

JCPenney

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Federal Communications Commission
Office of the Secretary

May 26, 1992

Donna R. Searcy
Secretary, Federal Communications Commission
1919 M St. NW
Washington, D.C. 20554

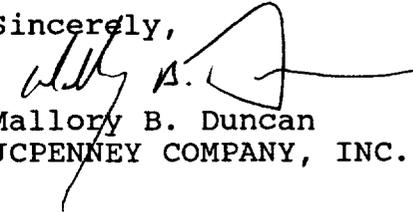
RE: CC Docket No. 92-90

Dear Ms. Searcy,

Enclosed for filing are the original and nine copies of the Comments of the J.C. Penney Company, Inc. with respect to the Notice of Proposed Rulemaking on this matter.

Please make these Comments part of the official record.

Sincerely,


Mallory B. Duncan
JCPENNEY COMPANY, INC.

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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Federal Communications Commission
Office of the Secretary

In the matter of the)
)
Telephone Consumer Protection)
Act of 1991)

CC: Docket No. 92-90

COMMENTS OF THE JCPENNEY COMPANY, INC.

I. INTRODUCTION

The JCPenney Company (Penney) submits these comments in response to the Federal Communication Commission's Notice of Proposed Rulemaking (NPRM) FCC-92-176 released April 17, 1992.

In response to the passage of Public Law 102-243, the Commission's notice sets forth the manner in which it seeks to implement the required congressional restraints on auto dial and prerecorded voice equipment and requests additional comments as to the need and methodology for further restrictions on telephone solicitations. The NPRM represents a thoughtful and comprehensive analysis of an extremely complicated (and in parts problematical) piece of legislation. To the extent that certain portions of the underlying legislation are internally inconsistent or fail to reflect technical realities, the Commission is placed in the awkward position of attempting to reconcile these difficulties. A close reading of the legislation and the NPRM reveals that the Commission has done a remarkable job of addressing many of the problems presented. A few, however, remain. The

Administration has noted that the law provides the Commission with the authority to address the concerns identified by Congress while maintaining the flexibility necessary not to encumber efficient business operations.¹ The Commission should use that flexibility to further refine this rule.

II. AUTO DIALERS AND ADRAMPs

A. Differences Distinguished

There is one point on which Congress, the Commission and the Penney Company all agree: uncontrolled intrusions upon customer privacy is a matter of utmost concern. This issue is of greatest consequence when random and sequential auto dialers are used to deliver prerecorded messages (ADRAMPs).² When ADRAMPs are used to deliver prerecorded

¹ See, President's Signing Statement accompanying the Telephone Consumer Protection Act of 1991.

² For purposes of analysis, it is critical to distinguish between auto dialers generally and the subclass of auto dialers known as ADRAMPs. Auto dialers are a labor saving device designed to dial specified numbers, to listen for a ring on the receiving end, and to hook together the calling party and the called party when the phone is answered. In most cases, when the calling party is a live operator, an autodialed call is indistinguishable to the recipient from an operator dialed call. So used, auto dialers merely do the preliminary work prior to the customer's involvement in the telephone call.

ADRAMPs are significantly different. An ADRAMP essentially substitutes a prerecorded message for the live operator in the preceding example. This coupling creates a new device. Therefore, when the calling party and the called party are connected, the called party hears the voice of a recording device and ordinarily has no opportunity to speak with a live operator. As the Commission recognizes, when such devices are used to deliver brief messages of significance to the called party they can be a low cost, beneficial means of facilitating necessary business (e.g., to inform individuals of school closings, to advise them of the delivery of ordered merchandise, or alert individuals to scheduled power outages). However, ADRAMPs can also be used in an intrusive manner.

solicitations to individuals who have no interest in the property or services being offered, they can constitute a significant intrusion. This is especially likely when the devices are programmed to dial in a random or sequential order. In these situations, the relatively low cost involved in coupling a prerecorded message with an automatic dialer provides the solicitor not simply with the capacity to deliver a needed message to selected individuals, but rather with a low cost means of blanketing a community with its solicitations. Because labor becomes a negligible cost, the solicitor whose message only appeals to one person in a thousand is nonetheless able to force 999 other persons to answer his phone call in hopes of reaching that one prospect. It is such uses which have given ADRAMPs a negative reputation, and have led to the provisions in Public Law 102-243 and this rulemaking.

When auto dialers are used in this manner, the overwhelming majority of consumers are not only forced to respond to an advertisement in which they have no interest, but, because there is no live operator involvement, they are often deprived of the means to communicate their wish not to be called in the future. If, in addition, the line is seized, the intrusion is exacerbated by the consumers' loss of control of their phones for the duration of the offending solicitations.

The practical effect of such practices is to reduce the economic value of private telephone lines and equipment which have been paid for by the consumers. The Penney Company believes that the Commission should take action to restrict such practices.³

³ We note that §227(a)(1) defines an automatic telephone dialing system as "equipment which has the capacity -

- (A) to store or produce numbers to be called, using a random or sequential number generator; and

B. Suggested Modifications to the Proposed Rules

In general, the Penney Company supports the NPRM's treatment of auto dialers and ADRAMPs. For purposes of the final rule, however, we would suggest the following clarifications.

1. Limitations to Prohibition on Certain Calls

Section 64.1100 of the proposed rules prohibits auto dialers from being used to call residential telephone lines, emergency lines, the guest rooms of health care facilities, certain mobile phone lines, and any service for which the called party is charged for the call, absent prior express consent or genuine emergency. In implementing these regulations it should be made clear that the final category (calls for which the called party is charged) should only cover those instances in which the calling party knew, or might easily have determined, that the caller would be charged for the call. Absent such an interpretation, the Commission might inadvertently prohibit the use of auto dialers by subjecting companies to liabilities that they could not readily avoid. For example, how could nationwide marketers know which prefixes correspond to paging services or other specialized mobile radio services in every market in which they seek to operate?

(B) to dial such numbers. (emphasis supplied)

Thus, the restrictions in the legislation would appear to encompass only those devices used for the congressionally identified abusive purpose. We ask that the Commission consider whether auto dialers that have been altered, programmed, or otherwise changed, so as to reasonably likely to defeat their use as a random or sequential dialers, should be as covered by these rules.

a) Call Forwarding. Alternatively, many telephone companies offer "call forwarding" which allows the consumer to transfer calls from his home number to a distant location. If that location is in a toll calling zone, the individual will be charged the toll rates for the forwarding function. To our knowledge, there is no means by which a firm which uses an auto dialer to place a permissible call could know in advance that the call would be subject to the forwarding charge. Yet, a literal reading of the rule could cause the call to be deemed a violation. The Commission should explicitly state that a consumer's employment of call forwarding signifies prior express consent to receiving the charged call.

b) Special Facilities. As to calls to guest rooms in health care facilities, these telephone numbers also vary greater from location to location. Simply because a business chooses to market nationally does not mean that it knows the specific telephone number of every guest room in every health care facility in the nation. Some methods of conveying this information to businesses must be developed. We would suggest that the Commission deem it compliance with this provision if marketers refrain from calling numbers delivered to them by health care facilities nationwide (either directly or by reporting those numbers to some readily identifiable single source).⁴

c) Giving Number as Consent. Finally, although it is implied in the proposed rule, it should be made very clear that a customer's decision to volunteer a number at which they

⁴ For example, this might entail health care facilities registering their numbers with a recognized "do not call" data base, such as that administered by the Direct Marketing Association, or by registering their numbers with the Federal Communications Commission. Since individual guest room numbers are not even listed in most telephone directories, it is essential that the Commission assist the business community in complying with this new prohibition.

can be contacted by a merchant constitutes "the prior express consent" of the called party required under the rule. If a customer volunteers to a merchant the number of his car phone, the guest room of a health care facility, or a particular residential number, the merchant should not be penalized for taking the consumer at his word.

2. Established Business Relationship

The Commission proposes an exemption for auto dialed calls to former or existing clientele. The genesis of this exemption is the provision in the law excluding from the definition of a "telephone solicitation" calls or messages "to any person with whom the caller has an established business relationship."⁵ While the concept of an established business relationship exception is commendable, we agree with the Commission that it is most evident in the telephone solicitation portion of the legislation.

a) Definition of EBR Not Needed. The Penney Company does not believe that it is necessary for the Commission to define an "established business relationship" in order to promulgate regulations under this act. There is no statutory mandate that it do so and the clear meaning of the words should allow sufficient flexibility for firms to demonstrate the existence of such a relationship as the need arises. Nevertheless, if the Commission should decide to define the concept we would propose that Commission adopt explanatory language outlining the general concepts to be considered in determining whether such relationship exists. The concepts should be expressed from the standpoint of the marketer so as to

⁵Section 227(a)(3)(B)

provide some certainty to companies relying upon the Commission's guidance in determining whether to make calls to specific individuals. A definition turning upon the customer's affirmative acknowledgement of the existence of such relationship is likely to lead to serious disagreements in precisely those cases where certainty is most needed. The remainder of this section provides the general outlines that such an explanation might take.

b) At Most Guidelines Should Outline the Scope of Exemption. Section 227 (a) (3) of the law exempts from the definition of telephone solicitation calls to individuals with whom the telephone solicitor has an established relationship. It would appear that the purpose of this section is to allow consumers generally to exclude unwanted sales calls without precluding telephone communications between merchants and individuals who are connected by prior business dealings. The legislative history of this bill makes it clear that it was not the intention of Congress to prohibit businesses from contacting their customers.

It is reasonable to assume, for example, that a family that shops regularly with a particular retailer would not object to advance notice of discounts given to "preferred shoppers"; but, that family might object to telephone solicitations from merchants with whom they have had no connection or rapport. A customer with a particular size or color preference is unlikely to object to a call from a merchant who knows her well enough to be aware of those preferences and who alerts her to a new delivery, although she might object to seemingly random solicitations by strangers.

Whether a business relationship is established is not strictly a function of the number

of contacts between the potential seller and buyer. Where the involvement has been intensive and requires the disclosure of detailed personal information, such as is typical among the parties involved in the purchase of a home or certain insurance products, one or two contacts may be sufficient. Where the involvement is minor or incidental (e.g. purchasing candy from a vendor), numerous contacts may be needed to "establish" the relationship. Similarly, where there is an ongoing financial relationship, such as for the continuing provision of credit; or where the consumer voluntarily provides his or her telephone number to the business entity in question, there arises a reasonable presumption that the consumer would not object to receiving calls from that business.

In view of this and in light of the many variables involved, the Penney Company suggests that the best test as to whether an established relationship exist is a subjective one. To wit: whether the consumer, within a few seconds after answering the telephone, recognizes the company making the call and can quickly ascertain the reasonable basis on which the seller is asserting the existence of an established relationship. Where a seller has reasonable grounds to believe that his or her company would be so perceived by the individual called, then there a reasonable basis for believing that an established business relationship exists. It might be noted that in the case of autodialed pre-recorded message calls, the provision in Section 64.1100 (d) (1) of the rules requiring that the business identify itself at the beginning of the message facilitates the consumer recognition called for by this test.

3. Debt Collection Calls

a) **Generally.** Paragraphs 14, 15 and 16 of the NPRM address a possible exemption for debt collection practices. In its discussion the Commission notes that a sophisticated type of auto dialer is often used in debt collection to connect customers immediately to a live collection representative. These dialers sometimes deliver a recorded "hold" message to small percentage of debtors when all live operators are busy.

Debt collections calls are commercial in nature and do not fall under the proposed exemption for non-commercial calls, however, the Commission notes that because debt collection calls do not also involve an unsolicited advertisement, the proposed exemption for commercial calls not involving an unsolicited advertisement would also be applicable. The Commission further notes that to the extent that debt collection calls are made by independent collectors, the collecting company becomes a party to the relationship between the company holding the debt and the called individual. Consequently, the established business relationship exemption would apply to an auto dialer call to a former or current client. We would also suggest that by virtue of entering into a commercial or retail credit agreement with a lender or merchant, the customer has evidenced the prior express consent normally associated with any such business relationship and that would include the ability of the credit grantor to communicate orally with its client. In any event, we agree with the Commission's conclusion that to the extent such calls comply with all other state or federal debt collection laws, this is a non-telemarketing use of auto dialers not intended to be prohibited by TCPA.

b) Need for Specific Exemption. The foregoing exemptions would apply to debt collection calls. However, the Commission should affirmatively, specifically exempt debt collection calls. The use of sophisticated dialers for debt collection is a well-established, cost-effective means of reminding a company's existing clients of the timeliness requirements in servicing their debts. The consequences to the called consumers of failing to receive that message can be significant. In many cases a customer is able to preserve their credit standing if an obligated payment can be made within a short time period after receiving the collection call. To the extent that this secures a customer's credit standing, there are significant benefits to consumers from receiving such calls.

From the business' standpoint, as the Commission correctly observes, the use of auto dialers in debt collection increases the efficiency of the collector who no longer has to deal with unanswered calls or busy signals. The Penney Company alone has invested over thirteen million dollars in such dialing equipment designed to facilitate calls to its customers. In the absence of a specific exemption, much of the efficiency of this equipment would be negated.

Due to the uncertainty as to congressional intent regarding the applicability of the "established business relationship" provision to the auto dial/ADRAMP portion of the legislation we think it unwise to link a large portion of the financial services industry to a potentially unsettled exemption. On the other hand, the Commission could easily find that debt collection calls, while commercial in nature, neither contain an unsolicited advertisement nor adversely affect the privacy rights intended to be protected by the TCPA. Unlike randomly dialed pre-recorded messages which are the primary target of this

legislation, debt collection calls are carefully targeted towards those telephone numbers at which the potential debtor can be reached. There is no privacy incursion of the phone lines of other persons. Thus, this is a category of calls made for a commercial purpose for which the legislation expressly provides the Commission with the authority to exempt from the requirements proposed in Section 64.1100. The Commission should avail itself of the opportunity to provide this certainty to the industry.⁶

c) Technical Difficulties. There are two technical difficulties arising from the proposed rule's treatment of debt collection calls. Both concern the content of recorded messages.

Proposed rule 64.1100 (d) requires that all artificial pre-recorded telephone messages state, at the beginning of the message, the identity of the business individual or other entity initiating the call. In the case of the above referenced sophisticated dialers, delivering a complete hold message may not always be possible. Although it is the intention of these auto dialers to deliver a live collection representative to the called party immediately upon connection, this is not always possible. As was mentioned in those few cases where all operators are busy a brief message (such as "please stand by for an important message") might be delivered instead. Since the equipment is programmed to connect a called party to the live operator at the earliest opportunity means that the recorded message sometimes will be interrupted in order to deliver a live operator more quickly. Thus, even though the equipment might be programmed to deliver the rule required message ("please stand by for

⁶ To the extent that outside collectors make debt collection calls on behalf of the person holding the debt we believe that general agency principals should also confer upon them the protection offered to the debt holder.

an important message from the JCPenney Company"), there is no guarantee that a live operator will prior to the completion of even this brief message. If a live collection representative becomes available, the dialer will make the connection even though only the first two words of the message have been announced.

The live operator who then speaks with the customer is capable of answering the customer inquiries regarding the origin of the call but, strictly speaking, that information will not have been delivered to the consumer during the recorded message as the Commission's rule would require. Since this interruption occurs as a result of the equipment's programmed desire to facilitate the communications between the customer and the live operator, to require that consumer's be held on the recording for an additional period of time in order to allow them to hear the recording state the name of the company is costly, illogical, and self-defeating with respect to purposes of the act. We do not believe that this was either Congress' or the Commission's intention. Accordingly we would recommend that in those cases where a live operator is delivered to the called party, the Commission should clarify that the phrase "beginning of the message" to the state that it is satisfied when a live operator is offered for questioning as to the identity of the entity initiating the call within ten seconds after the call is connected.

The second technical difficulty arises from a conflict between the NPRM and the Fair Debt Collection Practices Act (FDCPA). Debt collectors may be an employee of the credit grantor or an outside agent. The FDCPA applies to both. Especially in the former case, it may be impossible for an in-house collector to provide a meaningful disclosure as to the entity initiating the call, as is required by the NPRM, while declining to identify its employer,

as is required by the FDCPA. The NPRM should specifically provide that in a debt collection context, and identification that does not reveal the identity of the debt collecting entity constitutes compliance.

II. ADDITIONAL REGULATION OF TELEPHONE SOLICITATION IS NOT NEEDED

The intrusions that were considered most significant both by Congress in passing the TCPA and by the Commission in its own reviews of consumer complaints indicate that the overwhelming majority of privacy problems are caused by ADRAMPs delivering unsolicited advertisements. The Commission's own study indicates that in 1991, consumer complaints with respect to ADRAMPs exceeded complaints with respect to live solicitations by a factor of more than ten to one. If the ADRAMP problem were addressed, as the proposed regulation most assuredly does, there is no need to impose the massive costs and disruptions necessary to establish comprehensive regulations addressing the relatively few complaints involving live operators. Each of the options proposed by the Commission will involve significant industry and societal cost. These cost will be significantly higher if the options are imposed in combination. We do not believe the benefits to be gained will in any way substitute for the extraordinary costs imposed.

A. Consumer Views

Furthermore we believe that consumer frustration with ADRAMPs has caused them to brand all telephone solicitations as unworthy even when they do not actually believe that to be the case. Two examples should help make this clear.

Recently the Penney Company commissioned focus groups with respect to telephone solicitations. Individuals were queried as of their feelings towards telemarketing and desirability of limitations on telephone solicitations. A number of them expressed the view that telephone solicitations were undesirable and should be prohibited. What they failed to recognize was that each of them had been chosen for participation precisely because they had made and maintained significant financial purchases as a result of telephone solicitations. We believe that these consumers were actually articulating their opposition to the intrusive ADRAMP calls and temporarily forgetting the more desirable calls to which they had all favorably and repeatedly responded.

This conclusion is bolstered by a second focus group with which we are familiar. Individuals who had responded favorably to a marketer's telephone solicitations were subsequently assembled to determine their views on telemarketing. Once again a number of consumers stated that telephone solicitations should be restricted. When the moderator of the group pointed out that the company from which they had all recently purchased would not be allowed to contact them in the event such calls were banned. The general response of the focus groups members was "oh, we wouldn't want to stop telephone solicitations from a company such as that one."

While focus groups results are by no means projectable to a general population they confirm our business impressions that consumers do not strenuously object to responsible telemarketing by live operators from reputable companies. Once the consequences are made clear, they most certainly do not want calls from such companies banned. By focusing on the most abusive and intrusive forms of telemarketing, the randomly-dialed unsolicited

pre-recorded message, by establishing mechanisms to eliminate those which consumers do not invite into their homes, and by providing a mechanism by which the consumers may identify and contact the purveyors of those solicitations which are delivered, the Commission appears to have nearly completely resolved this issue. Rather than require every business which happens to market by telephone to become subject to nationwide regulations the Commission should impose the restrictions set forth for auto dialers and ADRAMPs and advise the Congress, as the legislation allows, whether additional regulation appear to be warranted. We believe that after observing marketer's operation under the proposed regulations, further restrictions will prove unnecessary.

B. Available Options

Obviously, if the Commission deems it essential to impose regulation, or if the Commission should monitor this issue and subsequently determine that additional legislation and/or regulation is warranted, some provision from among the five options offered by the Commission is likely to be chosen. After reviewing the options available we believe that only the one set out in paragraph 32, if further modified, is appropriate. That proposal would allow companies to establish their own in-house "do not call" lists.

1. In-House Suppression

Relative to the other options, the advantages of this approach are significant. Many reputable companies already have in place some means of suppressing calls to consumers who indicate that they wish not to be contacted in the future. This makes sense, especially

from a business standpoint. Expending valuable operator time to conduct live solicitations of individuals who have already indicated an aversion to the message or to the company's product is a waste of precious resources. Furthermore, for those companies who have multiple lines of products, they do not want to sully their good name by forcing consumers to listen to unwanted solicitations -- especially if the solicitation results in the customer's becoming disinclined to buy the merchant's other products or services.

a) Message Tailoring. An additional advantage of in-house suppression is that it allows customers to tailor the kinds of messages they are interested in receiving from multifaceted firms. If a firm offers, say, both brokerage and travel services through separate operating companies, subsidiaries or divisions, a customer may choose not to receive solicitations from one division while indicating receptiveness to solicitations from another. Or the consumer may indicate that he or she wants no solicitation from the company altogether. The use of in-house suppression systems allows this tailoring.

b) Necessary Refinements. While we believe that the use of in-house suppression systems is the most cost-efficient means of eliminating unwanted live operator telephone solicitations, certain refinements are needed. Companies who do not have suppression systems or who seek to expand their systems must be given sufficient latitude by the Commission to accomplish that goal in a manner that avoids wasteful systems development. Thus, if the Commission mandates this approach, we would recommend that companies be given a sufficient time as to allow for the orderly development and/or expansion of new and/or existing suppression systems. The time needed will be most critical in the case of

those small firms who currently have no in-house systems and thus will be forced either to update or computerize much of their existing equipment. As a practical matter, without the benefit of computerization, it is unlikely that a small firm with a dozen marketing employees could effectively compile by hand a list of numbers not to be called and ensure that each of the eleven other members of the firm do not call the proscribed numbers (numbers often generated by their co-workers). For large national marketers there will be very significant expense in linking their many satellite offices to the suppression list developed by headquarters (and vice versa). In addition, suppression requests from among a company's various operating units must somehow be integrated. For this reason, an implementation period of less than one year would be certain to leave many companies vulnerable to violations.

Also, there are likely to be a number of companies, whether for financial or for other reasons, that simply will be unable to develop the necessary in-house systems. If the Commission feels it must mandate some system we would suggest providing sufficient flexibility in the final rule so that companies could choose another option (such as adoption of the Direct Marketing Association's telephone preference service) as a means of satisfying the proposed rule.

c) Publicity. The rule must also set forth some mechanism for publicizing the availability of such suppression systems. There are a number of ways which the public could be apprised of the existence of such systems. Local phone companies could be required to advertise their availability in monthly mailings to their customers. Alternatively, a consumer who receives a solicitation might use the occasion of that telephone call to ask

the company how further solicitations can be terminated. The company could either provide a consumer with a toll free number which the consumer could use to terminate such solicitations or, if technologically feasible, the company might have the solicitor make the necessary arrangements during the course of the initial call. Some companies might choose to volunteer their toll free number listings (if that is the approach they adopt) in certain of their advertisements. Other companies may choose to provide scripted responses to their live operators advising inquiring consumers as to how future telephone solicitations could be avoided. No single method of publication is perfect but the Commission encourage as much diversity in response as is effective. No single method of publication is perfect. There must be sufficient flexibility such that companies are allowed to respond to consumer requests in as efficient manner as possible while not imposing direct costs upon the consumer.

d) De Minimis Exception. Finally, regardless of the rule that is developed, the Commission should propose a de minimis exception for certain telephone marketing operations.

It is impossible to regulate every telephone call which happens to contain a solicitation. Throughout America in many towns, local merchants may call upon friends and acquaintances, although not established customers, to advise them of favorable offerings. When such calls are very limited in number and undertaken as much out of friendship as out of business purpose, it would be self-defeating to force such local patterns to bend to a national rule proscribing solicitations. If imposed literally, and without a de minimis exception, a Commission-passed rule could prohibit the manager of a small store from

calling his Rotary brothers to inform them of a sale. If the Commission is not to completely disrupt life in many American cities, an exception for such uses of the phone, either on the grounds that they are intrastate or, when the cross nearby state lines, on the grounds that they are de minimis should be provided. The colloquy on the legislation certainly indicated that such was intention of the drafters.⁷ A few dozen calls by a local merchant during the course of a week should not require him to adopt the massive compliance burdens the regulations would impose.

Furthermore, (while "established business relationship" provisions may provide some protection in a number of cases) a requirement that a consumer's toll free notification be instantly reported and adopted by every local facility and subcontractor of a major corporation either would be prohibitively expensive to accomplish (e.g. because it would require computer hook-ups to phones in every conceivable soliciting location) or otherwise unworkable.⁸ For these and other reasons we ask the Commission seriously consider

⁷ Excerpt from Congressional Record, S. 16204, Nov. 7, 1991. Debate on S. 1462:

Sen. Gore: ...I also noticed that the committee has directed the FCC to consider whether the procedures eventually adopted should apply primarily to local telephone solicitations. . . am I correct in my understanding that any company conducting primarily local telephone solicitations might be included in this category? It would seem that the provision should apply to companies that conduct business locally, and thus become part of the community, and are subject to the scrutiny of the community. . . For example, one of my constituents, Olan Mills, has photography studios located across the country. However, each location generally conducts its solicitations directly from the studio, within the local community. Nearly all of these calls are local in nature. . . Am I correct in believing that this is the kind of business meant by the committee to be considered under this provision?

Sen. Pressler: Yes, that is correct.

⁸ In many cases a subcontractor will provide services to a customer under the umbrella of a large corporation (e.g. rug cleaning services). A serious question is raised as to whether a subsequent call by that firm to offer follow-up services six months later will be allowed if in the interim the customer had otherwise requested of the primary firm that there be no

providing the requested exceptions or, that these comprehensive regulation not be imposed prematurely.

e) Proof of compliance. Regardless of the regulatory scheme adopted, the Commission should affirmatively state that the existence of a in-house suppression systems reasonable calculated to accomplish the goals of the regulation, written policies and procedures, and employee training programs to implement that system should be prima facia evidence that compliance with the regulations has been accomplished. Although we do not believe that any general purpose regulatory scheme for suppressing live operator call should be mandated, a carefully designed and flexible in-house solicitation program is the least offensive alternative. Other alternatives are either less effective, more costly or both.

2. Network Technologies

a) "All or nothing" undesirable. The Commission points out the serious questions as to whether network technologies currently exist to allow subscriber blockage of telemarketers via a common telemarketer prefix. Even if the technological questions can be resolved, however, JCPenney doubts seriously that such a method would be desirable anyway. Under a networking plan, according to the Commission, all telemarketers would be assigned a common nationwide telephone prefix which subscribers could unilaterally "block." Thus, consumers would be faced with an "all or nothing" telemarketing choice -- even the consumers who have objections only to very specific industries or companies. For example,

solicitations from it in the future. Does such a call extinguish the business relationship of the independent contractor who has actually provided the services?

where a subscriber might not object to receiving calls which advertise clothing or baby products, he would be forced to forego such desirable calls to avoid receiving the occasional undesirable real estate offer. Most consumers, we believe, would be unhappy with this "all or nothing" choice, thus undermining the usefulness of network prefix blocking as a viable method under the TCPA.

b) Technological Concerns. Unlike in-house company suppression lists, the technology utilizing prefix networking to prevent unwanted solicitations is not widely extant. Such a system would most likely require "SS7" switching technology. As is evident from the record in FCC Docket 86-10 (800 database), SS7 technology is not ubiquitous, and may never be. Thus, only those people who live in areas which do have SS7 could benefit from this approach. Thus, there would be significant costs associated with developing the technology, integrating it with existing systems and then switching every telemarketer into the prefix pool. Further, given the enormous diversity of the size and types of telemarketers nationwide, it is questionable whether enough lines even exist to make this technology a viable option. The North American Dialing Plan is already running short of available numbers and may not be able to accommodate a special telemarketing prefix. Finally, business might be required to install duplicate back-up lines for their non-solicitation activities. This inefficiency would ultimately be passed on to the consumers in the cost of goods.

c) Cost to Consumers. Given that networking technologies do not currently exist to implement this type of plan, the technologies would have to be researched and developed - - a strategy that would inevitably raise subscriber costs in the form of carrier rate base

increases. The blocking equipment, whether installed at the local telephone company or at the residence of the blocker, would ultimately be paid for by the consumer. An option that results in higher consumer costs would probably not be allowed under the TCPA, which mandates that the Commission choose a suppression method at no cost to subscribers.

3. National Database

The concept of a "National Database" of telemarketing "objectors" has been repeatedly debated since the early stages of the legislation. We have carefully examined the possible permutations of such a database and conclude that such a strategy is costly, unwieldy, of doubtful effectiveness and raises privacy concerns. Accordingly, we have identified the following problems with a "National Database."

a) Implementation Costly. A "National Database" would likely lead to major implementation difficulties. First, it would be an immensely costly proposition, according to all available evidence. The only presently operating "don't call" database exists in Florida; to cover the program's costs, subscribers are charged \$10 per year to object (a charge which would not be allowed under the TCPA), while telemarketers pay \$400 per year for quarterly updated lists. These costs would continue perpetually. Further, subscribers are forced to renew their objection every year or so, a bothersome procedure for most people.

b) Structural Flaws. Even given the best implementation program, industry practices dictate that objectors would discover a significant time lag -- as long as six months -- between the time of objection and the time it takes practical effect. For example, a person

"objecting" on January 1 first appears on the list sold to the telemarketers on April 1 (the end of the quarter). On April 1, however, the telemarketer is still gathering lists which will be used three months in the future. Thus, by the time telemarketers actually merge the January objection with their future call lists, as much as six months may have passed. A person's "objection," then, really does not take effect for up to six months -- a circumstance probably at odds with the expectations of most subscribers.

A database would also have to deliver the names and phone numbers of objectors in a format compatible with those used by the enormous number of the nation's telemarketers. Given the variety of computer systems used by the industry, the list of possible formats is endless. If the regulations solved this difficulty by requiring a standardized computer format, the resulting cost to telemarketers of reconfiguring their equipment set-ups would practically cripple the industry.

c) Administrative Difficulties. Potential antitrust problems await any regulatory solution that authorizes a private entity to carry out administration of the database. Given the antitrust difficulties of private administration, the government would be forced to manage such a database -- essentially forcing the Commission to open an entirely new division. This would be a significant and costly circumstance at a time where the federal budget is already stretched tightly. Finally, creating a national "master list" of individuals who are privacy-sensitive appears counter-intuitive at best. These problems of cost and administration make a smooth adoption and operation of a "National Database" of objectors next to impossible.

d) All or nothing" undesirable. As mentioned in our analysis of the viability of

network technologies, a single national list of "objectors" deprives consumers of selectivity. Few consumers would reject in advance every single telemarketing call directed at them and would prefer to discriminate among companies or products (as allowed by industry- or company-specific objector lists).

4. Special Directory Markings

The use of local phone company directories to "mark" objectors would doubtless be a most difficult method of implementing the "objector" concept. First, national telemarketers would have to somehow knit together numerous lists from the various local carriers in all 50 states -- an alternative both costly for business⁹ and inconvenient for the carriers. Second, because of the lead times required by most telemarketers (as mentioned above), most objectors would not stop receiving calls for up to six months. Finally, because subscribers often move or change numbers, the lists would have to be updated at least every year to ensure that numbers do not remain perpetually on "do not call" status.

5. Time of Day Restrictions

As the Commission observes in paragraph 33, most telemarketers voluntarily comply with reasonable time of day restrictions as a matter of wise business practice. Telemarketers seek to make a good impression on their prospective customers and would gain little by offending them with calls at inconvenient times. Thus, national time of day restrictions

⁹ For example, the Florida list contains over 25,000 names. At \$10 per name plus \$400 for each company seeking a computerized listing, it is clear that maintaining that one state's list exceeds several hundred thousand dollars annually.