

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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MAY 26 1992

Federal Communications Commission
Office of the Secretary

In the Matter of
The Telephone Consumer Protection
Act of 1991

CC Docket No. 92-90

COMMENTS OF THE
BANC ONE CORPORATION
CALIFORNIA BANKERS CLEARING HOUSE ASSOCIATION
FIRST USA BANK
NEW YORK CLEARING HOUSE ASSOCIATION
QVC NETWORK
VISA U.S.A., INC.

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SUMMARY

The Commission's proposed regulations exempting certain types of calls using automatic dialing devices and prerecorded messages from the statutory prohibition against such calls to residential subscribers correctly balance consumer privacy interests against the legitimate needs of the business community. These comments are filed by a coalition of membership organizations comprised of financial institutions, individual financial institutions and other businesses that use automatically dialed prerecorded voice messages and live telephone solicitations to disseminate important and useful information to consumers. The Coalition strongly supports the Commission's recognition that prerecorded or artificial voice message calls made for debt collection purposes do not raise the types of privacy concerns that warrant coverage under the Act. The Coalition also supports the proposed exemptions for calls not involving commercial solicitations and for calls to current or prior customers.

With respect to telephone solicitations, the Coalition believes that the benefits to consumers and the economy from live solicitations outweigh any potential privacy concerns. Accordingly, the Coalition does not believe that such calls should be subject to any regulations that the Commission may promulgate to address the privacy of

telephone subscribers. If the Commission chooses to restrict live solicitations, however, the Coalition recommends that any regulations so devised be carefully crafted so as not to impose onerous financial and administrative burdens on the business community, or unduly restrict a consumer's ability to purchase products marketed over the telephone. Of the various approaches proposed by the Commission in this regard, the Coalition favors the proposed company specific "do not call list".

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Pursuant to the Notice of Proposed Rulemaking ("NPRM") released on April 17, 1992, the Banc One Corporation, California Bankers Clearing House Association, First USA Bank, New York Clearing House Association, QVC Network and VISA U.S.A, Inc. (collectively the "Coalition") submit these comments addressing the Commission's proposed regulations implementing the Telephone Consumer Protection Act of 1991, Pub.L. No. 102-243 (to be codified at 47 U.S.C. § 227) (the "Act").

INTRODUCTION

These comments are filed by a coalition of membership organizations comprised of financial institution

members, large financial institutions and retail companies that rely on the telephone for critical business purposes, including a cost effective means of notifying consumers of overdue bills and informing them of existing or new products and/or services.¹ As such, the Coalition is directly affected by the Commission's proposals to limit the use of automatic dialing devices that leave a prerecorded or artificial voice message and to prescribe rules for live telephone solicitations.

The Coalition believes that the Commission's proposed regulations effectively balance consumers' privacy rights against the legitimate interests of the business community. While consumers have a right to ensure that their privacy not be unduly compromised by irresponsible telemarketers, it is also true, as the Commission is aware, that thousands of consumers benefit greatly from the ability to obtain timely information about their accounts through the use of artificial or prerecorded voice messages and to learn about new products and services over the telephone. Indeed, the telemarketing industry accounted for \$435 billion in annual sales in 1990 alone. The Coalition submits these comments to support the Commission's well-reasoned approach to these issues and to ensure that

1 A description of each the Coalition's members is attached as Appendix A.

beneficial business practices continue to be taken into account in finalizing the regulations implementing the Act.

DISCUSSION

I. THE PROPOSED REGULATIONS ON THE USE OF AUTOMATIC DIALING DEVICES AND PRERECORDED OR ARTIFICIAL VOICE MESSAGE CALLS CORRECTLY BALANCE CONSUMER PRIVACY RIGHTS AND THE LEGITIMATE INTERESTS OF THE BUSINESS COMMUNITY.

The Commission's proposed regulations correctly recognize the legitimate need for, and uses of, automatic dialing devices and prerecorded or artificial voice message calls by the business community. As the Commission has stated, "there are many valuable uses to auto dialer messaging that do not necessarily fall within the intended scope of [the Act's] prohibitions." NPRM at ¶ 9. Thus, while the Act's focus is the protection of consumer privacy from unwarranted automated prerecorded or artificial voice messages,² Congress expressly authorized the Commission to exempt commercial artificial or prerecorded voice message calls that "(1) do not adversely affect consumer privacy rights and (2) do not include the transmission of any

² See S. Rep. No. 178, 102nd Cong., 1st Sess. 1 (1991), reprinted in 1991 U.S.C.C.A.N. 1968 ("The purposes of the bill are to protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls to the home.").

unsolicited advertisement."³ As discussed below, the Commission's proposed treatment of artificial or prerecorded voice message debt collection calls -- calls which do not include a commercial solicitation -- and calls to existing or former clientele is fully consistent with the terms and intent of the Act.

A. Prerecorded or Artificial Voice Message Calls Made for Debt Collection Purposes Should Not Be Prohibited.

The Coalition strongly supports the Commission's recognition that prerecorded or artificial voice message debt collection calls should be exempt from coverage under the Act.⁴ For example, banks often use prerecorded voice messages to remind a customer of a past due amount on a loan. As the Commission correctly notes, the use of automatically dialed prerecorded voice messages in this instance "increases the efficiency of the collectorand is beneficial to the called party." NPRM at ¶ 15.⁵

3 47 U.S.C. § 227(b)(2)(B)(1991).

4 Live debt collection calls, including those that are made by use of an automatic dialing device that switch to a live operator once the connection is made, are not prohibited under the Act. See 47 U.S.C. §227(a)(3) and infra at II.A.

5 Indeed, because of the benefits of prerecorded or artificial voice message calls, members of Congress specifically directed the Commission to consider an exemption for such calls. See 137 Cong. Rec. S18784 (daily ed. Nov. 27, 1991) (comments of Senate Sponsor Hollings) ("Some debt collection agencies also use automated or (Footnote 5 Continued)

Furthermore, prerecorded or artificial voice message debt collection calls do not transmit an unsolicited advertisement. Rather, they remind an existing customer of an outstanding bill for a previously purchased service or product. Debt collection calls are not made on a blind basis to persons with whom the caller has no prior business relationship. By purchasing the product or service, the customer has voluntarily entered into a business relationship and reasonably expects that the company will attempt to notify the customer if the payment for the service or product is not made. Moreover, as the Commission notes, there are a myriad of federal and state consumer protection laws that give consumers redress for unwarranted or harassing debt collection practices by unscrupulous companies.⁶ If the Commission prohibited automatically dialed prerecorded voice message debt collection calls -- thus making it more difficult and costly for companies to collect unpaid bills or loans -- many companies might be

(Footnote 5 Continued)
prerecorded messages to notify consumers of outstanding bills. The FCC should consider whether these types of prerecorded calls should be exempted . . . ")

6 NPRM ¶ 15, 16. See, e.g., Federal Fair Debt Collection Act, 15 U.S.C. § 1692 (1988); Robbins-Rosenthal Fair Debt Collection Practices Act, CAL CIV. CODE §§ 1788-1788.32 (West 1985 and Supp. 1992); The Consumer Collection Practices Act, FLA. STAT. ANN. §§ 559.55-559.78 (West 1988); The Debt Collection Act, TEX. REV. CIV. STAT. ANN. article 5069-11.01-11.11 (West 1987 and Supp. 1992).

required to reconsider their lending policies or increase prices, including the cost of any extension of credit, to offset these higher transaction costs. Thus, the Coalition believes the Commission is fully justified in exempting debt collection calls from coverage under the Act.

We further agree that a separate exemption for debt collection calls is not necessary, provided that the Commission makes it clear in its final order that debt collection calls fall within the general exemptions for calls to existing or former clientele and commercial calls that do not offer a product or service. If the Commission chooses not to adopt these exemptions in its final determination, the Coalition requests that the Commission provide an explicit exemption for debt collection calls.

B. Artificial or Prerecorded Voice Message Calls to Existing and Former Clientele Should Be Exempt From the Act's Prohibitions.

The Coalition supports the Commission's proposed exemption for prerecorded or artificial voice message communications to residential subscribers with whom the caller has or has had a business relationship. Such calls to former or existing clientele do not implicate the same types of privacy concerns as calls to new customers. A consumer simply has less of an expectation that he or she will not be called by a company with which the consumer has

voluntarily entered into a business relationship, as compared to a company with which the consumer has had no such contact.

Moreover, placing restrictions on calls to persons with whom the caller has an established business relationship would disrupt customary business activities, impeding, for example, calls to current credit card customers about new products or services associated with the credit card. By becoming a credit card holder, the customer has chosen to do business with the company and expects to receive information of this nature.

The Coalition supports the Commission's proposed definition of business relationship as a "voluntary two way communication between the client and the business." NPRM at ¶ 14. The Coalition also believes the exemption should encompass former as well as current customers of the calling party. As noted in the House Committee Report, it was not the intent of the Act to "foreclose the capacity of businesses to place calls that build upon, follow up, or renew, within a reasonable period of time, what has once been [an] 'existing client relationship.'"⁷ The use of prerecorded voice messages in this situation is less intrusive (and accordingly involves less of a privacy threat) than calls by parties who have had no previous

7 H.R. Rep. No. 317, 102nd Cong., 1st Sess. 14 (1991).

relationship with the consumer. Callers who have had a prior relationship with the consumer have a greater incentive to ensure that the consumer is not offended by the prerecorded message, since they have more to lose in seeking to reestablish contact with the consumer. There is no need, therefore, to regulate calls to former clients when industry and market realities already provide adequate protections against harrassing or annoying telephone calls to these consumers.

C. Third-Party Agents of a Company Should Also be Covered by Applicable Exemptions.

Many companies find that it is more economical and efficient to hire other entities or individuals to engage in debt collection or other telephone-related marketing activities on their behalf. Failure to extend the applicable exemptions to these agents would create strong incentives not to use such agents, even when otherwise economically warranted. Such a result would be inimical to the public interest. The Coalition therefore supports the Commission's inclusion of language in the proposed regulations governing artificial or prerecorded voice message calls, which provides that, where an exemption is applicable, calls made "by, or on behalf of" the company are exempt. NPRM at Appendix B, § 64.1100(c). As discussed

below, the Commission should incorporate similar language in any regulations restricting live telephone solicitations.

D. The Use Of Predictive Dialers Should Not Be Restricted Beyond The Limitations of the Act.

The Commission should clarify its use of the term "auto dialer call." The NPRM refers to an auto dialer call as a telephone call made by an automatic telephone dialing system⁸ that: (1) leaves a prerecorded or artificial solicitation message, or (2) switches to a live operator once the connection is made.⁹ The Act, however, subjects the latter category of "auto dialer" calls -- the so-called predictive dialers -- to less regulation than the former.¹⁰

8 Under the Act, an "automatic telephone dialing system" is defined as equipment that has the capacity to dial stored telephone numbers in a random or sequential number sequence. 47 U.S.C. § 227(a)(1).

9 Calls that use an automatic dialing device, but do not leave a prerecorded or artificial voice solicitation message use a mechanism that is often referred to as a "predictive dialer." In certain circumstances a predictive dialer may leave a brief non-solicitation message for the called party, either requesting that the party hold for a live operator, or if the called party is not home, requesting that the party call a specified number. The Commission should state that such calls that leave a brief message fall within the exemption for commercial, non-solicitation calls.

10 Absent the prior express consent of the called party, the Act prohibits the use of predictive dialing devices to make calls to (a) emergency telephone lines, (b) the telephone line of a guest room in a hospital or other similar facility or, (c) cellular or mobile telephones or (4) telephone numbers for which the party is charged for the call. The Act also precludes simultaneous calls to a multi-line business. 47 U.S.C. §§ 227(b)(1)(A) and (D).

The Commission's draft regulations recognize the difference between auto dialer calls leaving a prerecorded or artificial voice message and calls that switch to a human operator once the connection is made. See NPRM at Appendix B, §§ 64.1100(a)(1) and (2). In the NPRM, however, the Commission treats these categories as interchangeable and certain language in the NPRM could mistakenly be interpreted to suggest that the use of a predictive dialer to make calls to residential subscribers, where the dialer switches to a human operator, is prohibited unless it falls within one of exemptions defined in the regulations.¹¹ That clearly was not the intent of the Act, and the Commission should clarify that its regulations concerning automatically dialed calls to residential subscribers apply only to auto dialing systems that leave a prerecorded or artificial message.

The Act also precludes the use of automatic dialing systems to make calls to certain telephone lines, except in emergencies or with the "prior express consent" of the called party. 47 U.S.C. § 227(b)(1)(A). The Commission

¹¹ For example, the Commission states that "[a]uto dialer calls are prohibited to: residential telephone lines without the consent of the called party, emergency telephone lines, the telephone line of a guest room or a health care facility, a paging service or other specialized mobile radio service, and any service for which the called party is charged for the call." NPRM at ¶ 8. Under the Act, however, and as reflected in the text of the Commission's draft regulations, NPRM at Appendix B, only auto dialer calls that leave prerecorded or artificial voice messages to residential telephone lines are prohibited.

should clarify that calls to telephone numbers provided by the customer satisfy the "prior express consent" requirements of the Act. Many customers may prefer to be contacted by companies at their workplace and may accordingly give out their business rather than their residential telephone numbers. If that number is assigned to a health care facility, doctor's office or other similar organization, however, a company may inadvertently violate the Act by calling the consumer -- using automated telephone equipment -- at the consumer's preferred location.¹² Moreover, it is not technically feasible to identify and segregate out from telemarketing lists, telephone numbers associated with cellular or paging customers. To resolve these concerns, the Commission should clarify that calls using automated telephone equipment to telephone numbers provided by the customer are not actionable.

II. RESTRICTING LIVE OPERATOR SOLICITATIONS IS NOT NECESSARY TO PROTECT CONSUMER PRIVACY RIGHTS.

The Commission seeks comment also on the need to restrict live telephone solicitations to residential

12 A related concern arises with respect to large employers with multiple telephone lines. It is possible that two accountholders who are employees of a large entity might be contacted at the same time, thus simultaneously engaging two telephone lines in violation of the Act. See 47 U.S.C. § 227(b)(1)(D).

subscribers with whom the caller does not have an established business relationship. For the following reasons, we believe that restricting live telephone solicitations is not necessary.

First, as the Commission's own complaint data demonstrate, the vast majority of telephone solicitation abuses have involved prerecorded or artificial voice messages. Thus, of the 831 complaints filed with the Commission in 1991, 757 involved prerecorded messages. See NPRM at ¶ 24. Congress also recognized the difference between live and prerecorded solicitations, noting that automatically dialed prerecorded voice message calls are more intrusive in that they cannot interact with the customer, do not allow the caller to feel the frustration of the called party and do not disconnect the line even after the customer hangs up.¹³

Second, many companies that engage in telephone solicitations to market new products or services do not use prerecorded messages. These companies are sensitive to consumer privacy concerns and have done a good job of policing their own practices, as exemplified by the small number of complaints lodged at the Commission against live solicitations. The paucity of complaints does not justify

¹³ S. Rep. No. 178 at 4,5, reprinted in 1991 U.S.C.C.A.N. 1972.

imposing new and burdensome regulatory constraints on responsible businesses that engage in beneficial live telephone solicitations.

Third, consumers, businesses and the economy benefit from unsolicited sales calls. As the Commission notes,

telemarketing "generated \$435,000,000,000 in sales in 1990 -- a more than four-fold increase since 1984. Thus, many consumers find such contacts beneficial and actually purchase the goods and services offered."

NPRM at ¶ 24.

A. Any Regulations Affecting Live Telephone Solicitations Should Be Narrowly Tailored to Accommodate Legitimate and Desired Business Activities.

If the Commission nonetheless decides that it is in the public interest to restrict live telephone solicitations, the regulations should be narrowly tailored.

Under the Act, the term "telephone solicitation" means:

the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods or services, which is transmitted to any person, but such term does not include a call or message (A) to any person with that person's prior express invitation or permission, (B) to any person with whom the caller has an established business relationship or (C) by a tax exempt nonprofit organization.

47 U.S.C. § 227(a)(3). Thus, Congress did not prohibit, or give the Commission power to regulate, live commercial calls

that are not made for solicitation purposes, such as debt collection calls, or calls made to a party with whom the caller has an established business relationship. In determining what restrictions should apply to live solicitations that are covered by the Act, the Commission would clearly be justified in adopting less restrictive regulations than those applicable to prerecorded or artificial voice message calls. Of the proposals raised by the Commission in the NPRM for regulating live solicitations, the Coalition supports the company specific "do not call list."

1. Live Solicitations Should Be Subject to Less Restriction Than Prerecorded or Artificial Voice Message Solicitations.

As previously discussed, consumers do not believe that live solicitations are as intrusive or problematic as automatically dialed prerecorded voice message solicitations. For this reason, the Commission should, at a minimum, ensure that the definitions used in its live solicitation regulations are no more restrictive than the definitions adopted in its prerecorded or artificial voice message rules. For example, the exemption from liability for live solicitations to persons with whom the caller has "an established business relationship" should encompass, as in the case of automatically dialed prerecorded messages, calls to "any person with whom the caller has had a prior or

current business relationship at the time the call is made." NPRM at Appendix B ¶ 64.1100(c)(3). Similarly, the regulations should specify that no restrictions apply to live commercial calls made for a non-solicitation purpose.¹⁴ Thus, live debt collection calls would not be subject to any regulation.

Similarly, the Commission should specify that agents hired by companies to engage in live telephone solicitations, like those hired to conduct auto dialed prerecorded message solicitations, are subject to the same exemptions and obligations under the Act. Such uniformity between the regulations for automatically dialed prerecorded voice messages regulations and live solicitations is appropriate not only because the latter are inherently less objectionable than prerecorded voice message solicitations, but also because a different set of exemptive regulations for prerecorded voice message solicitations and live solicitations would pose difficult compliance problems for companies and their agents.

14 To hold otherwise would be inconsistent with the Act, which defined a telephone solicitation as "a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in property, goods or services." 47 U.S.C. § 227(a)(3).

2. The Company Specific "Do Not Call List"
Is the Most Appropriate Means of
Restricting Telephone Solicitations.

Of the proposals included in the NPRM for restricting live telephone solicitations to prospective customers, the company specific "do not call list" is the most appropriate alternative for reconciling consumer privacy rights with the legitimate interests of the business community. The Commission should be sensitive to the concern of the President that any regulations "preserve legitimate business practices."¹⁵ As discussed below, the company specific "do not call list" best accommodates this concern while satisfying the intent of the Act.

First, in contrast to the national database proposal, the company specific "do not call list" is narrowly-tailored. By allowing consumers to screen telemarketing calls on a company by company basis rather than carte blanche, it "protects consumers from the calls they don't want, but [does] not restrict their ability to receive the calls they do want."¹⁶ Given that telephone solicitations generated \$435 billion in sales in 1990, it is clear that consumers respond positively to many unsolicited

15 Statement by President George Bush Upon Signing S.1462, 27 WEEKLY COMP. PRES. DOC. 1877 (Dec. 20, 1991), reprinted in 1991 U.S.C.C.A.N. 1979.

16 137 Cong. Rec. H11312 (daily ed. Nov. 26, 1991) (comments of Rep. Cooper).

calls. The company specific list ensures that consumers will continue to benefit from desired telemarketing activities.

Second, many companies currently utilize company specific "do not call lists" and find them to be an effective means of self-monitoring consumer privacy requests. As the experience of the business community demonstrates, the lists generally do not impose inordinate costs on companies and are typically not administratively or technically burdensome to implement.

3. None of the Other Proposals to Restrict Telephone Solicitations Are As Desirable As The Company Specific "Do Not Call List"

The national database proposal, unlike the company specific "do not call list," would not allow consumers to differentiate among solicitation calls on a company by company basis. Registration on the national list would prevent any live solicitation calls to the consumer, unless he or she had an existing business relationship with the caller. As such, the national database proposal would stifle competition by new companies. The national database, as well as an industry-based do not call list, would generally impose greater implementation costs than company specific "do not call lists." This added cost would unduly hamper the growth and development of legitimate

telemarketing activities. In addition, as the Commission has noted, the development and maintenance of a national database would impose substantial costs on taxpayers, which "in these times of fiscal restraint," NPRM at ¶ 29, would not be in the public interest. Finally, because a national database may require individuals to disclose significant identifying information, such as name and social security number, to enable companies to identify and purge the appropriate names from their telemarketing lists, the approach raises significant privacy concerns.

Like the national database alternative, the special directory markings approach is overly broad and would therefore preclude customers from tailoring their do not call requests to those products or services for which they have no interest. Further, given that the name, address and phone number information in telephone directories rapidly changes, the special directory markings frequently would contain out-of-date -- and therefore unreliable -- information. Finally, because many telemarketing efforts are conducted on a multi-state or nationwide basis -- requiring companies to consult numerous local telephone directories -- this approach would be more costly and less efficient than a company specific "do not call list."

The use of network technologies to allow consumers to screen solicitations through Caller ID or similar

services is not technically feasible in many parts of the country. Moreover, in those areas that offer such technologies, carriers have typically imposed an additional subscriber charge for the service and obligated the consumer to purchase ancillary telephone equipment that can display the calling party's number. Congress, in passing the Act, made clear that consumers should not be required to pay additional costs to restrict solicitations.¹⁷ Further, businesses would be required to purchase additional telephone lines that would be used exclusively for solicitations to new or prospective customers. Thus, the proposal would not only impose additional costs on consumers and businesses, but would also utilize hundreds of new telephone numbers at a time when such resources are becoming increasingly scarce.

CONCLUSION

For the foregoing reasons, the Coalition supports the Commission's proposed regulations for automatically dialed prerecorded or artificial voice message calls, which provide exemptions for existing and former clientele and non-commercial calls, as well as expressly include debt collection activities in the enumerated exemptions. With regard to telephone solicitations to potential new

17 47 U.S.C. § 227(c)(3)(E).

customers, the Coalition urges the Commission to refrain from regulating live solicitations. Alternatively, if the Commission decides to regulate such calls, the Coalition believes that the company specific "do not call list" is the best of the alternatives proposed by the Commission in the NPRM. Finally, given the less intrusive nature of live solicitations, such calls should not be subject to greater regulation than prerecorded solicitations, necessitating that any definitional exemptions applied to automatically dialed prerecorded calls be equally applicable to live telephone solicitations.

Respectfully submitted,



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