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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

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CC Docket No. 92-90

COMMENTS OF SECURITIES INDUSTRY ASSOCIATION

William Jordan
Director,
State Governmental Affairs
**Securities Industry
Association**
120 Broadway
New York, NY 10271

Richard E. Wiley
James T. Bruce, III
Rachel J. Rothstein
of
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000

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SUMMARY

In response to the Telephone Consumer Protection Act, the Commission has asked for comments on proposed mechanisms for protecting telephone subscribers from receiving unwanted telephone solicitations. Although SIA believes that there are no constitutional interests which require such rules, SIA is aware of Congress' directive for the Commission to investigate the issue and develop procedures for consumers to object to, and request discontinuation of, certain telephone solicitations.

SIA is concerned, however, that some of the Commission's proposals would place overly burdensome restrictions and costs on legitimate telemarketers. Specifically, SIA is concerned that the adoption of a national electronic database, special directory markings or new network technologies would have drastic effects on the marketing activities of many companies. Indeed, SIA believes that the only proposal which may permit the Commission to fulfill its obligations under the TCPA would be a company-based "Do Not Call" list. Time-of-day restrictions could be acceptable to SIA if narrowly limited to the Commission's original proposal.

SIA urges the Commission to carefully consider its comments, and those of the other parties, and to enact rules which will adequately protect consumers without placing undue

burdens on the legitimate business practices of American companies.

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Securities Industry Association ("SIA"), by its attorneys, hereby submits its comments in the above-captioned proceeding.¹ SIA understands Congress' goal of honoring an individual's desire for privacy while adequately balancing commercial freedoms of speech and trade. Accordingly, SIA urges the Commission to analyze the associated costs and effectiveness of each of the options proposed in the NPRM and choose an option which does not unfairly burden legitimate telemarketing practices.

I. INTRODUCTION

SIA represents over 600 securities firms located throughout the United States and Canada. SIA members include securities organizations of virtually all types -- investment banks, brokers, dealers and mutual fund companies -- as well as firms functioning on the floors of the exchanges. These firms range in size from large multi-national firms with tens

¹ Telephone Consumer Protection Act of 1991, CC Docket No. 92-90, rel. Apr. 17, 1992 [hereinafter NPRM].

of thousands of employees to small one and two person operations. SIA members are active in all securities markets and in many phases of corporate and public finance. Collectively, SIA members provide investors with a full spectrum of investment services and account for some 90 percent of the securities business conducted done in North America.

The sales practices of the securities industry are already highly regulated. Extensive anti-fraud and sales practice regulation begins at the federal level with the Securities and Exchange Commission and filters down to each state through its own securities laws. Furthermore, industry self-regulation, through organizations such as the National Association of Securities Dealers and the various exchanges, provides another layer of policing activity.

It has been SIA's experience that responsible telemarketers do not harass the public. Telemarketers depend on the public's goodwill, and it is simply not in a company's best interest to abuse this goodwill by alienating potential customers and their referrals with harassing phone calls. SIA recognizes, however, that abuses have existed in the past which may have persuaded some members of the public to look for ways to discontinue telephone solicitations to their

homes. Thus, the TCPA² was enacted by Congress and directs the Commission to review a number of regulatory alternatives and enact regulations to permit subscribers to object to receiving telephone solicitations.

II. THE COMMISSION SHOULD ADOPT A SYSTEM WHICH DOES NOT UNFAIRLY BURDEN LEGITIMATE TELEMARKETERS

Congress found that the "use of the telephone to market goods and services to the home and other businesses is now pervasive due to the increased use of cost-effective telemarketing techniques."³ In response to this finding, Congress directed the Commission to adopt rules concerning the need to enable residential telephone subscribers to avoid receiving telephone solicitations to which they object.⁴

Within this rulemaking, the Commission was directed to compare and evaluate alternative methods and procedures for their effectiveness in eliminating telephone solicitations to which subscribers might object. Congress gave the Commission several alternatives to examine, (electronic databases, telephone network technologies, special directory markings, industry-based or company-specific do-not-call systems) but left the Commission free to examine other alternatives as

² Telephone Consumer Protection Act of 1991, P.L. 102-243 [hereinafter TCPA].

³ TCPA at § 2(1).

⁴ See TCPA at § 3(c)(1).

well. If the Commission determines telephone subscribers have an interest in restricting calls they receive sufficient to justify significant burdens on legitimate telemarketers, SIA believes one of the Commission's proposed alternatives may be the least burdensome of the five suggested, and possibly a second one could be acceptable if very narrowly restricted. The other proposed alternatives, however, will place drastic and overly burdensome measures on telemarketers and will adversely affect both legitimate telemarketing practices and the provision of goods and services to the public in a cost effective manner. Because SIA believes no constitutional interest is violated by consumers receiving telephone solicitations, significant burdens on the telemarketing industry may not be justified. The Commission should carefully consider all of the alternatives and refrain from enacting any regulation that would interfere with the effective dissemination of information and products to the public.

A. Several of the Proposed Alternatives Would Not Meet Consumer Expectations and Would Unfairly Burden Legitimate Telemarketing Practices

The Commission seeks comments on five "potential mechanisms to restrict live operator telephone solicitation to subscribers . . ." ⁵ as well as any other alternatives

⁵ NPRM at 12.

that might fulfill Congress' mandate under the TCPA. The Commission asks for an analysis of the costs and benefits to be derived from each particular system and the procedures which might be used to implement the method. SIA believes that some of the systems proposed by Congress would not meet consumer expectations and would severely hamper legitimate telemarketing practices. Specifically, SIA opposes Commission adoption of an electronic database, special directory markings or industry-specific do-not-call ("DNC") lists. These options will not adequately protect subscribers and would deny consumers the right to choose between information sources which they want to receive and those they do not want to receive. Further, these options would place unfair burdens upon legitimate business practices. In addition, network technologies do not yet exist which would allow the Commission to fulfill its obligations under the TCPA.

1. Adoption of an Electronic Database Would Result in Subscriber Dissatisfaction

A national database would be difficult and costly to develop, implement and continuously administer and would not achieve the Commission's objectives of balancing "the privacy concerns which the TCPA seeks to protect and the continued

viability of beneficial and useful business services."⁶ Furthermore, an electronic database would be a deceptive solution from a consumers' viewpoint in that individuals would soon realize that the database does not enable them to eliminate all unsolicited telephone calls.⁷ Thus, for consumers who might want to discontinue all telephone solicitations, the electronic database will be a disappointing solution. Finally, a nationwide electronic database would impose considerable unnecessary expenses on legitimate telemarketers of all sizes and would unfairly burden small telemarketers.

For example, some individual securities dealers may not be affiliated with a nationwide organization, but still conduct solicitations on a nationwide basis. These individuals may be forced to purchase database information for the entire nation, even though they may only engage in a limited amount of calling. The sheer expense of having to purchase this type of information may make it impossible from a business standpoint for an individual to successfully comply with the Commission's rules. Developing procedures to

⁶ NPRM at 15.

⁷ The TCPA expressly excludes from the definition of telephone solicitation calls from a tax exempt nonprofit organization. See TCPA at § 3(a)(3)(C). Thus, solicitations by charitable, political, and non-profit organizations will continue, regardless of the consumers' desire to be free from these unwanted intrusions.

effectively employ such a system would be next to impossible for the individual or small business person. Thus, smaller telemarketers could not effectively compete with larger businesses in absorbing national database costs.

The securities industry's experience with Florida's database system illustrates the lost productivity and unnecessary expense law-abiding telemarketers incur in attempting to comply with a database system. As of December, only 28,000 Florida households -- out of nearly five million -- were participating in the database.⁸ However, all telemarketers were spending from \$1000 to \$1600 each year to purchase this list, regardless of the number of calls made by the individual or corporation. Furthermore, SIA has learned that most of the complaints filed against securities companies for violations under the new Florida law have turned out not to be valid complaints. Typically, after a consumer has indicated to the state his or her desire to be placed on the list, he or she assumes there will be no more telephone solicitations. The problem, of course, is that the consumer will not appear on the list until the next time the state updates and publishes it. Consumers are frustrated and file complaints with the state for failing to prevent

⁸ See, Have You Been Cold-Called, Fortune Magazine, December 16, 1991 at 109.

unwanted calls. Telemarketers are faced with the expense of investigating and answering these complaints.

2. Special Directory Markings Would Not Be Sufficient To Protect Consumers on a Nationwide Basis

SIA agrees with the Commission's conclusion that it is not clear how a special directory marking requirement could be applied on a nationwide basis for telemarketers. Indeed, short of forcing nationwide telemarketers to purchase every telephone directory published in the United States, SIA cannot conceive of a workable system incorporating special directory markings. Should the Commission require carriers to make these directories available on a computerized basis, the potential costs could be enormous. Moreover, questions such as time lag would need to be addressed. In short, a special directory markings mechanism would be expensive, difficult to adhere to, and difficult to enforce.

Licensed securities salespersons do not make random and indiscriminate calls. Their solicitations are focused on a specific, targeted market. Nonetheless, regardless of where a securities salesperson obtained the name of a prospective customer, he would be obligated to locate the person's name in the appropriate up-to-date directory and determine whether the name contains a marking. This would create an onerous

burden, especially for small telemarketers operating over a large geographic region.

Finally a special directory marking requirement would not meet consumers' expectation of preventing solicitations on a real time basis. Because most directories are published only once a year, there will be a significant lag between the time when a person expresses his or her desire to discontinue solicitations, and the time when that decision is effectuated. Meanwhile, consumers will continue to receive telephone solicitations. The possibility of widespread consumer dissatisfaction with the Commission's adopted mechanism will hamper all telemarketers in their business practices.

3. Network Technologies Do Not Present the Commission With Adequate Alternatives

SIA also has reservations as to the cost and feasibility of the Commission's network technology proposal. SIA is not aware of any existing network technologies which would allow the Commission to fulfill its obligations under the TCPA. While technology to enable individual telephone subscribers to eliminate unwanted solicitations may exist in the future, SIA cautions the Commission to refrain from adopting any proposal that would impose significant costs on telemarketers or other network users.

The NPRM contains a proposal whereby telemarketers would be assigned a dedicated prefix or area code which could be blocked by individual consumers at the LEC central office. To enact such a proposal, a dedicated prefix would have to be set aside from the North American Numbering Plan. There is no indication that such a dedicated prefix could even be made available. Furthermore, the LECs would have to upgrade many of their switches in order to accomplish a per line blocking for the prefix. Such a system upgrade will obviously take considerable time and expense. From a consumer's viewpoint, this delay will result in continued unwanted solicitations, not to mention higher rates for local exchange telephone service.

Moreover, the proposal does not provide a mechanism for telemarketers to be able to contact consumers for non-commercial purposes or for calls to existing customers.⁹ Such a system might require two separate telephone lines for each telemarketer -- one on the Commission-mandated prefix to be used for telephone solicitations and one on a regular prefix which could be used for other customer contact. Such a two-tiered system could be prohibitively expensive for individuals or small companies and would place substantial burdens on the national telephone network.

⁹ The TCPA exempts solicitations to established business customers from the definition of telephone solicitation. See TCPA at § 3(a)(3).

4. The Commission Should Not Adopt An Industry-Specific DNC Mechanism

Finally, SIA is opposed to the adoption of any type of industry-based list. An industry-based list would be difficult to manage, would place significant burdens on Commission resources, and could possibly create widespread customer confusion and dissatisfaction. Actually, the legislative history of the TCPA indicates Congress did not want a database broken into a menu of categories of types of marketers.¹⁰ This suggests that an industry-based DNC system would be inconsistent with Congressional intent.¹¹

Often, industries, by definition, include many diverse and competitive companies with no simple method of communication. The Commission would have to develop specific lines-of-business classifications, and then determine how these companies would interact to form such a list. Moreover, issues such as antitrust concerns must be addressed by the Commission should it decide to mandate that industry representatives develop procedures to limit marketing practices on an industry-wide basis. As a trade association, SIA would be wary of actively developing or participating in

¹⁰ See Telephone Advertising Consumer Rights Act, H.R. Rep. No. 317, 102nd Cong., 1st Sess., at 23.

¹¹ Looking at the sequence of legislative history of TCPA, it appears that the term "industry-based" was actually a synonym for "company-specific."

such a system for the securities industry for fear of antitrust implications.

Furthermore, with companies engaged in multiple businesses, the Commission would be burdened with having to make individual determinations as to where these companies should be placed. With the amount of telemarketing currently being conducted,¹² and expected to be conducted in the future, Commission resources would be significantly strained by these additional requests for rulings.

SIA believes that options such as an electronic database, network technologies and special directory markings do not successfully balance certain telephone subscriber's interests in not receiving solicitations with the need of telemarketers to continue to conduct legitimate business activities. Furthermore, these options will meet with widespread consumer dissatisfaction and confusion. SIA urges the Commission to refrain from adopting any of these regulatory proposals.

III. A COMPANY-BASED DO NOT CALL SYSTEM MAY PERMIT THE COMMISSION TO FULFILL ITS OBLIGATIONS UNDER THE TCPA

Company-based DNC lists, as described in the Commission's NPRM, may provide an effective means for the

¹² Congress found that over 30,000 businesses are currently engaged in telemarketing activities. See TCPA at § 2(2).

Commission to fulfill its mandate under the TCPA, although such an option would place strenuous restrictions on legitimate telemarketers. These lists would enable telemarketers to develop their own in-house system, which can be as simple or complex as necessary for the amount of telemarketing conducted.

As envisioned by SIA, a company-specific DNC list would require telemarketers to develop procedures for consumers to indicate they wish to cease receiving further solicitations by the company. A consumer could choose to discontinue solicitations by one or more companies, without having to eliminate solicitations from every company. Surely this approach is more consumer oriented than the "all or nothing" approach resulting from a nationwide electronic database. Finally, SIA would remind the Commission that any company-specific DNC list of subscribers' telephone numbers will rapidly become out-of-date due to demographic shifts, employment changes, etc. Therefore, we would suggest that individual numbers on a DNC list be required to be kept for no longer than two years.

IV. SIA DOES NOT OPPOSE THE COMMISSION'S TIME OF DAY RESTRICTION, BUT IS CONCERNED ABOUT ESTABLISHING TIME OF DAY REGULATIONS IN GENERAL

The NPRM suggests that time-of-day restrictions may be useful in fulfilling the Commission's mandate under the TCPA.

As discussed by the Commission, many states, as well as the Federal government, have already enacted regulations which limit the hours during which telephone calling may be conducted. As noted by the Commission, the Fair Debt Collection Act¹³ already limits the hours during which creditors may contact debtors to between 9 a.m. and 9 p.m. While telemarketers are not subject to this Act, most comply with these guidelines voluntarily as a sound business practice.¹⁴

SIA is concerned, however, that should the Commission enact any time-of-day restriction, it will be forced to constantly reconsider and refine the times under which solicitations would be prohibited. As recognized by the Commission, "any time restrictions more restrictive than a 9:00 a.m. to 9:00 p.m. system would likely be overly burdensome on legitimate business activities, difficult to monitor and offer little, if any, additional benefits."¹⁵ SIA fully agrees with the Commission that enacting any more restrictive regulations would unfairly restrict legitimate telemarketing practices.

¹³ 15 U.S.C. § 1602 et seq. (1988).

¹⁴ Moreover, the Direct Marketing Association has adopted voluntary guidelines which restrict telemarketing activities to between the hours of 9 a.m. and 9 p.m.

¹⁵ NPRM at 15.

One could argue that as long as the call was not at an unreasonable time of day -- before 9:00 a.m. or after 9:00 p.m. -- then it is no more intrusive at 7:00 than at 9:00. Thus, restricting solicitations during legitimate calling hours would not seem to provide consumers with any additional benefits. SIA urges the Commission, should it adopt time-of-day restrictions, to ensure that it does not embark upon a slippery slope of constantly redefining the proper time constraints within which telemarketers should operate.

V. CONCLUSION

SIA urges the Commission to carefully consider the alternatives proposed in the NPRM. Any mechanism adopted by the Commission to accommodate telephone subscribers' desire for privacy, must not impose unreasonable costs or burdens upon legitimate telemarketing activities. SIA believes that the company-based DNC list could be a less burdensome solution if appropriate guidance for its implementation and maintenance is given. Imposing a 9:00 a.m. to 9:00 p.m. calling restriction on telemarketers is not unacceptable, but the

Association is concerned that a time-of-day restriction might evolve by further regulation into a tighter restriction that could pose a grave threat to its members.

RESPECTFULLY SUBMITTED

SECURITIES INDUSTRY ASSOCIATION

By: 
Richard E. Wiley

James T. Bruce, III
Rachel J. Rothstein
of

WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000

William Jordan
Director,
State Governmental Affairs
**Securities Industry
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