

V. THE COMMISSION SHOULD CLARIFY THAT AUTODIALERS USED BY LIVE OPERATORS TO CALL RESIDENTIAL TELEPHONES DO NOT FALL WITHIN THE TCPA PROHIBITION ON ARTIFICIAL OR PRERECORDED VOICE CALLS

Time Warner submits that, as the Commission establishes its final regulations, it should take precautions not to view as interchangeable terms the principles of "automatic telephone dialing system" ("autodialer"), "artificial or prerecorded voice," and "automated call." In fact, the statute impacts these telemarketing mechanisms very differently. The Commission's proposed rules reflect the fact that only telephone calls using an artificial or prerecorded voice, not autodialer calls, are prohibited to residential telephones.<sup>40</sup> However, in numerous instances, the Notice appears to confuse the terms "artificial or prerecorded voice" and "autodialer." For example, paragraph 8 of the Notice reads "[a]utodialer calls are prohibited to: residential telephone lines without the consent of the called party . . . ." <sup>41</sup>

The TCPA defines "automatic telephone dialing system" as:

[E]quipment that has the capacity -- (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.<sup>42</sup>

As the Notice points out, "autodialer" is a synonym for "automatic telephone dialing system."<sup>43</sup> An autodialer is simply a mechanism whereby a number is programmed into a

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<sup>40</sup>47 C.F.R. §64.1100(a)(2) (1992) (proposed).

<sup>41</sup>Notice at ¶8. See also id. at ¶18.

<sup>42</sup>47 U.S.C. §227(a)(1).

<sup>43</sup>Notice at ¶2.

telephone and is retrieved and dialed via computer. This practice is commonly referred to as "speed dialing." Many basic residential and business telephones are equipped with this function for often-called numbers.<sup>44</sup> The use of automated dialing by Time Warner in its commercial telemarketing provides significant calling efficiencies for its live telemarketing operators, just as it does with residential autodialer utilization. Those efficiencies for a live operator in telemarketing provide cost savings which are beneficial to both Time Warner and the consumer.

In contrast to the use of autodialers by live operators, Section 3(b)(1)(B) of the TCPA prohibits persons within the United States from initiating:

[A]ny telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the Commission under paragraph (2)(B).<sup>45</sup>

Thus, while there is a clear restraint on the use of artificial or prescribed voice messages in telemarketing, the TCPA does not similarly restrain autodialer telephone calls to residences using live operators. Accordingly, the Commission should clarify that only calls

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<sup>44</sup>Time Warner also uses predictive dialers, whereby a computer automatically dials numbers loaded from a magnetic tape of customers' numbers. When the telephone is answered, the call is immediately routed to an available representative. Time Warner's use of autodialers and predictive dialers does not involve either random number dialing or sequential dialing as described in the House Report, or any perceptible time lag when a computer dials the number and routes it to a live operator. Thus, it is not clear that Time-Warner itself utilizes "automatic telephone dialing systems" under the statutory definition. Additionally, Time Warner clearly does not use artificial or prerecorded voice calling in any of its telemarketing efforts.

<sup>45</sup>47 U.S.C. §227(b)(1)(B) (emphasis added).

using an artificial or prerecorded voice, not all autodialer calls, are subject to prohibition by the TCPA.

VI. TELEMARKETING PROVIDES SUBSTANTIAL EMPLOYMENT, COST EFFICIENCIES, AND NEW PRODUCT DEVELOPMENT

As the TCPA notes, sales generated through telemarketing increased more than fourfold from 1984 to 1990, resulting in 1990 sales figures of \$435 billion.<sup>46</sup> The Notice "tentatively concludes that it is not in the public interest to eliminate this option for consumers."<sup>47</sup> Simply stated, telemarketing is an increasingly important component of the U.S. economy, and the Commission must be extremely cautious not to adopt burdensome regulations which would stifle its growth.<sup>48</sup>

Telemarketing in the United States is a major form of merchandising which employs significant numbers of people. At Time Warner, telemarketing is a crucial component of employment. Several thousand Time Warner employees are involved in telemarketing and activities directly associated with telemarketing. As a result, sales of Time Warner products and services through telemarketing are quite significant. More than 3.7 million people order Time Warner products annually via telemarketing, including renewing magazine subscriptions, purchasing recorded music, books, videotapes, etc. This represents a significant percentage of all orders for these products. Furthermore, in recent years, Time Warner has developed books, videotapes, and other products with specialized subject matter

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<sup>46</sup>TCPA, §2(4).

<sup>47</sup>Notice at ¶24.

<sup>48</sup>See President's Statement, December 20, 1991.

which would not have been economically feasible without the ability to offer the product by telemarketing. Indeed, if telemarketing was severely restrained as a merchandising method, Time Warner estimates that 20-30% of new offerings would not be economically feasible and thus not produced. Time Life Children's Publishing Division would be severely transformed or eliminated. Existing products would be impacted as well, especially for small niche audiences difficult to reach through mass marketing.

A principal reason for the projected inability of these products to survive is that certain products sell successfully through telemarketing, but not sufficiently by other means such as direct mail or TV marketing. An example of these past successes, which would not have been developed absent the use of telemarketing, is the children's offering, Fisher Price Little People's Big Books. Other examples include the Classics of the Civil War and Wings of War book series.

Any agency action that would stifle Time Warner's ability to offer the public these and other products through telemarketing would have damaging effects even if the product's viability were not eliminated immediately. It would force the use of other types of marketing which often have been proven more expensive and less effective than telemarketing. For example, TLB's cost per successful order through direct mail solicitation is several times the expense for telemarketing.<sup>49</sup> Multiplied by millions of orders, this cost difference is

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<sup>49</sup>Per unit (i.e., each piece of mail sent or telephone call made), telemarketing costs more than direct mail, about \$1.75 to \$2.00 per call versus \$.30 to \$.50 per 3rd Class direct mail piece. However, due to voluntary in-house suppression and the attention customers receive through the interaction with the telemarketing operator, the response rate of successful orders is much higher for telemarketing. As a result, the cost per successful order via telemarketing drops to a level from 1/2 to 1/3 of alternative methods, including direct mail. Obviously, the  
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astronomical and, at the very least, even assuming a continuation of the product, would force companies to pass through these unnecessary costs.<sup>50</sup> As a result, many products would not be offered at all, or if they were, the price would be substantially higher, making such products unaffordable for some consumers.

It is evident from the above descriptions that neither the Congress, the Commission, nor the vast majority of consumers desire to severely impact telemarketing as a method of merchandising. Accordingly, the Commission should be particularly cautious not to allow this result to occur inadvertently through unnecessarily restrictive regulations.

VII. THE COMMISSION SHOULD ADVOCATE RESTRAINT BY THE STATES TO AVOID UNDERCUTTING THE AGENCY'S IMPLEMENTATION OF THE TCPA

The TCPA prohibits the Commission from promulgating regulations under the authority of that legislation that preempt certain intrastate requirements or regulations which are more restrictive than the federal telemarketing requirements.<sup>51</sup>

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<sup>49</sup>(...continued)

ability of Time Warner to achieve such a higher success rate and thus greater consumer acceptance of telemarketing evidences, in part, that in-house suppression is quite effective and is one important reason why the Commission should not force Time Warner to forego telemarketing and substitute a greater portion of less efficient direct mail or television merchandising.

<sup>50</sup>Business postal rates have risen approximately 50-70% over the past four years, and the Postal Service projects another, quite likely major, increase in the Spring of 1994.

<sup>51</sup>Section 227(e) of the TCPA states that with certain exceptions of a technical nature: [N]othing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits -

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However, nothing in the TCPA precludes the Commission from exercising its exclusive jurisdiction over interstate communications by preempting state regulation that thwarts or impedes the Commission's national regulatory objectives.<sup>52</sup> Since such a preemption analysis would occur on a regulation by regulation basis, Time Warner submits that the Commission should provide guidance to the states with respect to its interstate regulatory objectives in this area and what types of state regulation might impermissibly intrude upon the Commission's regulatory authority. In particular, it is the Commission's responsibility to assure that a "crazy quilt" of disparate state regulatory schemes do not result in the stifling of an economically significant telephone-based national merchandising industry. The financial data of the telemarketing industry clearly establishes the industry's contribution to the economic fabric of the nation.

Specifically, the TCPA precludes only Commission regulations promulgated under authority of the TCPA that would preempt any state law that imposes more restrictive intrastate requirements or regulations. But this prohibition does not preclude Commission regulations promulgated under any other authority. State regulatory schemes which prohibit, for example, the use of automated dialing or telephone solicitations in general, either directly

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<sup>51</sup>(...continued)

- (A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;
- (B) the use of automatic telephone dialing systems;
- (C) the use of artificial or prerecorded voice messages; or
- (D) the making of telephone solicitations.

47 U.S.C. §227(e) (emphasis added)

<sup>52</sup>See Address by Sherrie P. Marshall, Commissioner, FCC, before the Direct Marketing Association, at 7 (May 19, 1992).

or through unduly burdensome regulations, clearly would have serious adverse effects on the nationwide telemarketing industry. It is precisely this type of state regulation that the Commission could address under its exclusive authority over interstate communications.

At the outset, the Commission should urge the States to rely on the federal regulatory scheme and allow it to be implemented and proven effective. As the federal scheme develops as an effective, workable approach, that is, it provides a reasonable balance between the First Amendment and business interests of the telemarketer on the one hand and the privacy rights of the consumer on the other, the States must be urged not to impose a patchwork of different regulations, each with its own set of costs and burdens. The aggregate effect of varied and potentially inconsistent regulatory schemes on the national telemarketing industry could result in significantly higher product costs for consumers and decreased availability of products in States where particularly restrictive or inconsistent regulations make it economically infeasible to market the products.

VIII. RESTRICTIONS ON TELEPHONE SOLICITATION SHOULD BE  
BALANCED AGAINST THE BENEFITS OF FREE SPEECH AND AN  
EFFICIENT MARKETPLACE

The commercial speech doctrine recognizes that speech will not lose its First Amendment protection merely because it serves a commercial purpose.<sup>53</sup> Telephone solicitation, encompassed by the TCPA, concerns commercial transactions and, as such,

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<sup>53</sup>See Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed. 2d 341 (1980); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Counsel, 425 U.S. 748, 762-765 (1976); Bigelow v. Virginia, 421 U.S. 809, 822-824 (1975).

constitutes commercial speech. Thus, such telephone solicitation is afforded a degree of constitutional protection by the First Amendment. As the TCPA recognizes, neither the privacy rights of the residential telephone subscriber nor the governmental interest in protecting those rights is absolute.<sup>54</sup> These rights must be balanced against the telemarketers' protected commercial speech rights.<sup>55</sup>

As was discussed supra, telemarketing has enormous consumer benefit and should not be unduly hampered as a form of merchandising. As recognized in Central Hudson Gas, "[c]ommercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information."

In Central Hudson Gas, the Court stated that "if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive."<sup>56</sup> The U.S. Supreme Court has repeatedly held that government restrictions upon commercial speech may be no more broad or no more expansive than necessary to serve its substantial interests.<sup>57</sup>

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<sup>54</sup>TCPA, at §2(9).

<sup>55</sup>See Address by Sherrie P. Marshall, at 2. Commissioner Marshall also mentioned "innovative technological advances" and business interests as interests that would need to be balanced against residential privacy expectations. Id. at 2-3.

<sup>56</sup>100 S.Ct. at 2350.

<sup>57</sup>See, e.g., Central Hudson, supra, at 566, 100 S.Ct., at 2351; Metromedia, Inc. v. San Diego, 453 U.S. 490, 507-508, 101 S.Ct. 2882, 2892-2983, 69 L.Ed.2d 800 (1981) (plurality opinion); In re R.M.J., 455 U.S. 191, 203, 102 S.Ct. 929, 937, 71 L.Ed.2d 64 (1982); Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 644, 105 S.Ct. 2265, 2278, 85 L.Ed.2d 652 (1985); Shapero v. Kentucky Bar Assn., 486 U.S. 469, 108 S.Ct. 1916, 1921, 100 L.Ed.2d 475 (1988).

Caller ID provides an example of where the privacy rights of the called party are balanced against the rights of the calling party.<sup>58</sup> The FCC has not undertaken broad regulations governing the use of caller ID by the called party or the evasion of such called party's right to know. In order to protect the privacy rights of the calling party, most jurisdictions have adopted reasonable blocking mechanisms that allow the caller to determine selectively to whom he or she will disclose his or her telephone number.<sup>59</sup> Moreover, a protective device has been developed which allows the called party to selectively reject calls from undisclosed or "blocked" telephone numbers. In short, the industry has essentially regulated itself through technology-driven innovations. Similarly, in the present case, there is no need to severely impair telephone solicitation by burdensome regulations and unnecessary costs. The marketplace in large measure will produce the desired result in conjunction with in-house suppression techniques that are being increasingly utilized by companies such as Time Warner.

Time Warner submits that among the regulatory alternatives discussed in the Notice, the development and use of company-generated "do not call me" suppression lists strikes a

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<sup>58</sup>See Rules and Policies Regarding Calling Number Identification Service, 6 FCC Rcd 5752 (1991); The Caller ID equipment aids the called party by informing him or her of the calling telephone number so that he or she can decide whether to answer the telephone. See also Address by Sherrie P. Marshall, at 3.

<sup>59</sup>Central Telephone Company of Illinois, Proposed establishment of Custom Calling II Service referred to as Caller Identification Service; Illinois Bell Telephone Company, Proposed Establishment of Custom Calling Service Referred to as Caller ID., 90-0465; 90-0466, Illinois Commerce Commission, 126 P.U.R. 4th 313, October 3, 1991; In the Matter of the Application of Indiana Bell Telephone Company, Incorporated for Authority to Offer Caller ID Service in Certain of its Exchanges, Cause No. 38970, Indiana Utility Regulatory Commission, 129 P.U.R.4th 361, December 31, 1991.

reasonable balance between the interests at issue. There is no need to require a costly and burdensome national data base administered by the government and paid for by merchandisers, who will pass these costs through to the consumer.<sup>60</sup> Many different products and services are conveniently available today by means far beyond simply selecting them from store shelves. There is no basis to assume that a consumer who is disinterested in a particular telemarketer's product will have no interest in all products offered via telemarketing. Company-based "do not call me lists" allow consumers to determine which telemarketers can call them, as is the case with the use of the Caller ID blocking mechanisms which enable the calling party to choose whether to disclose his or her telephone number on a call-by-call basis.<sup>61</sup>

By requiring telemarketers to maintain self-generated suppression lists of consumers who have informed them they do not want to be contacted, the impact on both the consumer's residential privacy rights and the telemarketer's commercial speech rights is minimized, and a reasonable balance between the two is achieved.

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<sup>60</sup>See Investigation by the Commission of the Public Utility Telephone System for Telephone Solicitation Advertising or Announcements to Residential Telephones, Decision No. 93731, California Public Utilities Commission, 7 CPUC 2d 198 (November 13, 1981) ("This Commission believes that the best method is industry self-regulation in this area."). See also Address by Sherrie P. Marshall, at 6.

<sup>61</sup>See, e.g., Curtis v. Thompson, 840 F.2d 1291, 1304 (7th Cir. 1988); Project 80's, Inc. v. City of Pocatello, 857 F.2d 592, 597 (9th Cir. 1988).

## IX. CONCLUSION

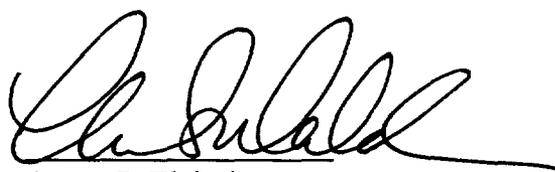
As the Notice recognizes, a highly intrusive regulatory scheme to implement the TCPA would contravene the will of Congress and the vast majority of consumers. It would also have severely detrimental effects on creative merchandising techniques and related economic growth, even if taxpayers could afford it. Accordingly, Time Warner has suggested a reasonable approach to achieve the desired limits on intrusion to residential privacy. These points take into account the unique consumer benefits of telemarketing, and the fact that telemarketing satisfies millions of customers every year:

1. Reliance on corporate in-house suppression rather than a federally-mandated national data base to eliminate calls to consumers who do not wish to receive them.
2. A flexible definition of "established business relationship" which would allow for reasonable corporate judgments regarding inter-division marketing, passage of time between the development of products, and reasonable customer expectations about being telephoned.
3. Action by the Commission to urge states to refrain from establishing a patchwork of different prohibitions on telemarketing unless a Commission-implemented national policy of uniform regulations is proven to be unworkable.

If these elements are part of a balanced regulatory scheme, telemarketing can continue as a viable, vibrant sector of the U.S. economy that provides adequate privacy to American consumers.

Respectfully submitted,

TIME WARNER INC.

A handwritten signature in black ink, appearing to read 'A. Fleischman', written over a horizontal line.

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