

Merrill Lynch & Co., Inc.
3000 K Street, N.W.
Suite 620
Washington, D.C. 20007
202 965 5550
FAX 202 965 5580



Bruce E. Thompson, Jr.
Vice President
Director of Government Relations

RECEIVED

May 26, 1992

MAY 26 1992

ORIGINAL
FILE

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

Federal Communications Commission
Office of the Secretary

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

Dear Ms. Searcy:

Merrill Lynch, Pierce, Fenner & Smith, Incorporated respectfully submits the attached comments in response to the Commission's Notice of Proposed Rulemaking in the above-referenced matter.

We include an original and nine copies of our comments.

Sincerely,

Bruce E. Thompson, Jr.

No. of Copies rec'd 010
List ABCDE

RECEIVED

MAY 26 1992

Federal Communications Commission
Office of the Secretary

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.**

In the Matter of)
)
The Telephone Consumer Protection)
Act of 1991)
)

CC Docket No. 92-90

**COMMENTS OF
MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.**

Merrill Lynch, Pierce, Fenner & Smith, Incorporated ("Merrill Lynch") welcomes the opportunity to comment in response to the Commission's Notice of Proposed Rulemaking under Title II of the Communications Act of 1934 which has been mandated by the Telephone Consumer Protection Act of 1991 ("TCPA"). Merrill Lynch is a direct, wholly-owned subsidiary of Merrill Lynch & Co., Inc., a publicly-held, global, diversified financial services company that through its subsidiaries is engaged in the securities, commodities, insurance, money management, investment advisory, investment banking, interest rate and currency swap and foreign exchange businesses (among others).

Our comments relate to the Commission's request for comment "concerning the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object." Aside from the question of their constitutionality, we are greatly concerned that any restrictions on live telephone solicitations beyond reasonable time and place restrictions (e.g., no calls after 9 p.m. to known residences) or requiring internal guidelines on telephone conduct will greatly impede consumer access to financial services, have a significant impact on our sales productivity, and place an unreasonable compliance burden on professional and courteous salespeople whose business relies on phone sales. A direct consequence is a reduced ability to bring new savers to the financial system, and new investment to the capital markets.

We at Merrill Lynch strongly believe that the customer's interest must come first. We operate under the principle that no one's bottom line is more important than the reputation of the firm. Therefore, we believe that it is in the best interest of our firm to use professional and courteous relationship-building techniques, not harassment or nuisance, to attract new contacts to our products and services.

Constitutional Privacy Rights--Not Involved in Live Phone Solicitations

Merrill Lynch does not believe that privacy rights are violated by residential callers who are courteous and who respond respectfully to their prospect's desire to end the call. Such calls are, of course, very different from automated calls that cannot be disconnected or that deprive persons of the free use of their telephone equipment. There is a clear distinction between live and automated calls regarding the ability of the person called to give or withhold consent to continuing the call; we have no objection, therefore, to provisions of the TCPA relating to regulation of automatic dialing systems and facsimile machines.

We do not believe that the same concerns as to giving consent exist with live solicitations. Lack of consent to a live call can be expressed simply and immediately by a live response (such as "no thanks") and disconnecting. If a constitutional right not to receive any live telephone solicitation, regardless of its tone, did exist, then such right would extend to non-profit calls as well as for-profit calls. There is no justification for regulations burdening business calls that are for profit, and exempting business calls that are not. If restrictions are to be placed on respectful telephone solicitations, then there would clearly be a need for additional Commission authority to restrict as well those calls exempted under 47 U.S.C. § 227 (a)(3).

Merrill Lynch does not believe that any broad restriction on residential calls that affects professionally and courteously conducted solicitations is needed. In our view, any such restriction would be unconstitutional.

Nature and Value of Merrill Lynch Solicitations

Merrill Lynch's Private Client business depends on prospecting by our Financial Consultants, or "FCs", to identify potential investors in the community who may not know of our services and may welcome such information. The telephone is the most direct, cost effective, efficient and versatile vehicle for communicating such information to the general public. Our FCs are trained and motivated to conduct all telephone communications courteously and professionally, consistent with a corporate ethic that emphasizes the best interests of the client (and by extension, potential client). Clearly, high pressure tactics are inconsistent with the client's best interests, and are not permitted.

It is important to recognize that in every community there are many people who genuinely need the assistance of a professional financial advisor, and do not really know how to "tap in" to Merrill Lynch's resources. Merrill Lynch Financial Consultants bring a significant amount of new client assets to the financial markets each year directly as a result of contacting those clients initially by cold call. For this reason, we feel that there is a shared benefit for prospects and Merrill Lynch in telephone contact. While the truly uninterested individual may consider a cold call a momentary irritant, a contact from a professional who treats prospects with courtesy and respect is a necessary component of investor involvement in the financial markets, and of capital formation.

Our team of 11,000 Financial Consultants in more than 500 offices places over one million unsolicited prospecting calls per year, yet our sales and compliance supervisors have received very few objections from those contacted complaining of nuisance, harassment or inappropriate persistence. In fact, only one half of one percent of all complaints directed to executive management since January 1991 involved cold calls. When such a complaint is received, our managers make every effort to assure that the complaining party is not contacted again, and that the subject of the complaint is reminded of the proper manner of telephone solicitation.

Proposed Regulatory Alternatives

We believe that consumer dissatisfaction with telephone solicitation relates primarily to automatic dialing, prerecorded messaging, and automatic facsimiles, and that there is no need to restrict live telephone solicitation. The Commission's statistics showing only 74 complaints in 1991 regarding all live solicitations, compared to the 1.5 billion live solicitations a year made by brokers, alone, cited by Chairman Edward Markey of the House Telecommunications and Finance Subcommittee, do not justify imposing the burden of protecting against unsolicited live calls on the businesses involved.

Our concerns with the Commission's specific proposed alternatives are discussed below.

Databases. Our objections to this alternative relate to its impact on access to potential clients, FC productivity, and cost:

I. **Access.** A national objectors' database is a deceptively attractive solution to an occasional nuisance. The availability of a no-cost option to block receipt of commercial messages in any medium might well carry initial widespread appeal and be well-subscribed. But the unintended result is the stifling of the communication of information that sustains our economy and provides necessary and valuable services to the public. Although our many current clients who were first acquainted with us by telephone clearly found the use of the telephone for that purpose valuable and appropriate, we fear that many might also have been interested in subscribing to an objectors' list, had it been available, to address other types of calls, not knowing that information regarding their personal investing options would thereby be foreclosed.

II. **Productivity.** The list of subscribers would likely grow to a significant number as it has under a similar scheme in effect since late 1990 in Florida, where the list grew from under 2,000 names to over 26,000 in four quarters. Were only a tiny percentage of consumers to subscribe to an objectors' list, however, the impact would still be great, since the burden on the FC and the firm is the same regardless of the list's size. In Florida, our FCs must compare every number they wish to call against the State's list of numbers only, which increases significantly the time it formerly took to look up prospects' numbers. Due to subscribers' privacy concerns, a Federal database would likely also provide numbers only, making cross-referencing of prospects against the list very difficult. An FC could, therefore, make far fewer calls per day than before, diminishing his or her productivity.

Compounding the productivity problem is the impact that the list's existence has had on the FC's relationship with the prospect community. Due to difficulties in complying with a list that remains constantly out-of-date, we have logged FC encounters with prospects claiming to be on the list (many of whom threatened action that could jeopardize the FC's career) who actually were not yet on the list. The short term effect on the productivity of the FCs involved was enormous. Additionally, the expectations of the consumer wishing to be shielded from calls was not met. The problem will only get worse with time, as more of the listed objectors change addresses and phone numbers, and once again begin to get calls after they believed themselves to be shielded from such calls. It has been estimated that 25% of the U.S. population moves each year (mostly within the same community). The constant out-dating of the database that results will pose a major consumer acceptability problem with this alternative (as with others).

The productivity effect can not easily be mitigated by other prospecting methods in our industry. There is no good alternative to cold-calls for an FC to attempt to serve prospective clients. He or she begins a career with few, if any, referrals. Our inventory of products is affected by so many variables that their availability needs to be communicated to the public quickly. Prospecting with bonds, for instance, cannot be done effectively through any medium other than the telephone because bonds at given prices are available for only a short while. We could be accused of "baiting and switching" if we advertised in the newspapers or mailed a circular, as conditions and availability change so quickly. Furthermore, the cost of other alternatives is prohibitive. Newspaper advertisements average \$3200 *per ad* in Florida. Phone bills for a representative Merrill Lynch sales office in Florida average \$5000 *per month*, including long distance for 40 FCs.

III. **Cost.** The Florida database is funded (partially, at least) by subscriber fees of \$10. The TCPA, however, forbids a charge to subscribers. The Commission, furthermore, anticipates that no taxpayer funds will be available for the system. Businesses involved in telephone sales would, therefore, foot the entire cost of a federal database. Aside from the costs of setting up and maintaining such a database, broker-dealers accessing the database must pay for software, hook-up

and significant on-line time, if the database is computerized. Where the broker force exceeds 11,000 people, as at Merrill Lynch, these are significant new costs.

Network Technologies. The same concerns for access to potential clients are raised by network technologies such as prefix blocking as are raised by databases. The burden on the telephone numbering plan that this would place seems out of proportion to the problem, and in any case, authority would be required for the Commission to include non-profit callers in the class of calls that could be blocked, in order to truly address the nuisance concerns.

Special Directory Markings. Merrill Lynch FCs obtain names of prospective clients through a variety of sources, including referrals, public announcements, and professional listings, among others. It is often difficult to know the location of a prospect for whom a telephone number is available. A directory-marking system would be virtually impossible to comply with where the address or community of the prospect is not known. Where the prospects' residential address is known, furthermore, a difficulty arises where a community is served by more than one phone book, both as to the necessity of a requirement that all competing phone book providers use special markings, and the necessity for all telemarketers to be sure that all available phone books were checked for each number called. FCs who prospect outside of one community, which is the rule rather than the exception, would be required to maintain a large volume of phone books with overlapping coverages. The very process of checking and cross-checking such an unwieldy resource is prohibitively time-consuming, and full compliance is hard to assure.

Industry-based or Company Specific Do Not Call Lists. We at Merrill Lynch make every effort to comply with a prospect's stated desire not to receive additional phone solicitations. Although we maintain an informal internal list of such prospects, we believe that a mandatory system could not both meet consumer expectations about the capabilities of such a system and be economically viable or enforceable. Such a system would effectively require us to constantly track persons who had rejected our services so that we did not contact them again, regardless of their changes of address and telephone number. The system costs merely for setting up such an internal information system is estimated at over \$100,000. Much more expensive, however, would be the storage, sorting software and inputting costs required to maintain accurate numbers for objecting prospects and to keep such information constantly available to our 11,000 FCs. The long-term costs of such a system are in the millions of dollars.

Under our current internal system, there are no federal penalties for a failure to prevent any return call to persons listed. If this alternative were to be federally mandated, and a penalty, administrative action, or private right of action to attach, we would urge that the standard that applied be one of reasonableness, e.g., that firms establish internal listing procedures reasonably designed to assure that persons who have clearly indicated to their caller or other designated employee of the firm a desire not to be called by the firm or its employees are not called within a reasonable period after the request. Strict liability should not be applied, due to the size and turnover of the broker force, training and notification considerations, mobility of the U.S. population, and the difficulties inherent in a determination of whether a prospect in a particular instance clearly expressed a desire not to be called.

Any difficulties inherent in maintaining such a system on a company-wide basis are compounded if required to be maintained on an industry-wide basis. A central administrator would have to be established, with attendant costs and concerns regarding the proprietary nature of the information pooled. More importantly, the products and services offered as well as sales techniques utilized by each firm vary widely among firms in the industry, and resistance or objection to solicitations by one firm can not be assumed to apply industry-wide.

Time of Day Restrictions. Although no federal mandate now requires good telephone etiquette, Merrill Lynch FCs are recruited and trained to be professional and courteous at all times. Maintaining reasonable hours for contacting prospective clients is inherent in professionalism and courtesy, as well as in good business practice, as no well-trained FC wants to begin a relationship on a rude footing. We do not oppose, therefore, reasonable restrictions on times during which prospects may be called at home. Any restriction must take into account the flexibility and diversity of schedules and lifestyles, and the very personal nature of the services offered by our sales force. Once again, a standard of reasonableness, rather than strict compliance, should be applied.

Other Suggested Alternative

Internal Guidelines on Telephone Conduct. The Commission might consider requiring telemarketers to maintain internal written guidelines on telephone conduct to encourage all telemarketers to give consideration to the professionalism and courtesy exercised by their employees. Such guidelines would alert employees to internal or industry "do not call" lists, inform of "time of day" guidelines considered proper by the firm, remind of the conduct guidelines followed in the firm's training program or viewed as appropriate by the firm, or provide such guidelines for the first time.

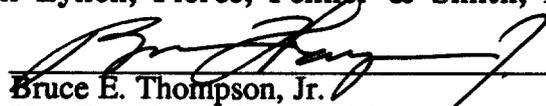
This alternative would require businesses to affirmatively address telephone conduct concerns as an internal policy matter without imposing unreasonable burdens on legitimate business practices. Since only guidelines are involved, it should be an absolute defense to private suits under the TCPA that the firm had taken steps reasonably designed to develop and distribute to pertinent employees written guidelines on telephone conduct.

Merrill Lynch appreciates this opportunity to convey our concerns regarding restrictions on live telephone solicitations, and we would be glad to provide any additional information that the Commission staff may require.

Respectfully submitted,

Merrill Lynch, Pierce, Fenner & Smith, Inc.

By:


Bruce E. Thompson, Jr.
Vice President, Director of Government
Relations
Merrill Lynch & Co., Inc.
3000 K Street, N.W., Suite 620
Washington, D.C. 20007