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Before the
Federal Communications Commission
Washington, D.C. 20554

MAY 26 1992

Federal Communications Commission
Office of the Secretary

CC Docket No. 92-90

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

COMMENTS OF THE CENTER FOR THE STUDY OF COMMERCIALISM

The Center for the Study of Commercialism [hereinafter CSC] hereby submits the following comments in response to the above-captioned Notice of Proposed Rulemaking, FCC #92-176, released April 17, 1992, ("Notice"), by the Federal Communications Commission ("FCC" or "Commission").

In comparing the proposed rules with the requirements of the Telephone Consumer Protection Act of 1991,¹ we find that several sections of the Notice appear both inconsistent with the Act's intent and problematic for consumers. In particular, the Commission seems to have misread the Act's intent to protect residential telephone customers from "live" telemarketing solicitations as well as from automated ones, and failed to propose any method for protecting consumers from "live" solicitations. In addition, three of the proposed exemptions for automated callers, those for "informational" commercial calls, "prior business relationships" and calls to businesses, may be unauthorized by the Act itself and are certainly overbroad.

¹ Telephone Consumer Protection Act of 1991, 102 P.L. 243; 105 Stat. 2394, enacted Dec. 20, 1991, codified at 47 U.S.C. § 227 (hereafter "TCPA").

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List A B C D E

I. AUTODIALED CALLS

CSC supports the proposed rules prohibiting any autodialed calls to emergency lines, hospital rooms, pagers, mobile phones, to two or more lines of a business simultaneously, and prohibit sending unsolicited advertisements to FAX machines. 47 U.S.C. § 227 (b)(1) (A), (C) and (D). Commendably, the Notice implements these provisions more or less as set forth in the TCPA.² See Notice at 1-2 & Appendix B (Proposed Rules).

However, the same is not true for the heart of the Act, the prohibition on making any autodialed calls to residential phones without the recipient's "prior express consent." Section 227 (b)(1)(B). Although the FCC is authorized to exempt some calls, it does not authorize exemptions as broad as those found in the Proposed Rules. See Notice at 3-5; proposed 47 C.F.R. § 64.1100 (a)(2). In particular, CSC urges removal or modification of these exemptions: that for "informational" commercial calls, "prior business relationships", and "autodialed calls to business"

A. INFORMATIONAL COMMERCIAL CALLS SHOULD BE LIMITED

The Act permits the Commission to exempt commercial calls which do not contain advertisements and "will not adversely

² We also support the "noncommercial calls" exemption proposed Technical and Procedural Standards requiring faxes to print information identifying the caller, voice autodialers to identify themselves, and autodialed calls to "clear" within five seconds after the callee hangs up. NPRM at 8-9; proposed 47 C.F.R. § 68.318.

affect the privacy rights that [this] section is intended to protect," TCPA Section (b)(2)(B).

However, the "informational" call exemption, whereby commercial entities may continue to use autodialers to inform customers of product pick-up dates, etc. is overbroad. The examples provided (e.g., to alert employees to a late opening) are reasonable non-commercial uses of auto dialers. However, it would be beneficial for the FCC to provide examples of what would not be included in this exemption. For example, it would not be appropriate for a local mall to alert telephone subscribers that the mall includes Macy's, Bloomingdale's, and K-Mart and is open from 9 a.m. to 9 p.m. daily, or that a new type of computer may be viewed or tested at the outlets of a computer chain. Almost any clever telemarketer can conceivably tailor an "informational" message which might be permitted under the proposed rule.

B. THE PROPOSED EXCEPTION FOR AUTODIALED "PRIOR BUSINESS RELATIONSHIP" CALLS IS OVERBROAD.

Even more disturbing, the Commission has impermissibly diluted the "prior express consent" exception found in Section (a) of the Act by equating it with the "established business relationship" exemption, which appears only in the section relating to live "solicitations." 47 U.S.C. § (a)(3).³ The law excludes these calls only from its restrictions on

³ The Commission states that "it is unclear" whether a prior or existing business relationship with the called party authorizes an autodialed call to that party." Notice at 5. It is not unclear, merely unauthorized. Compare 47 U.S.C. § (a)(3)(A) & (B) with § (b)(1)(B).

"solicitations" or voice calls, not from its autodialer prohibition. Calls to which the callee has previously given express consent are exempted under either section, whether live or autodialed. Compare 47 U.S.C. § (a)(3)(A) & (B) with § (b)(1)(B). Thus, the proposed exception for autodialed "voluntary business relationship" calls is unauthorized by the Act.

If the Commission does impermissibly extend this exception from the live solicitations section into the recorded call section of the Act, it should at least respect the verb tense specifically chosen by Congress and signed into law by the President. The statute refers to "a person with whom the caller has an established business relationship." The proposed language goes much farther, referring instead to "any person with whom the caller has had a prior or current business relationship at the time the call is made." Proposed 47 C.F.R. § 64.1100(c)(3). The terms "has had" and "prior" simply read the phrase "has a relationship" out of the statute. "Has" is present tense and means current -- not yesterday, last month, or last year. If a person bought a purse yesterday, they do not have a current relationship. Furthermore, it is unclear what the phrase "at the time the call is made" modifies. There can be no relationship "at the time the call is made" unless the customer is in the act of purchasing something at that moment or their check has not yet cleared the bank.

As for charge accounts, the act of paying an annual fee might constitute an "established business relationship" for a finite time period of one year. However, no such relationship can exist where the consumer is not using the card, pays no fee, and has no "current" relationship with the company. If the person called has a credit arrangement with the company, but has not actually purchased anything for a year or more,? or has not recently used the card, no relationship exists. Under the proposed rule, any affirmative act by a consumer at any time, no matter how remote, might be construed as a substitute for the explicit consent required by the Act.

At a minimum, the language of this provision must be narrowed to require actual consent, as the Act itself mandates, and the exception narrowed to permit autodialed calls only where a "current" or "ongoing" relationship exists. We propose that such a relationship be found only where transactions actually are occurring between the parties on a regular basis, such as a book club magazine subscription, or charge account which has current balance, active transactions, and regular monthly payments. In addition, in order to carry out the intent of the Congress, the regulations must clearly provide a means by which consumers may terminate any such relationship, i.e. by calling or writing to the company itself, a central telemarketing office, their phone company or the FCC.

C. AUTODIALED CALLS TO BUSINESSES SHOULD ALSO BE BANNED

A further problem is that the Commission has tentatively concluded that business phones need no protection from autodialed calls. It tentatively concludes that no health, safety, or economic rationale justifies such a prohibition, and seeks comment on whether any privacy interest would be served by such regulation. Notice at 7-8. Such an interest does exist and the FCC should regulate these calls as well.

In addition to tying up secretary time, telemarketing calls also go directly to top officials of companies, especially with companies that have direct-dial systems. Such calls can be extremely disruptive of conversations, meetings, or other activities. Such calls not only invade the privacy of business people, but they also reduce efficiency. The cost of such nuisance calls to the economy cannot be measured, but it is clearly substantial when aggregated over the total number of calls made annually. Furthermore, the benefits to the economy are negligible considering the low rate of response to auto-dialed sales calls. In other words, 50 or 100 business people may be disrupted for every one person who finds such calls useful. In sum, one could argue that the harm from autodialed calls to businesses is even greater than those at homes, because they not only disrupt privacy but also cost the nation's economy.

II. HUMAN OR "LIVE" TELEMARKETING CALLS

Although these calls were obviously of great concern to Congress, the Commission has utterly failed to propose any regulation in this area. Notice at 10. CSC believes this is

contrary to the spirit, if not the letter, of the Act. While it is true that autodialed calls may be somewhat more intrusive than live calls, the legislative history of the TCPA makes it clear that Congress intended for the FCC to regulate all solicitations, whether live or autodialed. Otherwise, section (c) of the Act is rendered superfluous, which violates the first rule of statutory construction.

Although the Act itself does not explicitly require the Commission to prohibit live calls it does find that telemarketing generally is expensive, intrusive, a nuisance, and an invasion of privacy. Findings (1)-(8), TCPA § 2. These findings do not distinguish between autodialing and live solicitations. However, the Commission must consider regulating live calls, investigate

"the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object,

"consider whether there is a need for additional Commission authority to further restrict telephone solicitations, . . . and, if such a finding is made and supported by the record, propose specific regulations to the Congress;"

and "prescribe regulations to implement methods and procedures for protecting the privacy rights described [above] in an efficient, effective and economic manner and without the imposition of any additional charge..."

47 U.S.C. § 227(c). This rulemaking proposed does none of these things. Rather than address, the problem of how to regulate such calls, whether by a national opt-out database or some other method, the FCC has reframed the issue as whether to regulate at all.

Both autodialed calls and "live" telemarketing calls invade the rights of individual homeowners' to privacy in their own homes, which have long been recognized as meriting protection.⁴ In order to fully protect the homeowner from receiving unwarranted and unwanted intrusions, disturbing his or her the freedom of one's thought and mind in the home, both types of calls must be prohibited, or at least regulated. The TCPA mandates that the Commission recognize and protect these privacy interests.

Calls made in person are arguably more intrusive than those made by machines. It is easier to ignore or hang-up on a automated call because people are not likely to be inhibited about being rude to a machine. In addition, many subscribers are used to "tuning out" machine-generated advertisements, such as those on television and radio, and do not regard them as intrusive, while the live sales pitch demands the recipient's undivided attention, whether the message is accepted or rejected.

⁴ Both the Fifth and the First Amendments have been held to protect the right to privacy in one's home. See Boyd v. U.S., 116 U.S. 616, 630 (1886). See also Stanley v. Georgia, 394 U.S. 557 (1969).

See Testimony of Robert Bulmash, Senate Subcommittee on Communications, Hearings on Telephone Consumer Privacy Issues, 102nd Congress, 1st Sess., July 24, 1991; "Dialing for Your Dollars," The Washington Post, Dec. 12, 1991, Home Section at 9,12.

None of the arguments proffered in the Notice justify this abdication of the Commission's Statutory responsibility. The fact that some consumers may "find such contacts beneficial and actually purchase the goods and services offered" does not abrogate this legal requirement. Neither does the fear of "[eliminat[ing] this option for consumers" since consumers who do wish to purchase such goods may freely consent to calls from any telemarketer, who is then free to contact them on a daily basis. Would-be sellers may continue to communicate their sales pitches via television advertising, billboards, catalogs, mail advertisements, newspapers and circulars.

As support, the NPRM cites floor statements by Reps. Markey and Rinaldo complaining about automated calls, and a conference report from Sen. Hollings' (unpassed) bill which regulated only auto-calls and junk faxes. It ignores other portions of the legislative history that focussed on the more general problem of unwanted calls, whether live or prerecorded. See 137 Cong. Rec. S8991 (daily ed. June 27, 1991) (statement of Sen. Pressler); Testimony of Robert Bulmash, Senate Subcommittee on Communications, Hearings on Telephone Consumer Privacy Issues, 102nd Congress, 1st Sess., July 24, 1991.

The FCC indicates that only a small percentage of complaints pertained to live calls. However, the complaints it receives are only a tiny fraction of all complaints that people have. After all, the FCC has never invited the public to complain. By contrast, when Ann Landers wrote a column about auto-dialers, thousands of people were alerted to the possibility of complaining and wrote to the FCC. Similar opportunity and encouragement to complain about live calls would likely result in a similar outpouring of letters.

III. METHODS OF REGULATING LIVE CALLS

Finally, the Commission has also requested public comment on a variety of ways to protect unconsenting consumers against telemarketing, assuming it agrees that consumer privacy is affected at all. It seeks a "rigorous analysis" of the costs and benefits of establishing a nationwide database, company- or industry-based "do-not-call" lists, network technologies, special directories, and or time of day restrictions. CSC believes that a national "do-call" database is the best option, followed by a national "do-not-call" database. We also urge the Commission to adopt the proposed time of day restrictions. NPRM at 13-15.

A. THE COMMISSION SHOULD ADOPT A NATIONAL "DO-CALL" DATABASE

The TCPA calls for the FCC to consider a national database of consumers who do not wish to receive telemarketing calls. We urge the FCC to consider a "do-call" list, in addition to the

"do-not-call" list mentioned in the law. TCPA § (c)(1)(a). It is far more convenient and economical to establish a national database of consumers who do wish to receive telemarketing calls by creating a "do-call" list, rather than a "do-not-call" list.

A do-call list is preferable for several reasons. The burden of signing up on the list would fall only on those consumers who do wish to receive sales calls. Since many Americans feel their privacy is invaded by unsolicited telemarketing calls, only those people who wish to receive -- or do not mind receiving -- such calls would get them. As for telemarketers, the nature of a do-call list would provide them with the most likely prospects -- people will expect the calls and therefore will be more open to the sales pitch.

With a "do-not-call" list, privacy is a serious concern, since such a list could potentially fall into the hands of unscrupulous entities that might violate the law with impunity in order to reach a "virgin" group of potential customers. A list of people who do want to be called, request to be called, and expect to be called, however, needs little protection. A do-call list is not as difficult to compile since it will be far shorter than a do-not call list. Telemarketers may be required to an updated purchase list regularly and the fees generated from its sale can be used to cover its administration.

- B. IN THE ALTERNATIVE, THE COMMISSION SHOULD ESTABLISH A DO-NOT-CALL LIST

If the FCC does not agree to a do-call list as described above, the most preferable alternative is a national database of consumers who do not wish to receive telemarketing calls. We agree that the costs should be borne by telephone companies and then reimbursed by telemarketers, as the Notice contemplates.

For many years, telemarketers have had unrestricted Notice access into the lives and homes of consumers. At the expense of many Americans' privacy, such companies use the private equipment of consumers -- their telephones -- to deliver unsolicited, and in many cases invasive and annoying, sales pitches. The private home is a privileged forum and telemarketers must no longer trespass without permission. Since telemarketers gain the most from reaching such a prized audience, telemarketers should be prepared to pay for the privilege.

A national do-not-call list would not be difficult to administer. It could be maintained by a telemarketing trade association, much like the one already established by the Direct Marketing Association.⁵ Telemarketers would be required to use the list, and they would have to pay a fee to cover the costs of compiling and maintaining that list. As the Act itself requires, the cost of such a list must be borne entirely by telemarketers, since they are in the position to directly benefit from calling consumers at home. We agree that government should not have to

⁵ See testimony of Richard A. Barton Haig before the Subcommittee on Telecommunications and Finance, House Committee on Energy and Commerce, 102nd Congress, 1st Sess., April 24, 1991, at 107.

pay for management of any database and that telemarketers should bear the entire cost. Maintaining such list would assist them as well as consumers, since it would save them from wasting time and money calling those who do not want to be called.

The system should allow telemarketers to easily compare their lists of prospective clients with the list of consumers who do not wish to be called. The trade association maintaining the list would oversee administration, but staff salaries, costs, benefits, etc. would be covered by the pooled resources of all telemarketers. The telemarketers could elect a governing board to oversee the list's administration.

C. ALTERNATIVE OPTIONS

If technically feasible, the option of utilizing network technologies such as a special prefix appears excellent. Subscribers could be advised via a notice in their telephone bill (perhaps once a year) that they can simply check off a box and be protected from telephone solicitations. A nominal charge of a dollar or two might cover the telephone company's costs.

The alternative of using specially marked directories seems weak because telemarketers may not use directories themselves, but rather computer-generated lists. However, the fact that directories contain markings means that phone companies would have asked subscribers and would have a database of "don't call" subscribers.

Company-specific "don't call" lists could hardly be the only source of consumer protection under the TCPA, but perhaps

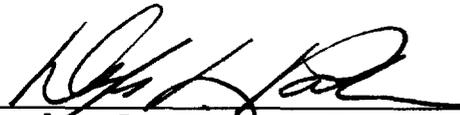
companies could be encouraged to maintain such lists for added consumer protection above and beyond the more comprehensive approach envisioned by the law. In addition, non-profit organizations could be encouraged to maintain such lists, as well as to request advance ~~organizations~~ permission from members to be telephoned.

Finally, CSC endorses the Commission's proposal to restrict telemarketing calls to between 9 pm and 9 am. Such restrictions are both "effective" and "necessary". Notice at 15.

CONCLUSION

For the foregoing reasons, the Commission should modify its proposed rules, narrowing the exceptions and regulating live calls, autodialed calls to businesses, and establishing a national do-call database.

Respectfully Submitted,



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May 26, 1992