.

Second, the TCPA does not consider the larger issue of calls that are made on behalf of a non-profit or supposedly on behalf of a non-profit. There has been much abuse in this area. In some instances the non-profit gets only a very small fraction of the funds raised—in essence they have sold the use of their name. In other cases, so-called “non-profits” have been created solely for telemarketing purposes. Exempting non-profits from this section will stimulate the use of auto dialers by non-profit organizations, contributing to a loss of privacy by telephone customers. In the event non-profits are exempted from this section, CA believes that such ex-

emption should only cover calls that are made by the non-profit, not calls that are made on behalf of a non-profit.

CA believes that *any* exemptions to the auto dialer prohibition—including those by non-profit organizations—should specify that the organization must first inform anyone it plans to call through an auto dialer of its intention to use such a mechanism; individuals objecting to receipt of such calls must be removed from the list of people to be called, regardless of the reason for the call, unless it qualifies as an “emergency call.”

13. The linkage of “former and existing clientele” is too broad. If I purchased a suit from a store five years ago and never returned, I have no current relationship with that firm, and that business should have no need to send me a privacy-violating message through an auto dialer. In dealing with this category, the Commission should exclude former clientele from the category of allowable auto dialer calls, and should seek comment on a reasonable time period to define current and former clientele. We suggest that anyone you have not done business with in a one-year period is a “former” client; organizations should be prohibited from sending auto dialer messages to former customers.

Here, too, CA believes that *any* exemptions, except for emergency calls, to the auto dialer prohibition—including calls to existing and former clients—should specify that the organization must first inform anyone it plans to call through an auto dialer of its intention to use such a mechanism; individuals objecting to receipt of such calls must be removed from the list of people to be called.

14. A business relationship is, by definition, one that is current in nature. The mere fact that a person bought a product or service from a company two years earlier does not mean that there is now a business relationship in place. To CA, a business relationship must be one that is held together by a contract or other similar arrangement.

Here again, CA believes that *any* exemptions, except for emergency calls, to the auto dialer prohibition—including those to people with whom one has a business relationship—should specify that the organization must first inform anyone it plans to call through an auto dialer of its intention to use such a mechanism; individuals objecting to receipt of such calls must be removed from the list of people to be called, regardless of the reason for the call.

15. There should be no exemption for debt collectors. Improper debt collection practices are a major source of consumer complaints. First, most of these complaints involve harrassment conducted over the phone. Given this history, there is a real possibility that allowing auto dialers to be used for debt collection purposes will increase the potential for harrassment, and will lead to violations of federal debt collection law and regulations. For example, use of auto dialers will encourage harrassment by persistent, repeated calls to debtors. Use of auto dialers—except for dialing purposes only—does not give the recipient of the call the opportunity to discuss with a live person any errors made by the collection agency, or enable the subject to challenge the debt claim.

Second, use of auto dialers to place debt collection calls would be a violation of the Fair Debt Collection Practices Act, because it would allow, promote and facilitate the communication of the alleged debt to third parties, namely, anyone who happened to answered the phone (including minor children and other immediate family members, visiting friends, relatives, maids, repairpeople, salespeople, etc.). Such an action is expressly forbidden under the law. The only instance in which such a call could meet the requirements of that law would be if the call were placed by the auto dialer merely to allow the connection to be made; communication would have to be made solely by a live person, if only to confirm the identity of the person receiving the message. For such an exemption to be allowable, the FCC would first have to specify separate conditions for auto dialer calls by debt collectors,

in order to guarantee that no third party answering the call could learn that the call involved collection of a debt.

Third, it is our belief that calls by debt collectors do not fall under the allowable exemption categories of the TCPA. These are clearly commercial calls that adversely affect the privacy rights of the people called. The TCPA provides no justification whatsoever for such an exemption.

16. We disagree with the interpretation by the FCC of debt collection calls. Debt collection calls are by their very nature intrusive and involve an invasion of the privacy of the party called. This fact has already been clearly recognized by federal law. The Fair Debt Collection Practices Act recognizes the need to protect the privacy of people called by debt collectors, by limiting the hours in which such calls might be placed. The FCC's proposal lacks even such a minimal protection for the subject of debt collection calls, and would potentially encourage violations of federal law by permitting auto dialer calls with great frequency and at any time of the day or night.

The Fair Debt Collection Practices Act also recognizes the privacy implications of debt collection calls by allowing debtors the option of forcing debt collectors to end communication with them. This provision is a clear acknowledgment by Congress that such calls can be intrusive and violations of privacy, and, when necessary, should be limited. Considering the ways in which Congress has protected the privacy of debtors in the past, the Commission should be careful not to reduce such protections now.

Third, the fact that debtors have had a "prior or existing business relationship" with a creditor is irrelevant. A debtor who has failed to pay a debt is, in most cases, a person who no longer wishes to have a relationship with the creditor. Receiving calls from a party you do not wish to do business with, by definition, is an invasion of privacy. The fact that the debtor may be obliged to receive such calls

from a live person is beside the point; to the extent that auto dialers increase the number of calls that debtors receive, then these people have been singled out to suffer reduced privacy because they have been alleged to owe money to someone.

17. We do not disagree with the proposed interpretation of "emergency purposes," but we would see such emergency calls as only coming from governmental agencies or utility companies. We suggest that the regulations specify that frivolous use of this exemption is a violation.

"D. AUTO DIALER SOLICITATIONS TO BUSINESSES."

18., 19. We see no reason why businesses should have fewer privacy protections than residential customers. The Commission notes the importance of balancing the commercial speech objectives of advertisers with business privacy concerns. However, CA would hold that the commercial speech objectives of advertisers are the same whether the call is being made to a residence or business and thus should be given no more weight here than in the discussions of the residential market. No exemption to privacy protections should be permitted for auto dialer calls to business customers.

"F. TELEPHONE SOLICITATIONS TO RESIDENTIAL SUBSCRIBERS."

22. CA wishes to repeat the concern pertaining to non-profit agencies that we set forth in #12. We think that a distinction needs to be drawn between calls actually made by a non-profit and those that are made on behalf of non-profits. There have been significant problems of telemarketing abuse related to calls that were allegedly made on behalf of non-profits. Any exemption should be read to cover only those calls actually made the by non-profit itself.

23. The privacy and nuisance concerns of auto dialer calls are very similar to the concerns of calls placed by a human being. Both types of call invade a person's privacy. In addition we have learned that when you shut down one form of communication or one aspect of a problem it will spring up in another. If there are not

consistent consumer protections in place for all calls then the type of problems that we have seen on auto dialed calls will simply migrate to human-placed ones.

However, TCPA deals with the two types of calls in very different ways. TCPA would eliminate many auto dialed calls; it does not eliminate live telephone solicitations, but instead gives consumers the right to stop receiving them. In seeking guidance for how to handle this divergent approach, the Commission should consider the finding of Congress, that "Many consumers are outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers." This statement lumps all telemarketing calls together, with the clear intention that citizens be given the right to limit any and all such calls. Therefore, for both auto dialed and live telephone solicitations, the Commission should take the most proactive approach in giving consumers the right to privacy from such calls.

24-26. We are concerned that the FCC in its argument in items 23. and 24. is minimizing the privacy and nuisance issues related to telemarketing calls. CA does acknowledge that telemarketing serves a service for consumers. The TCPA speaks to this when it talks of the \$435 billion in total telemarketing sales in 1990. However, we make a very real distinction between in-bound and out-bound telemarketing calls. It is the outward bound calls portion of that \$435 billion that we are particularly concerned with.

When the consumer makes the call the purchase decision is quite similar to one made at a retail store. The consumer has initiated the call after having made some basic decisions in terms of needing a type of product and then deciding which brand and how much he or she wants to pay.

When a telemarketer makes the call he or she must create a need to buy in the mind of the called party and further get the person to buy the specific product being sold while still on the phone. In essence, the telemarketer needs to convince the

consumer not to comparison shop but to buy on impulse. As such, it is extremely important to insure that tight consumer protections be in place.

There is nothing in TCPA that eliminates the option for consumers to receive or place telemarketing calls. The focus of TCPA is to insure that those consumers who do not wish to receive in-bound telemarketing calls can have their desires honored.

It is the conclusion of CA that two of the proposed rules as set forth in Appendix B should apply to both auto dialed and live solicitations. Specifically, the following rules should apply to both types of calls:

- Except for emergency calls, telemarketing calls should not be placed to those lines set forth in § 64.1100 (a)(1), (a)(2);

- In all calls, the caller should clearly identify the business or individual making the call, and state the phone number and address of the individual during or at the end of the call, as set forth in § 64.1100 (d)(1), (d)(2).

27. As noted above, CA believes that the intent of TCPA can best be insured through the creation of a National Telemarketing Center (NTC) that would operate a National Telemarketing Database (NTD).

28-29. The FCC correctly notes that there would be some limitations to the total effectiveness of a national database. But, on balance we can find no alternative that would even come close to equaling what such a database could deliver. CA does not see a problem with not charging the consumer for being listed in the database. While this does mean that the telemarketing industry will have to bear the total cost of such a system, it will be these very companies that benefit from such calls. Further, we believe that the costs of accessing the database will be offset by having a list that excludes those consumers who specifically don't want to receive such calls.

Such a list will be significantly more valuable than one that would include such

While it is true that if the database were updated on a quarterly basis that consumers could still receive such calls for a period of several months, that could be explained to the consumer. Further, such a system would still provide greater assurance of not receiving calls than any other alternative.

The issue of consumers listed in the database continuing to receive calls from non-profits is one that we spoke to in #22. Primarily, we are concerned when the calls are made on behalf of a non-profit there is great opportunity for telemarketing fraud and nuisance calls. We believe that the FCC should revisit the whole charitable institutions exemption after two years to determine whether potential consumer complaints might justify further action being taken.

CA believes that the privacy concerns related to the database can be handled quite simply. As we noted in the second section of our brief, telemarketers would not actually have access to the database. Instead, they would contract with the center to purge the names of people who do not wish to receive telemarketing calls.

29. CA believes that it is an advantage to have the NTC an independent entity not supported by the taxpayer. Such a data base would actually benefit telemarketers and it is they, not the taxpayer, who should bear the cost. An independent NTC that is governed by a board of consumer and industry leaders would have more support from consumers than one that was run by either industry or the government.

30. It is CA's understanding that a network solution to the problem does not exist technologically and could not exist in the foreseeable future.

31. Directory markings of those consumers who do not wish to receive telemarketing calls is not an efficient method to use. There are hundreds of local telephone companies producing thousands of directories, and CA does not understand how national telemarketers would be able to access them all in any cost effective fashion. Further, there is the special problem of consumers who may have unlisted

phone numbers but who might be on one telemarketing list or another because of purchases or some other reason. Since they are not listed in the directory there is no way they could have the special mark placed next to their name. Further, directories are only updated on a yearly basis which would result in a far longer time lag time than would be the case with the NTD, which could be updated quarterly.

32. An industry or company based "don't call" list would be an administrative nightmare and would only offer the individual consumer a patchwork of protection. Key problems would include: forcing the consumer to notify every single company that might potentially call him or her; the lack of standardization between companies in terms of how consumer were notified as to the existence of such lists; what form they are kept in; and how to merge lists from different companies.

In addition, such a system would be a regulatory nightmare. One, for the individual company, which could never be sure that lists they buy had been screened properly; and two, for the regulators who would have to track a paper trail for each consumer complaint to determine where there had been a violation of a don't call request.

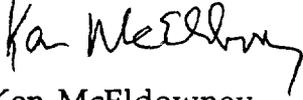
33. While CA believes that time of day restrictions are important, they do not seem appropriate to be considered as a alternative. Consumers who wish to stop all incoming telemarketing calls want to stop these calls, not just channel them into certain times of the day. Our reading of the TCPA indicates that merely adopting time-of-day restrictions would not honor the spirit of the legislation.

## CONCLUSION

Consumer Action strongly supports the TCPA and the FCC efforts to implement this highly important piece of consumer protection legislation. We believe that the spirit of the bill can best be achieved by the establishment of the National

Telemarketing Database governed by the National Telemarketing Center and restricting exemptions as much as possible.

Respectfully submitted,



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May 21, 1992