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MAY 26 1992

Federal Communications Commission
Office of the Secretary

BEFORE THE

Federal Communications Commission

In the Matter of

THE TELEPHONE CONSUMER
PROTECTION ACT OF 1991

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CC Docket No. 92-90

COMMENTS OF DIRECT MARKETING ASSOCIATION

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TABLE OF CONTENTS

SUMMARY OF ARGUMENT.....	2
I. INTRODUCTION: THE FACTUAL CONTEXT.....	4
The Scope and Diversity of Telephone Marketing....	4
Unwanted Telephone Solicitations.....	6
ADRMPS.....	9
II. REGULATIONS REQUIRING COMPANY-SPECIFIC DO-NOT-CALL PROGRAMS BEST SERVE THE PURPOSES OF TCPA.....	10
A. The Relevant Factors.....	10
B. Mandatory Company-Specific, Do-Not-Call Lists Serve the Purposes of the TCPA.....	11
Consumer Flexibility.....	12
Ease of Administration and Enforcement.....	15
Avoidance of Unnecessary Regulation.....	18
C. The Alternative Regulatory Options Do Not Serve the Purposes and Criteria of the TCPA.....	21
National or Regional Do-Not-Call Databases.....	21
Special Delivery Marking; Network Technologies....	27
Time-of-Day Restrictions.....	29
III. ALL ADRMP CALLS THAT DO NOT TRANSMIT AN UNSOLICITED ADVERTISEMENT SHOULD BE EXEMPTED FROM THE OPERATION OF SECTION 227.....	33
CONCLUSION.....	37

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The Direct Marketing Association ("DMA") submits these comments in response to the Commission's proposals for implementation of the Telephone Consumer Protection Act of 1991 ("TCPA"). We will address two of the central issues presented by the Notice of Proposed Rulemaking:

(a) The selection of the preferred method for protecting residential subscribers' rights to avoid receiving telephone solicitations to which they object; and

(b) The scope of the exemption for commercial automatic pre-recorded message calls that do not involve the transmission of unsolicited advertisements.

We will show that, of the methods and procedures available to the Commission for implementation of the "do-not-call" requirements of Section 227(c) of the TCPA, there is only one that makes sense: companies engaged in telephone marketing to residential consumers should be required to establish and operate in-house, do-not-call lists and to maintain appropriate records demonstrating that such

programs are properly carried out. We urge adoption of this regulatory option. It is consonant with the best interests of all consumers and is readily administrable and enforceable; it serves the basic purposes of the TCPA without impairment of legitimate business practices and at the least possible cost to the economy. The alternative approaches to implementation of the do-not-call requirements of TCPA are impractical, ineffective, prohibitively costly and, in a very real sense, anti-consumerist.

The DMA also endorses the proposed exemption from the automatic dialing pre-recorded message ("ADRMP") provisions of the TCPA for commercial pre-recorded messages that do not contain advertisements. The Commission should make clear that its proposed exemption permits any such call to be made so long as it does not directly and explicitly market a product or service. These calls are of benefit because they permit the delivery of information of interest and value to consumers in a timely, efficient and cost-effective manner.

In support, the following is stated:

SUMMARY OF ARGUMENT

The Direct Marketing Association respectfully maintains that there is only one "efficient and effective" means of implementing the TCPA's provisions designed to protect consumers from unsolicited telephone calls to which they object: a regulatory framework based upon company-specific, in-house, do-not-call programs, reinforced by voluntary, self-administered industry-wide

lists such as the Direct Marketing Association's Telephone Preference Service. The regulation should establish recordkeeping requirements from which verification of compliance with company-specific, in-house, do-not-call policies can be determined and should stipulate that adherence to such recordkeeping requirements constitutes presumptive compliance with the TCPA.

Both in its own terms, and when contrasted with the alternative regulatory options (or any combination of those options), company-specific, do-not-call requirements best suit the purposes of the TCPA, which is designed simply to provide regulatory assurance that businesses do not annoy their present or potential customers. Company-specific, do-not-call regulations avoid restriction of legitimate business practices and impose the least possible burden upon the American economy. By contrast, a regulatory approach based upon third-party administration of national or regional do-not-call databases simply will not work; this system would also deprive consumers of choice and would be prohibitively costly. The regulatory options based upon special directory markings or network technologies are not really options at all; they are variant forms of the unworkable and unsound third-party database approach. The proposal for time-of-day restrictions does not respond to the purposes of the TCPA and is, in any event, irrational and unduly intrusive upon consumer interests and legitimate business practices.

As a part of its regulatory system, the Commission should make clear that telephone solicitation calls made on behalf of tax exempt organizations are not subject to the TCPA. It should also adopt the proposed exemption for automatic pre-recorded message calls that do not contain unsolicited advertisements and should make clear that this exemption applies so long as the message or any trailer to the message does not contain comparative or qualitative descriptions, price information, calls to action, or inducements to buy, sell, rent or lease.

As a matter of constitutional policy, it is incumbent upon the Commission to select the regulatory approach which furthers the governmental interest underlying the TCPA by the most "reasonable fit" between the regulatory options chosen and the interest to be served. Because the regulatory system advanced by the DMA in these comments offers the greatest flexibility to consumer and to marketer and is the most readily administrable, enforceable and least costly of the options available, it satisfies that test.

I.

INTRODUCTION: THE FACTUAL CONTEXT

1. The Scope and Diversity of Telephone Marketing. Now in its 75th year, DMA is the principal trade organization representing business enterprises and nonprofit organizations engaged in direct marketing practices for the promotion and sale of goods and services and the solicitation of funds to support charitable and similar undertakings. The term "direct marketing" does not define an industry; it describes methods or techniques for advertising

(and servicing) a broad range of consumer and industrial products and services. Our more than 3,500 members include such diverse businesses as: Cable television systems; newspaper, magazine, book and record publishers; manufacturers and marketers of hardware, tools, appliances and electronics; banks and other financial institutions; manufacturers and marketers of wearing apparel; telecommunications and information service providers; retail stores; automobile manufacturers; and distributors of specialty foods. The DMA's membership also includes a full array of businesses -- advertising agencies, list managers, and service agents -- that support and assist these industries in carrying out their marketing and servicing activities. Members of the DMA range in size from companies listed on the national stock exchanges (and in the Fortune 500) to sole proprietorships.

2. Direct marketing techniques used by American businesses include direct mail marketing, direct response advertising (space, television and, more recently, on-line) and telephone marketing. Section 2 of the TCPA asserts that total sales generated by telephone marketing were \$435 billion in 1990. In any event, it is unquestionably the case that the use of the telephone to market goods and services is a well-accepted and established direct marketing practice. It is used either as a primary marketing vehicle or in conjunction with other direct marketing and advertising methods. The success of telephone marketing as a means of promoting and servicing the sale of a broad range of consumer

goods is the best evidence of its legitimacy: if telephone marketing were broadly objectionable to consumers, it would long ago have failed.

3. Unwanted Telephone Solicitation. Despite widespread acceptance of telephone marketing, there are some consumers who do not wish to receive telephone solicitations from at least some marketers. Some percentage of the American public simply does not care for any form of advertising, regardless of the medium. In the case of telephone solicitations involving live operators, the number is quite small. National marketers and service agents that maintain company-specific, do-not-call lists report that, on average, fewer than one percent of consumers called during a year signify that they do not want such calls; and the number of complaints received by the Commission about live operator calls is so small as to be statistically insignificant.

4. Nonetheless, mindful of their responsibilities to the American public, the members of the DMA have established, as a part of their comprehensive system of self-regulation, guidelines regarding the use of the telephone in direct marketing. A copy of the current guidelines are submitted with these comments as Attachment A (hereafter "Telephone Guidelines"). In terms of the do-not-call provisions of the TCPA, Article 7 is of significance, stating in relevant part:

telephone marketers should remove the name of any individual from their telephone lists when requested directly to do so by the consumer ...

Article 12 of the Telephone Guidelines further provides that:

Names found on such suppression lists should not be rented, sold, or exchanged except for suppression purposes.

5. As a part of its Consumer Awareness Program, the DMA publishes and distributes a variety of brochures designed to enable consumers to enjoy the convenience of direct marketing while avoiding possible problems. Its publication entitled "Tips for Telephone Shopping" (produced in cooperation with AT&T American Transtech) is appended as Attachment B (hereafter "Telephone Tips"). The brochure reinforces the DMA's ethical guidelines regarding name removal. It informs consumers that, if they prefer "not to be contacted by telephone," they should explain to the caller that they are not interested and

ask to be removed from their calling list. Most businesses do not want to annoy their customers or potential customers and will do as you ask.

6. The fact is that, both as a matter of simple economics and customer relations, marketers do not want to annoy their customers or potential customers. In preparation for this proceeding, DMA conducted a survey of its membership; coincidentally, a parallel survey was conducted by The Direct Marketing Club of Chicago.^{1/} Based on those surveys, it is

^{1/} We do not contend that these surveys are of statistical validity. Among other things, there are a very large number of businesses engaged in telemarketing, particularly at the local level, that do not belong to the DMA or to the Chicago Direct Marketing Club. We note, however, that Congress has estimated that 18 million Americans receive telemarketing calls every day. If that number is accurate, then the companies that responded to the
(continued...)

estimated that between 50 and 85 percent of national marketers and service agents voluntarily maintain company-specific (in-house), do-not-call policies. Another 8 to 13 percent of national marketers report that, although they do not maintain their own do-not-call lists, they do rely upon other sources to avoid making unwanted calls.

7. Recognizing that there is a small segment of the American population that does not wish to receive any telephone solicitation calls, the DMA operates a Telephone Preference Service ("TPS"). Initiated in 1985, TPS parallels, for telephone solicitation, a mail preference service founded by DMA in 1971. The manner in which TPS works is shown by the Consumer TPS Enrollment Card attached to these comments as Attachment C. TPS is free to consumers, has been listed as a public service in the front part of the white pages of many telephone directories, and is regularly promoted in the mass media by the DMA through action-line reports (e.g., Better Business Bureaus, Consumer Action columns, Ann Landers, etc.) and in meetings and public conferences held by the DMA in cooperation with consumer organizations. DMA members are strongly encouraged to participate in TPS. A substantial percentage do so. The majority of companies responding to the DMA survey indicated that they either match their calling lists against

1/(...continued)

DMA survey represent 16 percent of the total number of calls made daily. Thus, it can be said that our survey is at least fairly representative of the practices and policies of national telemarketers.

TPS or require their telephone service agents to do so. There are currently over 400,000 names on the TPS list.

8. ADRMPS. As a part of DMA's self-regulatory program, it has addressed the question of the use of Automatic Dialing Recorded Message Players (ADRMPS),^{2/} the subject of Section 227(b) of the TCPA. Article 5 of the Telephone Guidelines provides, in relevant part:

When a telephone marketer places a call to a consumer for solicitation purposes and desires to deliver a recorded message, permission should be obtained from the customer by a live "operator" before the recorded message is delivered. (Emphasis added.)

Article 12 of the Telephone Guidelines prohibits the use of automatic dialing equipment for random or sequential calling.

9. Article 5 of the Telephone Guidelines -- requiring permission before a pre-recorded call is completed -- is specifically focused on ADRMP calls made for "solicitation purposes." This is because DMA has long recognized that ADRMPs are used in other contexts which definitionally do not annoy consumers. ADRMPs are an efficient vehicle by which many businesses can

^{2/} This is the term commonly used in the industry to refer to pre-recorded messages delivered by means of automatic dialing equipment. The term "automatic dialing equipment" refers merely to a mechanical device that dials telephone numbers, used in place of manual (human) dialing. Thus, automatic dialing equipment can also be used to complete "live operator" calls. The TCPA clearly recognizes these distinctions in the way in which its prohibitions and restrictions are constructed: ADRMPs and live operator calls placed by means of automatic dialing equipment are subject to Section 227(b)(1)(A); only ADRMP calls are subject to 227(b)(1)(B); and all telephone solicitation calls, including ADRMP calls, are subject to 227(c).

provide service to existing or former customers. The Commission's discussion of commercial pre-recorded calls that do not transmit an advertisement (Notice of Proposed Rulemaking in Docket 92-90, ¶11 (April 10, 1992) (hereafter "NPRM")) enumerates some of these applications. There are others. For example, ADRMPs are regularly used to inform customers that a product is now in stock, has been shipped, or is available for purchase. Such calls are also used to remind consumers that service or maintenance contracts or subscriptions to magazines, newspapers or other continuity services are about to expire. Although all such calls are "commercial," in the sense that they further business interests, they are primarily designed to enable businesses to serve their customers in a timely, cost-effective and reliable manner. They are, therefore, of benefit not only to businesses but also to consumers.

**II.
REGULATIONS REQUIRING COMPANY-SPECIFIC,
IN-HOUSE, DO-NOT-CALL PROGRAMS BEST SERVE THE
PURPOSES OF TCPA.**

A. The Relevant Factors.

10. The statement made by the President in signing S. 1462 into law points out that the TCPA gives the Commission flexibility among regulatory options in order to avoid "unnecessary regulation or curtailment of legitimate business activities" and to "ensure that the requirements of the Act are met at the least possible cost to the economy." The Commission should also keep firmly in mind the basic purpose of Section 227(c) of the TCPA. Although the TCPA speaks in terms of subscribers' "privacy rights," fundamentally

this provision is designed simply to provide regulatory assurance (and a means of enforcing such assurance) that businesses engaged in telephone solicitation do not "annoy their customers or potential customers." See Telephone Tips at 1. In light of these considerations, it is clear that determination of the "most effective and efficient" means to accomplish the purposes of the TCPA (Section 227(c)(1)(E)) involves consideration of the following factors:

(a) Whether the regulatory option is "consumer-friendly" in the sense that it easily permits a telephone subscriber to decline those calls deemed annoying, while permitting the consumer to accept those which are of interest and benefit.

(b) Whether the regulatory option is readily administrable by all marketers subject to the requirements of the TCPA and susceptible of effective and fair enforcement.

(c) Whether the regulatory option avoids unnecessary regulation and cost.

B. Mandatory Company-Specific, Do-Not-Call Lists Serve the Purposes of the TCPA.

11. The DMA submits that the application of these criteria compels the conclusion that the Commission should adopt a regulatory framework which requires all telemarketers subject to the general requirements of subsection 227(c)^{3/} "to establish,

^{3/} We note that, under Section 227(c)(1)(C), the Commission is empowered to consider whether "different methods and procedures" should be adopted for "small businesses." However, we do not believe that the purposes of TCPA would be served by creating an
(continued...)

operate and maintain do-not-call lists." NPRM at ¶32. This regulatory framework should require that marketers (or their service agents) have recordkeeping systems from which the company do-not-call policy and operation can be verified; the rule should stipulate that maintenance of such records and procedures creates a rebuttable presumption that the mandatory in-house, do-not-call system requirements have been complied with.^{4/}

12. Consumer Flexibility. Company-specific, in-house, do-not-call requirements enable consumers to freely determine whether they wish to be solicited by a particular business concern, or in connection with a particular product or service or type of product or service. For example, under such an approach, a consumer may elect to receive telephone calls about newspaper or magazine subscriptions but decline to receive calls from a marketer promoting automotive parts; another consumer might accept calls from one magazine publisher or automotive parts distributor but not others. All-or-nothing choices are avoided. This system is also easy for the consumer to use: the consumer simply informs the marketer that he or she is "not interested" and asks that his or

3/(...continued)

exemption for, or special standard applicable to, some categories of telephone marketers. Rather, as we have suggested (see supra ¶10), the Commission should adopt that regulatory option which is most readily administrable by all telephone marketers. To do otherwise would create difficult definitional questions, threaten competition and impose other harms to the economy.

4/ As discussed, infra ¶18, the recordkeeping and presumption aspects of this proposal are modelled after the Federal Trade Commission's Mail Order Merchandise Rule.

her name be removed from the calling list. No paperwork or bureaucratic red tape is involved for the consumer, and the request takes effect immediately. This approach is pro-consumer because it allows the consumer, rather than some third-party or quasi-governmental entity, to decide whether particular calls from a particular marketer are annoying.

13. Under Section 227(a)(3) of the TCPA, the term "telephone solicitation" does not include calls of "tax-exempt nonprofit" organizations. For practical as well as constitutional reasons, the Commission should make clear that this exemption is applicable whether the call is made directly by the organization itself or is made on behalf of the organization by a service agent. The existence of this exemption demonstrates that the do-not-call provisions of the TCPA are not grounded on the protection of "core" privacy rights but rather upon the proposition that consumer annoyance should be avoided whenever possible. By exempting tax-exempt calls, the Congress has determined that, although some of such calls may be annoying, they serve social purposes -- the support and enhancement of educational, philanthropic, and public service -- which outweigh the potential for annoyance. In these circumstances, it should make no difference, in terms of the purposes of the TCPA, whether the call is made directly by the tax-exempt organization or on its behalf by a service agent.^{5/}

^{5/} The exclusion of calls made "on behalf of" as well as "by" tax-exempt entities further serves to avoid certain of the constitutional difficulties that are implicated by the TCPA. The
(continued...)

14. Nonetheless, under company-specific, do-not-call rules, telephone subscribers who do not wish to receive any solicitation calls placed by businesses will have means at their disposal to avoid them. Although commercial marketing lists are indeed proprietary in nature, it is the established practice among most users of telephone marketing to either decline to rent names of consumers who have asked for name removal or, at the very least, to inform the renting party that identified consumers have indicated a preference not to receive telephone solicitations. As a result, consumers whose names have been removed from the list of more than one national marketer will, in a short period of time, be removed from the lists of all other national marketers using the same or similar lists. This is the result of the economics of direct marketing and established, sound business practice. See Telephone Guidelines at Article 12.^{6/} Within the limits of the

5/(...continued)

Supreme Court has made plain that it is the message, rather than the speaker, which is entitled to First Amendment protection, Reilly v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781 (1988), and has emphasized that some of the "most valued forms of fully protected speech are uttered for a profit." Board of Trustees of State University of New York v. Fox, 429 U.S. 469 (1989). The Commission's approach to implementation of the TCPA must, in all respects, harmonize the purposes of the TCPA with the policies that underpin the First Amendment. See discussion, infra ¶ 45.

6/ In addition, TPS is entirely consistent with compulsory in-house do-not-call list requirements; and the DMA has every intention to continue to offer and to attempt to improve and refine this service. At least with respect to the many national marketers who now use it, TPS provides a safety net for the minority among consumers who do not want to receive any telephone solicitations.

TCPA, therefore, regulations mandating company-specific, do-not-call programs, self-regulation, and the workings of the marketplace will protect those few consumers who wish to accept no commercial telephone solicitations from marketers.

15. Ease of Administration and Enforcement. The TCPA contemplates two complementary means of enforcement. Section 227(c)(5) of the Act creates a private right of action for any person who has received more than one telephone call within any 12 month period "by or on behalf" of the same entity made in violation of the Commission's regulations. There is an "affirmative defense" if the marketer can show that it has established "reasonable practices and procedures" and has implemented them with "due care." In addition, the Commission has direct enforcement authority under the Communications Act. See 47 U.S.C. §503(b).

16. A regulatory framework based upon company-specific, in-house, do-not-call lists meshes well with these enforcement mechanisms. It places responsibility for compliance where it properly lies --directly with the telemarketer or its telephone service agent; there is no third-party involvement to confuse or complicate the determination of responsibility. Moreover, company-specific, in-house suppression does not require specialized equipment, extensive training of sales representatives, or other complex or confusing administrative requirements. Implementation of such a system on a compulsory and nationwide basis by both large

and small businesses should not be overly difficult or time-consuming.^{7/}

17. The NPRM inquires whether, under a company-specific, do-not-call list regulatory framework, telemarketers should be "required to produce evidence of compliance." NPRM at ¶32. DMA's answer is in the affirmative. The Commission's regulation should require that (i) the company's policy regarding the operation of its do-not-call system be in writing; (ii) such policy set forth practices to assure that telephone service representatives (TSRs) -- who are actually involved in the making of telephone marketing calls -- are informed of and trained in the use of the do-not-call system; (iii) such policy provide a reasonable retention period, of at least one year, for names of persons who have requested that they be removed from the marketer's calling list; and (iv) records demonstrating that do-not-call requests are complied with be maintained. Our surveys show that compliance with these procedural requirements is readily attainable. Many of the marketers who answered the DMA survey and who have company-specific, in-house, do-not-call policies have them in writing; virtually all companies

^{7/} The TCPA and the Communications Act itself make it unarguable that the Commission's rules will govern all interstate telephone solicitation calls; and that the states may not impose other or contrary requirements upon such calls. See 47 U.S.C. §152. Thus, at least at the interstate level, company-specific, do-not-call requirements represent the most expeditious means of implementing the TCPA. Federal regulations are also likely to serve as the model for state regulation in this area. See discussion at n.13 infra.

with such policies (whether or not in writing) provide training to TSRs in the use of such systems.

18. The DMA believes that the Commission should take a further step to assure that these basic evidentiary requirements are complied with. Its rule should provide that compliance with these evidentiary requirements creates a rebuttable presumption that the marketer is in compliance with the basic rule. This approach closely parallels that taken -- in an analogous setting -- by the Federal Trade Commission under its Mail Order Merchandise Rules. See 16 C.F.R. §435.1(a)(4).^{8/} It has worked well in that context. It will assure the integrity of the basic regulatory framework and will minimize dispute and confusion.

19. Enforcement under this regulatory framework will be expeditious and relatively simple. Upon receipt of a consumer complaint, the Commission need only require the marketer to provide the documentation required by the Commission's rule; if the documentation exists, the marketer is presumptively in compliance. Similarly, litigation under the private cause of action provision of the TCPA will be simplified. Marketer compliance with the Commission's rules regarding in-house, do-not-call lists (including the rules regarding documentary evidence), would, as a matter of

^{8/} Although the purpose of the Mail Order Merchandise Rule is different than that of the statute involved here, the situation is analogous because the FTC rule and any rule the FCC adopts will require self-administration, making a system of verification necessary. Many telephone marketers voluntarily comply with and are familiar with the Mail Order Merchandise Rule's verification process.

law, establish the affirmative defense that the marketer has exercised "due care" and has in place "reasonable practices and procedures" in conformance with the TCPA; marketers who fail to satisfy these requirements would bear a heavy burden of proof to show compliance, as they properly should. This regulatory construct is thus readily administrable by the Commission and state courts. It is fair to both consumers and marketers.

20. Avoidance of Unnecessary Regulation. Implementation of TCPA through mandatory, company-specific, in-house, do-not-call programs moots the need to resolve two otherwise very difficult definitional problems created by the TCPA. The first relates to the definition of an "established business relationship", the second to the definition of the term "residential subscriber."

21. Under the TCPA, the term "telephone solicitation" excludes any call or message "to any person with whom the caller has an established business relationship." Section 227(a)(3)(B). The regulations regarding unsolicited telephone calls to be adopted by the Commission will not apply to this category of calls. However, as the legislative history of the TCPA makes clear, there are formidable difficulties involved in defining the term "established business relationship." See H.R. 317, 102d Cong. 1st Sess. 13-16 (1991). In point of fact, it is virtually impossible to fashion a single definition of this term that will work for all industries and all businesses that are engaged in telephone marketing.

22. Fortunately, a regulatory system based upon company-specific, in-house, do-not-call systems makes it unnecessary for the Commission to attempt to fashion such a definition for purposes of "solicitation calls" governed by the TCPA. Under this regime, the determination whether or not there is an established business relationship is made by the consumer: once a consumer informs a marketer that his or her name should be removed from the calling list, it is simply irrelevant whether the marketer thought or had reason to believe that there was an established business relationship. Regulations based upon company-specific, do-not-call systems make the statutory term "established business relationship" self-defining and eliminate unnecessary and complex definitions.^{9/}

23. Reliance upon company-specific, in-house, do-not-call lists similarly eliminates the need for regulation addressing the somewhat less apparent, but no less thorny, problem of the definition of a "residential telephone subscriber." Section 227(c) is applicable only to "residential telephone subscribers." That is, the do-not-call systems mandated by the Commission will not,

^{9/} In its draft regulations governing the use of artificial or pre-recorded voice messages, the Commission has proposed an exemption for such calls made to persons with whom the caller has had a "prior or current business relationship." See, § 64.1100(c)(3). If such an exemption were consonant with the TCPA (see 227(b)(2)(B)(ii)) it would raise the same definitional problem. The provisions of the TCPA governing pre-recorded messages do not apply to "live operator calls"; however, the do-not-call standards adopted by the Commission under Section 227(c) will apply to all marketers, including those who use fully pre-recorded messages. Thus, the adoption of company-specific, do-not-call rules solves the definitional problem for purposes of both Section 227(c) and Section 64.1100(c)(3) of the proposed rules.

in legal terms, apply to "business-to-business" calls. However, the term "residential telephone subscriber" is nowhere defined in the Act or its legislative history. It is not self-defining: many Americans -- e.g., farmers, real estate agents, freelance journalists, consultants -- conduct business from their homes and do not maintain a separate business telephone number. The TCPA leaves the status of telephone numbers listed in the residential section of the directory (where there is one) used for business purposes unresolved; the status of telephone numbers listed in a directory that does not distinguish business from residential numbers is often unknowable.^{10/}

24. Implementation of company-specific, do-not-call requirement makes it unnecessary to resolve these questions. Once a company do-not-call system has been put into place, the marketer has every reason (both economic and regulatory) to remove the names of objecting consumers from the list without regard to whether the telephone number is purely residential or is also used as a business number. Because company-specific programs are essentially self-administered, the incremental cost of compliance in such cases is negligible and the incentive to avoid the risk of confusion or, worse yet, of regulatory sanction or litigation is strong.

^{10/} It has been suggested that these lines would bear the status assigned to them by the local exchange carrier. However, this leaves the marketer with the impossible task of contacting all LECs to find out how a particular line has been characterized.

25. Accordingly, we submit that a regulatory framework based upon regulations that (i) require telemarketers to establish, operate and maintain company-specific, in-house, do-not-call lists, (ii) establish documentary requirements with respect to such policies, and (iii) create a rebuttable presumption that compliance with such documentary requirements constitutes compliance with the regulation is exceptionally well-suited to the basic purpose of the TCPA. Although not without cost to the business community (and, therefore, indirectly to the public), these requirements should not significantly burden the American economy.

C. The Alternative Regulatory Options Do Not Serve the Purposes and Criteria of the TCPA.

26. National or Regional Do-Not-Call Databases. We are not unmindful that the structure of the TCPA and its legislative history suggest a congressional preference for national or regional do-not-call databases. We believe that Congress failed to grasp the enormity of such an undertaking.

27. National or regional do-not-call lists simply will not work for two basic reasons. Under the legislation, these lists may only contain telephone numbers. See Section 227(c)(3). This restriction makes operation of such databases completely impossible. The DMA's enrollment card for TPS (see Exhibit C to these Comments) requests consumers to provide not only name, complete address and ZIP code, as well as telephone number, but also "variations of my name." See, Attachment C. Without all of this information, it is impossible to assure that the rights of

consumers who do not wish to receive telephone solicitations are protected, without impairing the rights of those who wish to do so. According to the United States Census Bureau, 50 percent of the American population moved between 1985 and 1990; 18 percent move every year. See N.Y. Times, Dec. 20, 1991, at A16, col. 1. It is estimated that the useful life of a published telephone directory in an urban market is less than 6 months and that approximately 10,000 telephone listings change every day. See M. Roman, Telephone Marketing 41 (1976). It is equally well-known that telephone numbers are regularly reused and reassigned by local exchange carriers.

28. In these circumstances, a national or even a regional database which is limited to telephone numbers is foredoomed to failure. It is utterly impossible to maintain and update reliably a list based only upon telephone numbers. At any time, 18 percent of the national or regional list will be out of date. Consumers who do not wish to receive telephone solicitation calls will either be forced to re-enter their telephone number every time they move or will inadvertently receive calls that they do not want; other consumers who enjoy the ease and convenience of shopping by telephone may end up being denied those benefits because, when they move, they are assigned a telephone number already entered into the national or regional database. Moreover, because of the extremely limited data field, marketers will have great difficulty matching

their lists with the database, finding "hits" where they are not supposed to exist, and missing "hits" where they do exist.

29. For these reasons and because Congress has definitionally excluded political and charitable calls from the scope of Section 227(c), regulation of unwanted calls by means of a national database system will quickly fall into consumer disrespect. Consumers will believe that there is a governmentally-sanctioned system in place assuring protection from calls to which they object.^{11/} When they find that this is not the case, there will be confusion and dissatisfaction with the responsible regulatory authorities. There will also be complaints about the many legitimate businesses that engage in telephone solicitation but are, because of the regulatory system, utterly powerless to help the consumer. Because of its fundamental operational infirmities, the national or regional database approach carries with it a very serious hidden cost to the economy.

30. In any event, this option abjectly fails the tests defining the "most effective and efficient" means of accomplishing the purposes of the TCPA.

31. First, such a system is not consumer-flexible or friendly. It forces consumers to an all-or-nothing choice: they must either agree to accept telephone marketing calls from all

^{11/} Although the Commission has made it clear that the national or regional database will not be governmentally funded, this approach requires the Commission to appoint or approve some entity as the database administrator. The impression that the system is governmentally-sponsored will be unavoidable.