

gave the called number to the caller or its agent (e.g., in group homes, dormitory situations, etc.),

(b) the called number is that assigned to a business employing the called party, or

(c) the called party's number has subsequently changed and the caller has not been so notified.<sup>22</sup>

- (3) the called party has a prior or current business relationship with a calling party (as described elsewhere in these comments).

**VI. THE COMMISSION HAS APPROPRIATELY ALLOWED CALLING PARTIES AUTHORIZED TO USE AUTODIALERS DELIVERING ARTIFICIAL OR PRERECORDED MESSAGES FOR SOLICITATION OR OTHER COMMUNICATIONS TO USE THIRD PARTY CONTRACTORS, AGENTS AND AFFILIATES.**

Entities acting on behalf of parties permitted by the TCPA to make autodialed calls with prerecorded or artificial communications or solicitations should stand in the shoes of these parties when it comes to the exceptions and obligations set out in the Act.<sup>23</sup> These entities can and often will include third party contractors and agents, and also affiliates of the qualifying business entity where the affiliate is engaged in telemarketing, customer service or debt collection for or on behalf of other companies within the corporate family.

These third party or affiliated calling enterprises play an

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<sup>22</sup> See 137 Cong. Rec. H11311 (daily ed. Nov. 26, 1991) (statement of Rep. Rinaldo) (discussing issues related to a person's change in residence and change in telephone number).

<sup>23</sup> See, e.g., NPRM at para. 14, 16.

important role in modern use of telephone technology for debt collection, customer service and product and service marketing. As they are held to the exacting contractual standards of those entities on whose behalf they are making the calls, so too should the third party contractors and affiliated telephone services entities benefit from the exceptions for which the principal party has qualified under the TCPA. As they benefit from the exceptions of the principal, the third party contractors and affiliates would be subject to the obligations imposed on the principal under the TCPA.

Generally speaking, it makes no difference to customers or consumers whether the entity making an autodialed solicitation or communication is the calling party or an entity acting on behalf of the actual calling party. At the same time, failure to extend the exceptions of the Commission's rules to third party contractors and to affiliates could cripple the telemarketing industry upon which many businesses are dependent. This would have a significant dampening effect on employment in the telemarketing industry itself, and would curtail the operations and activities of many industries.

**VII. PREDICTIVE DIALERS WHICH DELIVER NO MESSAGES OR ONLY PRERECORDED OR ARTIFICIAL MESSAGES ASKING THE CALLED PARTY TO AWAIT A LIVE COMMUNICATIONS, AND AUTODIALERS WHICH DO NOT DIAL RANDOMLY OR SERIALY ARE ENTITLED TO SPECIAL TREATMENT UNDER THE TCPA.**

The Commission invites comment on whether it is in the

public interest to recognize the inherent difference in the nuisance factor of autodialer calls as opposed to live solicitations. Citicorp submits there are inherent differences between and among two classes of calls relevant to the Commission's inquiry. These two classes are:

- (1) autodialed calls carrying prerecorded or artificial voice messages or telephone solicitations, and
- (2) predictively dialed calls<sup>24</sup> which carry a prerecorded or artificial voice message asking the called party to wait for a live communication or solicitation.

Citicorp submits it was the first category of calls which raised the ire of some Members of Congress and moved legislators to draft and consider the TCPA. Within this category are the calls that are arguably the most intrusive, disruptive, unexpected and undesirable of those received by telephone subscribers. These calls, especially when made in the absence of an established business relationship or prior consent, are clearly within the prohibitions of the TCPA unless some of the Act's exceptions otherwise apply.

The second category of calls, however, warrant special Commission treatment beyond whatever treatment such calls deserve

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<sup>24</sup> The Commission provides an excellent discussion of predictive dialing technology in Paragraph 15 of the NPRM. Predictive autodialers are called "predictive" because they are programmed to predict, based upon a number of factors, the end of the last call occupying a live telephone operator (e.g., a customer service representative or a debt collector), so that the autodialer then can alert the operator to the delivery of the next connected call.

by virtue of the fact they qualify for exceptions articulated by the Commission in its NPRM. The Commission should exercise the flexibility given it by the Congress to "design different rules for those types of automated or prerecorded calls that it finds are not considered a nuisance or invasion of privacy."<sup>25</sup>

For example, predictively dialed calls generally deliver prerecorded or artificial voice messages that are usually short and are delivered only when a live operator cannot immediately take a connected call. The kind of a message typically delivered in this context has one purpose, that is to request the called party to wait or hold until a live operator can establish a connection and come online.

This category of autodialed calls should be treated by the Commission, at most, as a "commercial call with no advertisement." The prerecorded or artificial voice message asking the called party to wait for an important live message or to wait for a customer service representative to come online, is clearly "commercial" and just as clearly does not constitute the delivery of telephone advertising or solicitation. The treatment of these calls as "commercial calls with no advertisement" would take them outside the prohibitions of Section 64.1100(a)(2) of the Commission's tentative proposed rules.

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<sup>25</sup> TCPA, Section 2, Finding 13.

The Commission also should exempt entirely from the TCPA those automated dialing systems which store, produce and dial phone numbers generated from the calling party's customer list or the calling party's company-specific "can call" solicitation list. Where autodialers are programmed with other than random or serially generated numbers, they should fall outside the reach of Section 64.1100(a)(2) of the Commission's proposed rules.

**VIII. THE COMMISSION SHOULD ADOPT THE "COMPANY-SPECIFIC DO-NOT-CALL LIST" APPROACH FOR RESTRICTING TELEPHONE SOLICITATIONS.**

Citicorp commends the Commission for exploring alternative means for restricting telephone solicitations to those individuals who do not wish to receive them. By reviewing carefully all options, the most effective and least burdensome alternative is likely to be adopted.

**a. The Company-Specific Do-Not-Call Approach is the Most Sensible Alternative.**

Citicorp supports the alternative described by the Commission as the "company-specific do-not-call list." This approach warrants special attention because:

1. it will work;
2. it will accord greater recognition of telephone subscriber privacy interests than other alternatives;
3. it will give telephone subscribers the opportunity to choose for themselves which telephone solicitations they wish to receive and which they wish to avoid;

4. it will avoid undue costs or superfluous restrictions upon telemarketers;
5. it will avoid burdening the Commission's already finite budget and resources;
6. it will provide an appropriate balance between the protection of legitimate privacy expectations and the continued viability of telemarketing as a necessary and fruitful business service.

Citicorp currently has in place a number of company-specific do-not-call lists. These have been found to be effective from the standpoint of the individuals as well as the businesses involved. Citicorp primarily uses telemarketing technology in connection with its existing customers, and Citicorp avoids calling those customers and consumers who indicate they do not wish to receive telemarketing calls. In the case of its credit card customers, for example, Citicorp communicates at least once a year to its cardholders that should the cardholder not wish to receive telephone solicitations, the cardholder need only communicate that desire to Citicorp in writing or by calling an 800 number. In addition, in-house training and calling scripts for Citicorp's telemarketing personnel or contractors instruct callers that if a customer indicates he/she does not want future telephone solicitation, then that request is to be noted in the customer's file and honored.

The company-specific do-not-call list is not only workable, it also provides Citicorp's cardholders, for example, with greater insulation from unwanted telemarketing than would be

provided in a national data base system under the TCPA. If Citicorp customers request placement on one of its company's do-not-call lists, then that customer will not be called even though the TCPA exceptions for established business relationships would permit such a call. If, however, a national do-not-call list is implemented and if a Citicorp customer requests placement on that list but fails to take the additional step of notifying Citicorp itself, then that customer likely will be solicited under the TCPA established business relationship exception. This severing of the customer from the business when it comes to communication of a do-not-call preference is an unintended side-effect of the national list approach, one which disturbs the normal business-customer relationship and one which, as a result, may subject the customer to greater unwanted solicitation than intended. The TCPA, moreover, allows telemarketers to make two calls per year to any person, even if he/she appears on a do-not-call list, before the person may sue the telemarketer under the Act. In contrast, Citicorp's do-not-call lists foreclose any and all calls to individuals who request to be put on the list.

Citicorp endorses the approach of company-specific do-not-call lists. In implementing an in-house do-not-call list, the Commission should specify precisely the governing parameters. Citicorp would include the following elements in any set of guidelines:

- \* All telemarketers should have a written policy

implementing company-specific do-not-call lists.

- \* As part of that policy, all telemarketing calling representatives should be informed of the existence of a do-not-call list and the procedures to be followed in meeting a customer's request to be included on the do-not-call list.
- \* Telemarketers should be given thirty days to take the necessary administrative and software programming steps needed to include an individual's name on an in-house do-not-call list.
- \* Customer requests to be included on a do-not-call list should have a life of no more than two years. While the customer should have the opportunity at that time to continue on the list, that continuation must be positively indicated by the customer.<sup>26</sup>
- \* Customers may be notified of their ability to be included on in-house do-not-call lists through company-specific notices included in regular company mailings and even the inclusion of notice within phone books of general circulation.<sup>27</sup>
- \* Customers requesting placement on the do-not-call list of one company within a holding company

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<sup>26</sup> The Commission should provide guidance on the effect of customer termination of a business relationship on the customer's location on a do-not-call list. If a customer terminates his/her business relationship with a telemarketer, it would seem logical that the customer should be removed from the relevant do-not-call list. This will remove any cloud over whether the telemarketer may take advantage of the "prior business relationship" exception to implement customer retention efforts including calls seeking customer renewal or customer feedback.

<sup>27</sup> The Commission should reject any regulatory approach that insinuates local exchange or long distance carriers directly in the process by which a customer notifies a company that it wishes to be included or removed from a do-not-call list. Inclusion on a company-specific do-not-call list, for example, is a sensitive customer-relations matter that should be handled by the company, not potential competitors. See 137 Cong. Rec. S18785 (daily ed. Nov. 27, 1991) (statement of Sen. Pressler) (noting competitive and confidentiality concerns when phone companies become involved in implementing do-not-call regulatory alternatives).

having multiple affiliates and subsidiaries, should not automatically be listed on the do-not-call lists of other companies within the corporate family. Placement on the lists of other, affiliated enterprises should remain the choice of the customer. Conversely, a company or a caller acting on the company's behalf need not under the TCPA check the do-not-call lists of affiliates when placing a call to a customer not appearing on the company's own specific do-not-call list. This amounts to a "per company" limitation on the effect of a customer's request to be placed on a company-specific do-not-call list where the company involved is affiliated with other companies within a corporate environment.

If a telemarketer can certify and, if necessary, demonstrate that it has implemented and is in compliance with all the criteria above, then that telemarketer should be entitled to the legal presumption that it has complied with the requirements of the TCPA. The Commission should state that this presumption can be claimed as an affirmative defense in any private action or Commission enforcement action alleging violation of the TCPA.

Citicorp does not see the need for additional enforcement mechanisms to bring about the goals of the TCPA. The Commission can proceed on its own or can act upon complaint of consumers pursuant to Section 227 of the Communications Act of 1934 as amended by the TCPA. In addition, the TCPA establishes a private right of action for consumers to sue for violations of the Act and the Commission's regulations thereunder.

Additional enforcement powers, such as Commission audits of telemarketers or the imposition of Commission filing requirements

for telemarketers, would be unnecessary and costly. Congress in the TCPA made it expressly clear that the private right of action it created, as well as the Commission's general powers to investigate complaints, are to be the primary enforcement mechanisms for the TCPA.

**b. The National/regional Do-Not-Call List Should be Rejected.**

A national or regional database of telephone numbers of residential subscribers objecting to telephone solicitations should not be the regulatory alternative adopted by the Commission in this proceeding. This system, among other things, would be operationally difficult and costly to implement. For example, Citicorp's largest telemarketing center employing over 400 live telemarketers would be able to support in-house a national or regional database only if the database consisted of less than 500,000 names of non-Citicorp customers.<sup>28</sup> Anything larger would require a costly and prohibitive upgrade to the data center supporting the telemarketing function or would require contracting with a third party data processor to perform the necessary merge/purge/matching and return the data to us. These

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<sup>28</sup> Citicorp's in-house system supporting its telemarketing center can accommodate an in-house, national do-not-call database larger than 500,000 names but only where those names are those of Citicorp customers. This is because Citicorp denotes customers who do not wish to receive Citicorp solicitations by way of an asterisk inserted in pre-existing customer profiles. Creation, storage or processing and matching of a database of non-Citicorp names larger than 500,000 in number would require entirely new, albeit limited, do-not-call profiles with an appropriate increase in storage and processing capabilities.

costs would have to be added to the cost to be borne by Citicorp and others engaged in telemarketing for creation, maintenance, updating and upgrading of the national do-not-call database and the cost of periodically excising Citicorp's customers from that data base.

Aside from the costs of a national do-not-call database, there are outstanding issues surrounding the capabilities and the identity of the administrator responsible for the database. The Commission would need to ensure the adequacy of the administrator's technical capabilities, professional standards and sheer processing capacity. The complexities and systems requirements of a national do-not-call database would be daunting for any provider; the Commission would need to maintain constant supervision of the database administrator in order to conform to the statutory requirements of the TCPA.

Moreover, it is highly likely that telemarketers would resist and protest the selection of any database administrator if it were a phone company or any other possible competitor of a telemarketer. The national database of Americans requesting do-not-call status would be a unique commercial asset and a source of valuable competitive intelligence which would exist nowhere else but in the hands of the database administrator.

The value of the national do-not-call database would expand

dramatically if the database is linked, as it must be, with other identifying information such as Social Security Numbers, sex, address data, zip codes and the like. Such linkage would be necessary to establish independent qualifiers that would be used by the system administrator to establish and verify the identity of an individual requesting placement of his or her name on a do-not-call list. Many people have the same name; many maintain multiple numbers; people move. If independent qualifiers are not maintained and employed the national database will become useless. These qualifiers will also be necessary for cross-indexing and matching purposes by telemarketers when comparing in-house customer and do-not-call lists with the national do-not-call list provided by the database administrator.

This additional, qualifying data would be necessary on an ongoing basis in the case of a national database because the identifying information would be necessary for verification, updating and accuracy of do-not-call data as adds, changes and deletes occur. The national database would be unlike a company-specific system because the latter system already has in place independent, identifying qualifiers for list verification, updating and accuracy, i.e., customer account numbers and customer-specific account information. Even if the national do-not-call list administrator were required to erect walls to separate its national database operations from its other commercial activities, there would be a need for constant and

costly regulatory oversight and possibly complex and costly imposition of privacy safeguards such as those involving customer proprietary network information.

Additional privacy concerns are likely to arise, some of which may undermine the utility of the national do-not-call list itself. The maintenance of independent identifying information of the kind noted above, such as Social Security Numbers, is sure to create individual apprehension about the privacy protection accorded such data. Individuals considering the option of being placed on a national do-not-call list may decide to forego inclusion on the list in any event, but especially if they are required to disclose identifying data they deem to be private and/or irrelevant to the do-not-call request. These privacy considerations do not arise with company-specific do-not-call lists; the company simply uses data already in its possession (e.g., account numbers) to ensure that the right "John Smith" is added or deleted to its do-not-call list.

**c. Network Technologies for Screening Out Telemarketing Calls, and Special Directory Markings Denoting Do-Not-Call Requests, are Unacceptable Alternatives to Company-Specific Do-Not-Call Lists.**

The Commission alludes to an elaborate numbering assignment and subscriber blocking scenario which would assign certain telephone prefixes to all telemarketers and would enable subscribers to purchase or obtain free-of-charge screening technologies for phones that would allow them to detect incoming

telemarketing calls. This scenario, it is said, could possibly be seen as one regulatory alternative implementing the TCPA. Aside from its considerable costs for ratepayers generally, this alternative is fraught with significant administrative, practical and cost burdens for telemarketers.

These burdens arise, in part, from the requirement that telemarketers employ numbering schemes using the same prefix. This would likely be unworkable for telemarketers having a nationwide customer base; the same or a similar prefix simply is not available in every exchange for the same telemarketer to use. The telemarketer, then, would be forced to use multiple telemarketing prefixes. In addition, the telemarketer likely would face enormous administrative difficulties and costs if it were compelled to change its possibly unique, pre-existing numbers, including 800 numbers, as well as any letterhead, credit or business cards, telephone operator systems, or telemarketing screens and scripts displaying or incorporating these numbers. It is, furthermore, unlikely that there exists any block of numbers in any exchange or interexchange series that could be assigned to and support all the telemarketers that would have to use common prefixes (accordingly there would be numerous prefixes for the telemarketing industry, compounding the recognition problem for consumers under any screening scenario). Finally, there are numerous central offices across the country which would be unable to support passing on the telemarketer numbers to

subscribers' premises equipment.

This proposal should be rejected out of hand.

A similar fate should await the alternative requiring telemarketers to screen their marketing lists against telephone directories bearing special markings for those subscribers who have indicated to their respective local exchange carrier they do not wish to receive telephone solicitations.

This alternative is burdened by many of the problems associated with the national database system, particularly with respect to the involvement of potential competitors such as phone companies in the administration of the special directory systems. Such a system is also operationally impractical and probably the most costly of all the alternative regulatory approaches identified. This process would require telemarketers to collect and manually sort through thousands of generally paper-based directories across the country (an administratively huge if not impossible task), format and enter that data into some kind of system yet to be devised which would then perform a match (perhaps yet another costly and time-consuming manual task) against the telemarketer's database of customers. Chances for error in transcription, data entry and matching would be significant as would the likelihood of omission of names where phone books are missed. Telemarketers, too, would now have a

database of non-customers which they could not solicit, but which database they must maintain, update and upgrade on an ongoing basis.

The Commission should reject this alternative.

**d. Reasonable Time-of-Day Restrictions, Coupled with Company-Specific Do-Not-Call Lists, Should Suffice to Bring About the Goals of the TCPA.**

Reasonable time-of-day restrictions on telemarketing can be an acceptable alternative that, when coupled with the company-specific do-not-call list approach described earlier, may provide optimal telephone subscriber protection against the abuses giving rise to TCPA.

Restrictions that are more severe than those proposed by the Commission, that is, restrictions that prohibit or limit calls between 9:00 a.m. to 9:00 p.m., would severely constrain legitimate telemarketing practices and would disrupt customer service. The Fair Debt Collections Practices Act ("FDCPA"), it should be noted, sets out more generous restrictions than the Commission, permitting calling that starts at 8:00 a.m.<sup>29</sup> (versus the 9:00 a.m. time of the Commission) and ends at 9:00 p.m. The Commission should not be in the position of recommending permissible calling periods that conflict with and are more stringent than the time-of-day restrictions set out in

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<sup>29</sup> See 15 U.S.C. Section 1602 et seq., at 1605(a)(1).

the FDCPA.

The goal of telemarketing, initially, is to contact customers when they are available. More severe time-of-day restrictions than proposed by the Commission would interfere with legitimate and appropriate telemarketing practices and would amount to a virtual prohibition of telemarketing itself.

**VIII. CONCLUSION.**

Citicorp commends the Commission's efforts to balance the privacy concerns articulated in the TCPA with the efficiency benefits inherent in automated dialing and automatic voice technology. Citicorp asks the Commission to consider these comments in providing clarification to the rules proposed in the NPRM.

Respectfully submitted,

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