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Federal Communications Commission
Office of the Secretary

Comments of

Robert S. Bulmash
President,
Private Citizen, Inc.

Concerning the
Telephone Consumer Privacy Act

A Matter presently before the
Federal Communications Commission

May 26, 1992

No. of Copies rec'd 0+5
List A B C D E

Private Citizen, Inc. (PCI) was initially created in May 1988 to protect private citizens from unsolicited, and unwanted fundraising, political, survey, and business related calls to homes. PCI protects our fundmental right to be left alone by notifying (in writing, and on behalf of our members) over 1000 telephone marketing related organizations, that our members are unwilling to be freely annoyed by such calls. [1] Currently, PCI has about 2000 members.

Since 1985, I have studied the telephone solicitation industry, and its effect on citizens. What I found was an industry, operating freely within a legislative vacuum, and barging into our homes at their convenience in order to take advantage of our conditioned reaction to the ring of a telephone, for their own self-interested.

This *telenuisance* industry has diminished our sense of sanctuary; an essential component to our sense of "home". Perhaps Dante Ciritli of Grolier Communications (a telephone solicitation firm) phrased the problem best when he said, "[The public has] been conditioned to sit up and listen when the phone rings in our home. How natural is it for us to turn the TV down, or even to move into another room to give the caller our undivided attention. **And when the caller is a telemarketer, the result is a concentrated commercial message to which we have *no other choice* but to respond.**" [(2) - emphasis by this writer]

Before, and since this insight, people have related their sense of live unsolicited sales calls [3]:

83% preferred not to be called - Public Pulse / Roper Inc. Mag. 1/89
68% *very* annoyed - The Roper Organization Am. Demographic Mag. 3/91
66% hang-up on, or cut off the pitchmen.- Public Pulse / Roper Inc. Mag. 1/89
70% see it as an invasion of privacy - Walker Research Telemarketing Mag. 3/91
69% consider such calls an offensive way to sell - Walker Research Telemarketing Mag. 3/91
86% consider it annoying - Field Re'srch. commissioned by Pacific Telephone & Telegraph 1978
78% find it unacceptable - Ebasco Consult. commissioned by Washington State Utility Comm. 1985.

PCI's efforts are based on our fundamental, and therefore Constitutional right to be left alone; a right that Supreme Court Justice Louis Brandeis refered to as "the most comprehensive of rights, and the one most valued by civilized man."[3] Futhermore, The Preamble to the Constitution tells us that, "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure **Domestic Tranquility**..." created our system of government.

For it to exist, our right to be left alone to enjoy peace and quite, it must at least exist in our domicile. To effectuate that right we may notify entities of our unwillingness to be disturbed. Once put on notice, such an entity is bound to respect that right. For an entity involved in telephone solicitation to do otherwise, would be to violate a fundamental right, the spirit of the 9th Amendmment [4], as well as the property rights of a citizen to peacefully enjoy his or her own property.

The Telephone Consumer Privacy Act's (TCPA) purpose is to help protect our right to be left alone at home, free of intrusions from those we are unwilling to hear from. Unfortunately, in light of the rainbow exemptions allowed by the TCPA, and those tentitively proposed by the FCC, it seems to be shaping up as the antithesis of citizen protection. Private Citizen's fear is that once the FCC fulfills, its seeming intention to gut this already weak legislation, the TCPA will be seen by the *telenuisance* industry as a license to barge into our homes. Worse yet, courts may wrongly view any civil action brought against unwanted tele-intruders, as meritless unless filed under the TCPA (in the absence of state "telephone solicitation" legislation).

Thus this bill, which was touted as a "citizen's privacy protector" may truly become a "legislative crowbar" for junk callers to use in entering any home, while at the same time it will shield the tele-intruder from any repercussions. Indeed, leaders of the Phone Solicitation Industry are already talking about how the TCPA will legitimatize the industry [5].

Even if the TCPA is implemented in the most formidable version possible (and not exempt "live" calls";

- it will still allow every telenuisance firm (and their are tens of thousands of them), to call every citizen once every year without any repercussion,
- and even if after junk callers violate the law, by calling a specific resident repeatedly, and is sued, the law gives the tele-annoyer an *"affirmative defense"* by claiming that he tried not to call the telemark. (It will then be up to the telemark to prove otherwise.

As it is with any powerful industry's lobby, the DMA tells law makers that its self-regulatory policy benefits the public. The DMA has even created a Telephone Preference Service ([TPS], their euphamism for a "No Junk Call" list), that allows for the listing of citizens who don't want to be tele-anoyed. The DMA then tells legislators that junk callers do not want to call anyone unwilling to be called, as it would not be productive. What the DMA fails to disclose is that the vast majority of phone sales solicitions are unwanted; that it is the very nature of the *telenuisance* industry to call those who are unwilling to be called. To do otherwise would be to solicit only those it knew were willing to be called, a proposal too expensive for this media.

Tellingly, in the face of clear evidence of our annoyance (and its own TPS list of 500,000+ citizens who object to live unsolicited sales calls, last year, the Direct Marketing Association's (DMA) Sr. VP, Richard Barton told Congress that the DMA has, "no empirical data demonstrating that American consumers are generally opposed to current "live operator" telemarketing practices..." Yet, the DMA lobbiest knew the public's disdain for such practices 10 weeks later, when he was in a trade publication insisting that, "...telemarketers must continually remind themselves that theirs is the most obtrusive of advertising media." [6]

The industry has been successful. It has virtually cut the legs out from most state legislation. And is evidently now in the process of doing the same federally. The arguement has worked so well that now, when a phone solicitor continues to call a person who has repeatedly told that same firm to stop, the solicitor will commonly proclaim, "I will abide by the law... and only the law". The TCPA, if effectuated with the proposed exemptions, will surely turn our homes into their businesses.

Indeed, the best aspect of the TCPA is that it allows the FCC to ask Congress for the sweeping powers necessary to actually protect private citizens from the *telenuisance* industry. An action that I do not foresee.

ADRMP's (AutoDialing, Recorded Message Playing device)

AUTODIALERS - The proposed TCPA bans AutoDialers from calling 911, hospital, police, and fire emergency numbers, as well as physician and poison control offices. For the purposes of this aspect of the TCPA, it should also ban calls to the private homes of medical professionals "on call" for emergency service.

The proposed TCPA bans AutoDialers from calling the "rooms" of a hotel, hospital, health and elderly care home. For the purposes of this aspect of the TCPA, it should also ban calls to the private homes of elderly citizens.

ADRMP's TO BUSINESSES - The FCC seeks comment on the need for restrictions to protect a business's right to privacy.

Small, one man business operations may commonly get 10 phone solicitations a day. Many times, such as in metal working - fabrication / manufacturing, the businessman must shut down his equipment to answer the solicitor's call. The small businessman is in no position to miss the call of a potential customer, so as a result, the added cost of doing business (due to phone solicitors), are inumerable unnecesaary interuptions, and loss of productive time.

In Massachusetts, after an attorney was repeatedly called by Merrill Lynch, Pierce, Fenner & Smith, Inc., soliciting investment vehicles, the attorney asked that Merill Lynch stop bothering him in his office. [7]

When the calls continued, the attorney put his request of Merrill Lynch in writing.

When the calls continued, the attorney threatened legal action.

When the calls continued, the attorney got an court injunctive, enjoining Merrill from calling the attorney.

When Merrill Lynch was enjoined they did two things, they appealed and continued to call the attorney.

When Merrill Lynch appealed, the State Supreme Court took the case prior to an Appellate Court hearing. The State Supreme court found the words of the state law which the attorney used to base his original action on, did not accurately reflect intent of the state. The injunction was overturned, and a major industry (making 1,500,000,000 phone solicitations per year [see Chairman Markey's comments]) continues to call without regulation. And this is but one sector of the *telenuisance* industry. The burden applied to US commerce by all firms that continue to phone solicit in defiance of the previously expressed rwquest of the businessman, must be enormous.

The FCC should afford business protection from unwanted telephone solicitations.

GENERAL EXEMPTIONS PROPOSED FOR CALLS TO RESIDENCES

Note the following comment in the Findings of the TCPA, *"The Congress finds that:*
(#8) The Constitution does not prohibit restrictions on commercial telemarketing solicitations."
But Congress fails to mention other "telemarketing solicitation" restrictions that are not prohibited by the Constitution: that is, telemarketing-research / fundraising.

IT IS PROPOSED THAT ADRMP's WILL BE ALLOWED SOLICIT RESIDENTS FOR:

non-commercial purposes, such as political fundraising

tax-exempt organizations, such as the incessant Police and Fireman's Benevolent Associations.

former and/or existing clients.

The FCC should clarify if a citizen's "call for product information" to an 800 number, would qualify as as an existing relationship. Even if the citizen refuses to release his phone number. (Note that callers to 800 lines commonly have their originating [home] numbers supplied to the called party.)

The FCC should clarify a caller's duty to respect the right of a resident who has asked to be left alone. Even should that resident be a former or existing customer of the firm expressly told to stop calling. I feel that, in this circumstance, the calling firm has an easy opportunity (during the transaction of the initial business), and clear duty to ask the customer for affirmative, fully informed consent to telephone solicit his family in the future.

debt collection

For the purposes of supplying the FCC additional insight into this arena of solicitation, I have spoken with manufacturers sales representatives of predictive dialers. Although the FCC mentions that such equipment "immediately delivers answered calls" to telephone representatives, I am commonly told by these representatives, that it is often seen as appropriate to set the speed of the predictive dialer so high that it will "abandon" (hang up) on 30% of the debtors called, for lack of a representative to talk to those answering. Although this may seem unreasonable, perhaps this is but an additional means of applying pressure to those unable or unwilling to pay bills in a timely manner.

emergency purposes

This is interpreted to include health or safety information even if not of an emergency nature.

As a result, phone scamers that commonly use ADRMP's to pitch vitamin & water softeners will be allowed to continue. These scams first tell you of an "award" comming to the called party, if they purchase. Today, this is a predominant scam in telefraud, preying on mostly older citizens.

I suggest that FCC take this opportunity to act to protect older citizens in this regard.

ADRMP TECHNICAL STANDARDS

The name of the calling entity is to be stated at the beginning of the message.
Whose name? (principal or service agency)
It is likely the called party will not recognize either name, and will need more inforamtion to identify.
The address or phone number of the caller can be given at the end of the solicitation.
This requires the resident to listen to the entire pitch in order to get enough information to complain.
I suggest both phone number and address be given within 10 seconds of start of the solicitation.
The phone number shall not be the ADRMP's, and shall be answered during ADRMP operation.
The identifying information shall be given at a rate allowing it to be easily hand written as given.
The ADRMP shall release the line within 5 seconds of receiving "notification" of a hang up
Note that some local telephone companies take 25 seconds to transmit that signal. [8]
A dead line for 30 seconds, as a result of an ADRMP can result in a dead person forever.
I suggest that ADRMP's be required to "immediately release" the line.
- If not, then ADRMP's should not be allowed on that local exchange switch!
- that is, unless the law is meant to protect ADRMP instead of people.
Generally, The FCC misses the point: Most people don't want junk phone callers barging in to disturb them.
Instead of taking this opportunity to protect our right to be let alone, the FCC proposes rules to;
Require ADRMP users to give their name to the party called - a minimal requirement at best.
Allow ADRMP users to force victims to listen to an entire pitch before releasing their addresss.
Allow ADRMP's to tie up our telephone lines for up to 30 seconds AFTER WE HANG UP.
The FCC's proposals seem to protect the junk call industry, rather than the victims of junk calls.

TELEPHONE SOLICITATION TO RESIDENTIAL SUBSCRIBERS

The FCC's rulemaking procedure concerns the need to protect privacy rights, and avoid getting "junk calls".
President Bush indicated his wish that the FCC implement the TCPA in a pro-business fashion, saying;
"... I fully expect that the [FCC] will... ensure that the requirements of the [TCPA] will be met with the least possible cost to the economy."
The FCC's primary Presidential directive is a concern for the TCPA's effect on business.
The TCPA was created to protect our right of privacy from junk call intrusions.
The President seems to see the TCPA as a problem that citizen's created for business.
The FCC has a choice, it can either:
help unwilling victims of, *"the most obtrusive of advertising media"* (see Barton, cited above)
limit the protection of these victims by implementing the wholesale exemptions proposed.
There is a need for protection of our right to be left alone from the intrusion of telenuisance calls
They know, before making their next junk call, that the likely result will be to disturb us.
Most of citizens consider *telemarketing* to be annoying.
Folks who've asked callers to stop, commonly continue to get multiple calls from the same firms.
This is not a circumstance limited soley to what the industry refers to as "boiler-rooms".
AT&T, MCI, Olan Mills, CitiBank, an Encyclopedia Britannica division, Paine Webber, Merrill Lynch, non-profits organizations, and telemarketing-research firms have all been known to do it (to name a few).

Examples of the above include:
CitiBank *dictating* its policy to continue soliciting citizens, for up to six months, after being asked to stop.
Collateral to that is CitiBank's refusal to release the names of those firms who are telemarketing for them... even when CitiBank became aware that the calls were being made to me "in error" as a wrong number.
MCI soliciting an elderly woman the afternoon she returned from the hospital being diagnosed as having a malignancy. When the woman said "no" and hung up, the MCI solicitor quickly called back, asking for the woman's husband (she was never married). When asked, the MCI solicitor admitted that she had called earlier... but that she called back to talk to someone who could understand sense.
It is all the more horrific that when this matter was brought to the attention of MCI's Washington Headquarters, the resulting investigation claimed that the MCI solicitor inadvertantly marked the woman's card as a "busy", thus generating a second call. In this way MCI found a way to not have to deal with the circumstances involved. And that is the worst part of the problem... the MCI response to it.

Olan Mill's Chairman submitted his written statement for inclusion in the hearing record of the US Senate's Subcommittee on Communications last July, which was looking into regulation of the *telenuisance* industry. His closing remarks included, "We think the FCC should have some other options besides the national electronic data list. The option that we favor is the 'Do Not Call System' that we use now."
In describing its *Do Not Call System* to Congress, Olan Mills wrote, "When someone indicates clearly that they do not want to be called again, we put their number on a list and don't call them again for 2 years."
Olan Mills has a peculiar sense of its right to barge into my home. When I say "Don't Ever Bother Me Again!", Olan effectively hears, "Call me again in a couple years!" A plea for privacy is met by Olan with some patience, and then more calls. Tellingly, Olan sees this policy as so responsible that it crows about it to Congress. To me Olan's policy seems both socially absurd, and indicative of the business philosophy necessary to support an obtrusive sales process that effectively treats our right to be left alone in our own homes, free of annoying intrusions, as but a quaint historical anomaly.

The combined phone firepower of just the 3 largest US "outbound" telephone solicitation entities have the capability to tele-annoy more than 90 people per second.

The FCC says that their 1980 inquiry found that regulation was not warranted.
The FCC now asks if additional authority is need to protect consumers. The answer is yes, for:
Prior existing relationships, when the called party indicates that no further solicitations be made.
Non-profit/tax exempt entities, when the called party has indicated that no solicitations be made.
Survey-research, when the called party has indicated that no solicitation of data be made.
Political, when the called party has indicated that no solicitation be made.

The FCC is a body of the <u>people</u> of the United States, and should have our welfare at it's heart
We have a right to be left alone at home by those we have advised to leave us alone.
It is well recognized that solicitors have a duty to respect "No Solicitation" signs on doors
Martin v. Struthers 63 S.Ct. 682 - "...homes are sanctuaries from intrusions upon privacy, and of opportunities for leading lives of health and safety. Door-knocking and bell-ringing by professed peddlers of things or ideas may therefore be... circumscribed so as not to sanctify the rights of these peddlers in disregard of the rights of those within doors."
Carey v. Brown 447 US 471 - "The state's interest in protecting the well being, tranquility & privacy of the home is of the highest order in a civilized society." "Our decision reflects the right to be let alone in the privacy of the home. Sometimes the last citadel of the tired, the weary and the sick."
Rowan v. US Post Office 397 US 728 - "A mailer's right to communicate must stop at the mailbox of an unreceptive addressee. To hold less would be to license a form of trespass." "That we are often captives outside the home to objectionable speech doesn't mea we must be captives everywhere."
Reasonable time, place, and manner restrictions may be placed on otherwise free speech
see: In the Matter of Unsolicited Telephone Calls (FCC Docket No. 78-100)
Memorandum Opinion and Order of the FCC, 5/22/80, Page 16, Par. 35
See: Grayned v. Rockford, 408 U.S. 104
The FCC asks if the public interest to recognize the inherent difference between ADRMP, and live calls.
The issue's center is that we are called from our activity to respond to another's immediate summons.
The harm is the loss of our privacy, our right to be alone, to those who have been told not to intrude.
Whether calls are from people who dial phones, or program phone dialers, its the same result.
The FCC notes that, "*unsolicited sales calls* generated $435,000,000,000 in sales in 1990". (10)
Based on this figure, the FCC states, "*Thus many consumers find such contacts beneficial...*"
"Many" is a relative word. 1000 is "many", but measured against 1 million, it is few.
Nevertheless, the "vast majority" find unsolicited sales calls an annoyance.

[1]See accompanying Private Citizen, Authorization Form
[2]The Washington Monthly, December 1986 - Article titled "Dialing for Dollars"
in Telemarketing Magazine of April 1991, Groller was listed as one of the 5 largest firms doing +50% of its business f
company with ownership or equity interest.
[3]Harvard Law Review, 1890
[4]"The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by
Ninth Amendment, Constitution of the United States
[5]"Legislation will have a legitimizing effect for telemarketing." Teleprofessional, March 1992: *Legislation Aimed at Telemarketing Has Positive Twist*, quotes Steve Idelman, chairman, ITI Marketing Services, Inc.
[6]DM News Richard Barton's column, "Inside the Beltway", September 30, 1991 *Tone It Down, Telemarketers*
[7]Commonwealth of Massachusetts Appeals Court No. 89-P-1117 Middlesex County
[8]see FCC document # 63203: ICB-FS-UNSOL-1 April 1990 UNSOLICITED CALLS
(10) A $435 billion figure has been used through-out the TCPA legislative process. This figure's source has been attributed
alternatively to a 1985 prediction of Technology Marketing Corp. (as reported in The Encyclopedia of Telemarketin
1985 prediction of a consortium of the Direct Marketing Assoc., the U.S. Bureau of Economic Analysis, Forcasts As and
a *Telemarketing Magazine*.

Private Citizen, Inc.

P.O. Box 233 - Naperville, IL 60566 - 708/393-1555

AUTHORIZATION FORM

Yes, I'm fed up with junk phone calls. List me in the Private Citizen Directory for a year, and send it to telemarketers across America at least twice a year. Then send me a list of firms to whom it was sent. My $20 *check is enclosed.**

I/we _____

clearly print your full name (e.g. for spouses, John Q. & Jane Q. Doe) Note: Only one "last" name or Firm name may appear on this line.

located at _____

print your street address, city, state, zip * You can list one additional address for an added $)

hereby adopt as my own, the NOTIFICATION & OFFER and DEFINITIONS on the back of this form, and appoint Private Citizen, Inc. (PCI), to be my agent to communicate this to firms involved in telemarketing, and advise them of my wish not to be junk called, and that such a call will be taken as acceptance of my *offer*, and their obligation to pay me for their use of my time and telephone. Accordingly, PCI will also advise such firms of my name, city, state, zip, and

phone number (_____) _____-_____

To further protect your privacy, the Directory lists phone numbers in a separate table, apart from subscriber names, city, state & zip.

(_____) _____-_____ (_____) _____-_____

* You can list additional phone numbers for an added $5 each.

X _____ _____

SIGN HERE DATE

Are particular junk calling firms annoying you? Tell us about them below. If they are not already on our list, we can add them.

Firm name	Address	City - State - Zip	Phone #

To: Those involved in the *direct marketing / telenuisance / telemarketing / junk call* industry.
From: See my listing in the Private Citizen Directory, or see the reverse of this document,
Subject: The following is transmitted to you by my agent, Private Citizen, Inc., on my behalf:

NOTIFICATION & OFFER

- I consider junk calls (as defined below), to be an annoying invasion of my privacy, and an interference with my ability to peacefully enjoy my property. You are now instructed to carefully respect my rights in this regard!
- I am unwilling to allow your free use of my time and telephone for such calls and offer you such use on the following terms:
- I will accept junk calls, placed by or on your behalf, for a $100 fee, due within 30 days of such use.
- Each such call will be a separate acceptance of this offer, and upon its answer-ratification, all involved entities in receipt of this document will be bound by the resulting agreement and all terms contained herein.
- Your junk call to me will constitute your agreement to the reasonableness of my fee, my appropriate recording of such call, and your payment of all reasonable legal fees and/or collection costs as may be required.
- This offer extends for one (1), year from the date of its latest receipt by you, or until I may expressly modify it.
- Note that non-payment of charges billed as a result of your telemarketing activity, may be construed to indicate; your defiance of my request that you leave me alone and rejection of duty to respect my privacy, and/or your intent to unjustly enrich yourself at my expense, and/or your maintenance of a nuisance, and noisome trade at my expense.
- I may deem such wrongful, and/or tortious behavior as a cause of action based on, but not limited to implied, constructive, or quasi contractual obligation, and in which case I may endeavor to collect punitive and/or exemplary damages as well.
- I consider the sale or rental of my name and any other identifying information to be a conversion of my property (name). A $100 fee will be due within 30 days of each such conversion, payable to me by involved and notified entities.
- I hereby certify that I subscribe to PCI's NOTIFICATION & OFFER (below), and incorporate it with mine wherever possible.

Private Citizen, Inc. (PCI), for itself and its subscribers, hereby Notifies and Offers your organization as follows;
- The Private Citizen Directory is the property of PCI. It is not to be sold. A transfer of it must include this document.
- You may verify the intent and authenticity of those listed in PCI's Directory (details from PCI), by:
  - mailed inquiry to those listed in PCI's Directory (PCI can forward your request to those for whom you have no address),
  - inspection of original Authorization Forms at a location agreed upon by both PCI and the inspecting entity,
  - inspection of copies of Authorization Forms mailed to a location of your choice.
- Responding to a telephoned verification request is a service offered by those listed in PCI's Directory and obligates such callers to compensate called subscribers $100 per call. The terms and conditions described above apply here as well.

DEFINITION OF TERMS

PCI, and those listed in the Private Citizen Directory define the terms Telemarketing / Telenuisance / Junk call as:
- A telephone call to the premises of a PCI subscriber, delivered live or prerecorded, by voice or facsimile,
- by or on behalf of an organization, including but not limited to its agent, dealer, franchisee, contractor or subsidiary,
- without both an existing direct relationship with, and fully informed, affirmative authorization of the party called,
- whether such calling organization be of a commercial, non-profit, survey-research, or political nature and,
- dialed either randomly, sequentially, automatically, manually or intentionally targeted,
- intended to sell, rent, survey/poll, solicit information about, encourage donations to, generate/qualify sales leads for, create interest in or renew subscriptions for anything (tangible or intangible), of concern to the calling entity.

Junk calls include those by a firm having an established relationship with the called party, if the call is not related to the business established between them (ex. a city bank junk calling its credit card holders to peddle a city travel package).

Junk calls do not include calls made to collect debts if payment is not made per agreement, nor do they include calls made when both the calling <u>and</u> called individuals involved are <u>personally</u> acquainted with each other.

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