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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of
The Telephone Consumer
Protection Act of 1991

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CC Docket No. 92-90

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MAY 26 1992

Federal Communications Commission
Office of the Secretary

COMMENTS OF OLAN MILLS, INC.

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SUMMARY

Olan Mills believes that the Commission's NPRM represents a well-balanced approach to successfully implementing the goals of the TCPA while not placing overly burdensome requirements on telemarketing activities. Specifically, with regard to live operator solicitations, the Commission was directed to consider a number of alternatives for their efficiency and cost effectiveness. While various proposals were suggested in the TCPA only one, a company-based "Do Not Call" system, would accomplish these goals while successfully allowing consumers a choice as to which commercial telephone solicitations to discontinue.

A company-based do not call system allows consumers to right to choose with whom they will conduct business. Consumers will be able to discontinue solicitations from some companies, while continuing to receive offers from others. Moreover, a company-based do not call system would allow telemarketers to design and implement their own mechanisms for ensuring against making unwanted solicitations. The size and complexity of the system could thus be directly related to the amount of their actual telemarketing. Individuals and small companies can implement systems as simple as a set of index cards, while large, national telemarketers can incorporate computerized in-house systems for their employees. Finally, a do not call mechanism would impose the least costs on legitimate telemarketers, especially in light

of the fact that Congress wanted, and consumers deserve, such a system in place anyway to sever unwanted existing business relationships.

Other proposals suggested by the Commission, such as an electronic national database, special telephone directory markings, and network technologies would be costly -- if not impossible -- to administer on a nationwide basis, and would result in widespread customer confusion and dissatisfaction. For example, a national database would be anticompetitive because it would allow existing business to contact current customers, but prohibit new companies from marketing to these individuals. In essence, a national database would freeze the status quo of the existing marketplace. Finally, the customer would have no choice as to which solicitations to discontinue -- in essence, an all or nothing approach.

Special telephone directory markings, while useful at the local level, would be almost impossible to implement on a nationwide basis. This system could conceivably force all telemarketers to purchase every telephone directory in the country and then check their telemarketing lists against these directories. Finally, while Olan Mills does not oppose the time-of-day restrictions as proposed by the Commission, it is concerned that such a restriction will be constantly targeted for refinement and could lead to very narrow and burdensome requirements.

Olan Mills is not aware of any currently existing network technologies which would allow the Commission to fulfill its obligations under the Act. And while technologies may be developed, the design and implementation of such systems would be costly for ratepayers and telemarketers alike.

As telemarketers provide valuable services to the public, and to the economy, it is important for the Commission to refrain from enacting rules which unfairly restrict these valuable and legitimate practices. Olan Mills believes that a company-specific do not call system will allow the Commission to adopt rules protecting subscriber privacy rights, while not placing unduly burdensome regulations on telemarketers.

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COMMENTS OF OLAN MILLS, INC.

Olan Mills, Inc.¹ ("Olan Mills"), by its attorneys, hereby submits its comments in the above-captioned proceeding. In general, Olan Mills believes that the Commission's NPRM² contains a set of regulatory options from which the Commission can select a well-balanced approach to protect the privacy rights of telephone subscribers while ensuring that legitimate telemarketers can successfully continue offering valuable services to the public. Olan Mills urges the Commission to implement a system that will

¹ Olan Mills is a privately-held company operating over 900 photography studios nationwide engaged in family portraits. The company was founded in 1932 in Arkansas during the Depression and conducted its business primarily through the use of door-to-door solicitations. Beginning in 1948 the Company shifted to the use of telephone solicitation and until recently, the company marketed its products exclusively in that manner. While the company is currently trying other forms of marketing such as print and direct mail, it firmly believes that the telephone is vital to the continued growth of its business.

² Telephone Consumer Protection Act of 1991, CC Docket No. 92-90, released Apr. 17, 1992 [hereinafter NPRM].

protect consumers while not imposing unreasonable costs and burdens on legitimate businesses.³

I. IMPORTANCE OF TELEMARKETING

A. Telemarketing Offers a Valuable Service to the Public

As recognized by Congress, the "[u]se of the telephone to market property, goods and services directly to business customers, as well as individual consumers, is not only a common practice, but also a high growth industry."⁴ The dollar value of telemarketing sales has grown from just over \$80 million in 1984 to roughly \$430 billion in 1990. In 1986, there were 2.1 million personnel actively engaged in telemarketing, and it is predicted that by the year 2000, there will be eight million people engaged in telesales.⁵ Furthermore, telemarketing provides a wealth of jobs in rural areas where other employment opportunities might be sparse. In addition, it provides employment by many who would

³ See, Statement by The President, Rel. Dec. 20, 1991, requesting that the Commission "ensure that the requirements of the Act are met at the least possible cost to the economy."

⁴ Telephone Advertising Consumer Rights Act, H.R. Rep. No. 317, 102nd Cong., 1st Sess., [hereinafter House Report].

⁵ It is generally recognized, however, that because many individuals engage in telemarketing activities, it is impossible to accurately estimate the number of people engaged in telemarketing.

otherwise be excluded from the workplace and allows individuals to be employed directly in the home. The industry often employs otherwise unskilled labor, handicapped individuals, or those training for new career opportunities.

As society becomes more dispersed, telemarketing will play a greater role in providing goods and services to the public. Fixed location sales from traditional retail outlets often have substantial overhead and other costs and are experiencing a significant phase of concentration and evolutionary change. Telemarketing, on the other hand, represents a way to provide goods and services at lower costs and offer more convenient terms and conditions and is, contrary to fixed location retailing, experiencing a rapid growth, as public acceptance and new technologies expand.

B. Olan Mills' Telemarketing Experience

In 1948, Olan Mills shifted from door-to-door sales to telephone marketing of its products. Olan Mills has found through years of experience that for its line of business, there is no substitute for the telephone as a marketing tool. Only with a telephone can a marketer set an appointment for the family to assemble, scrubbed and dressed, at the local studio. The appointment for a family portrait is what leads the family to do what otherwise is easily forgotten, but later regretted. Today, the company makes about 50 million

calls per year, 99 percent of which are jurisdictionally intrastate. While almost all solicitations are made directly from the studio to the surrounding neighborhood, the company is experimenting with small, regional telemarketing centers. All solicitations are undertaken by company-trained and employed personnel under closely supervised conditions.

Olan Mills obtains its telephone marketing list from a standard commercial source. These lists are compiled from public records and thus omit unpublished telephone numbers. Names are then selected from the list based on various categories or "census tracts" developed by the federal government. This allows Olan Mills to target consumers who are likely to be interested in its products, and to avoid calling households that would probably not have any use for its family-oriented services. Names are also added to the list by referrals from other customers. Indeed, approximately one-third of all Olan Mills' telephone sales are from referrals.

Approximately fifteen years ago, Olan Mills was faced with the issue of how to accommodate customers who do not want to be solicited via the telephone. In an effort to be responsive to the privacy requests of these individuals, the company developed a system whereby consumers can object to

receiving further solicitations in the future.⁶ Once a consumer objects to being solicited, his number is placed on a list. This in-house "Do Not Call" ("DNC") list, which is maintained at every studio, ensures that customers will not be contacted again for a minimum of two years. There are currently over 440,000 names on the company's DNC list.

This DNC list is now evolving into a computerized system. Under this system, even if an operator receives a referral, they are directed not to call the consumer unless the number has been checked against the DNC list. Thus, consumers are ensured that telephone subscribers' privacy rights are respected. Furthermore, the DNC list has allowed the company to operate more efficiently and effectively by discontinuing solicitations to consumers who specifically do not want to be called by the company or to purchase its products. Thus, Olan Mills is convinced that the DNC list makes good sense both from a business and a consumer point of view.

⁶ Olan Mills found, generally, that consumers want to receive information about its products. Only .46 percent of people solicited by the company asked to be placed on the Do Not Call list. This low percentage probably reflects the effectiveness of the targeting achieved with the list of phone numbers called.

II. THE COMMISSION SHOULD ADOPT TELEPHONE SOLICITATION RULES WHICH DO NOT UNFAIRLY BURDEN LEGITIMATE TELEMARETERS

A. Congress Provided Various Regulatory Alternatives for Protecting Subscriber Privacy Rights

Congress directed the FCC to "initiate a rulemaking proceeding concerning the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object."⁷ Within this framework, the Commission was required to compare and evaluate a number of various options for their effectiveness in protecting such rights. The Commission was directed to carefully consider all of the alternatives and examine the costs, advantages and disadvantages associated with each. Finally, the FCC is directed to "prescribe regulations to implement methods and procedures for protecting the privacy rights . . ." of consumers.⁸

The Commission's NPRM identified five potential mechanisms to fulfill its Congressional mandate:

national or regional databases of persons who object to receiving solicitations, network technologies that enable called parties to avoid calls from certain

⁷ TCPA at § 3(c)(1).

⁸ In response to the Commission's invitation for comment, Olan Mills believes that there is a need for Commission action in this area, that Congress believed it was mandating issuance of a rule in this area, and that the law cannot be read any other way but as a mandate for issuance of a rule.

numbers, company generated 'do not call me' lists, special directory markings, and time of day restrictions.⁹

Olan Mills believes that the only option which would enable the Commission to fulfill its statutory mandate while not placing overly burdensome requirements on individuals and corporations engaged in telemarketing would be a mandatory, company specific "Do Not Call" list. Other alternatives suggested by the Commission are either not feasible at this time, or would mandate costly alternatives on legitimate business enterprises without adequately fulfilling consumer expectations of privacy or choice as to who calls them.¹⁰

1. The Commission Should Adopt a Company-Based "Do Not Call" Mechanism

This system, which was identified in the TCPA as an appropriate option, would require all telemarketers to maintain a list of telephone subscribers who object to receiving further telephone solicitations by that specific company. As discussed supra, Olan Mills has successfully utilized a voluntary version of this system for over 15 years. The Company is sure that this system, if made

⁹ NPRM at 12.

¹⁰ A related TCPA approach is the "industry-based" Do Not Call system. We know of no such proposal outside of the NPRM and believe it was a term mistakenly used in the legislation to refer to the company-specific DNC system.

mandatory, will best promote the public interest by adequately protecting subscribers while imposing only reasonable costs on telemarketers.

A company-specific DNC list provides consumers with the right to choose the specific companies who may call the respective consumers at home. No other option before the Commission promotes consumer choice -- a fundamental value of our free market system. The other options do not provide distinctions between different products and service providers. The Commission's policies should promote consumer choice, not abridge it.

A company-based DNC mechanism would also be an inexpensive alternative for telemarketers and ultimately consumers. Companies would be able to develop and maintain their own systems without being forced to purchase costly equipment to interact with an electronic database or other network technology. It has been Olan Mills' experience that a company-specific DNC system is relatively easy and inexpensive to implement. And, because the system is not overly technical, employees can be easily trained to utilize it.

In fact, the company-specific "Do Not Call" system is the least expensive option for the Commission and for the public. Actually, in an economic sense, this option is "free", its costs are "sunk costs." The reason, as explained

in Part III herein, is that the Congress intended, and good public policy requires, that this same system be mandated anyway to allow consumers to sever unwanted existing business relationships.

The consumer's involvement would also be easy. If called, the consumer may prevent any further calls from that company for a period specified in the rule by indicating unambiguously that he does not want to be called again in the future. Olan Mills would recommend that consumers not be called again for two years. After longer periods, the DNC list (or any such list) becomes outdated because of changes in addresses and telephone company system changes.¹¹

In addition, this mechanism would not discriminate against small businesses. The size of a company's DNC list will be directly proportional to the amount of telemarketing conducted by that corporation or individual. Thus, the procedures used to implement such a system -- and its simplicity or complexity -- will be directly related to the amount of telephone calling engaged in by the entity. Individuals can keep their lists on a home computer, or even on index cards, while large, nationwide telemarketers might computerize their system in order to ensure that the DNC list is available to all telemarketers in the organization.

¹¹ Roughly 16% of the nation's phone numbers change annually.

Companies engaged in relatively little telemarketing would not need to develop elaborate procedures or purchase costly equipment.

Moreover, a company-based DNC mechanism would best fulfill consumers' expectations of privacy once they indicate their choice. Customers could conceivably be placed on the list immediately (as it is with Olan Mills), or at least with minimal time lag. Other systems suggested by the Commission could take substantial time to implement and would still retain serious time lags. In essence, Olan Mills believes that a company-based DNC system would allow the Commission to fulfill its obligations under the TCPA in an effective and efficient manner while not placing unreasonable burdens on legitimate business activities.

2. A National Database Would Be Anticompetitive, Costly, and Would Not Fulfill the Commission's Mandate

The NPRM notes that the TCPA provides the Commission with the option of creating a "single national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations" ¹² The NPRM seeks comments on this approach and the issues related to it. Olan Mills opposes the national database.

¹² NPRM at 12.

a. A National Database Would Be Anticompetitive

A national database system would be anticompetitive and discriminate against emerging or growing businesses. After a subscriber asks to be included in the database, no commercial telemarketer can contact them, unless an established business relationship exists. Businesses that come into existence or enter a specific market after the database is created will never have an opportunity to phone consumers in the database. In other words, established businesses can keep their customers free of competition by new companies engaged in telemarketing. New businesses will be barred from effectively competing with established businesses for their customers through telemarketing.

Furthermore, this system allows one bad apple to spoil the whole bushel. A company creating a bad impression can destroy the telemarketing opportunities for better companies, better competitors, because under a national database approach, the consumer will never hear from them. In short, an electronic national database would essentially adopt the status-quo of the market at a particular time, allowing existing businesses to continue soliciting their customers -- even though they have been placed in the national database -- while freezing out any company emerging or expanding its markets after the implementation of the database.

b. A National Database Would Be Costly

There is no question that the establishment and creation of a national database would be a costly venture. Indeed, the Commission's own estimates of such a system range from \$1 to \$6 million,¹³ and Olan Mills anticipates that the actual figure would be much higher. While it is clear that telephone subscribers cannot be charged for their participation in the database,¹⁴ it is not clear how the burden for implementation and maintenance of such a system would be recouped. The Commission must consider the burden this system will place on legitimate telemarketers of all sizes, and on the public, who will be forced eventually to pay for the implementation of such a database in the form of higher prices.

The local exchange carriers are directed under the TCPA to "inform subscribers for telephone exchange service of the opportunity to provide notification . . . that such subscriber objects to receiving telephone solicitations."¹⁵ This notification process certainly will result in some expense to the carrier. This expense will have to be recaptured from either shareholders or ratepayers, neither of

¹³ See House Report at 22.

¹⁴ See NPRM at 13, TCPA at § 3(c)(3)(E).

¹⁵ TCPA at § 3(c)(3)(A).

which may be receiving any benefit from the electronic database.

The primary source of revenues for the database most likely will be recovered through the sale of computer generated lists to telemarketers. However, depending on how the database is structured, this system may unfairly burden those who engage only in limited telemarketing. It seems unreasonable to require individuals or small companies -- which conduct little or no interstate soliciting -- to purchase national, or even regional lists of telephone subscribers. Hard copy versions of these lists would have to be provided as not all individuals engaged in telemarketing have access to computers. These hard copy versions could be voluminous. Moreover, the costs associated with purchasing these lists -- even if only on a yearly basis -- could conceivably put smaller telemarketers out of business altogether.

For example, as discussed by the Commission, the Florida system requires telemarketers to purchase, quarterly, a list of all residents in the state who have chosen to discontinue telephone solicitations. The cost for this quarterly list is \$400 for a floppy disk or \$250 for a paper edition. In other words, \$1000 - \$1600 per year per telemarketer -- for just one state. Obviously, for individuals engaged in telemarketing from the home or a local office, this is a

significant financial burden, particularly if he or she conducts business in several states.

**c. A National Database Would Limit
Consumer Choice And Not Meet
Subscriber Expectations**

As currently envisioned by both Congress and the Commission, one national database would be adopted that would allow telephone subscribers to discontinue receiving all commercial telephone solicitations. Such a blanket withdrawal from all types of telemarketing might not be consistent with consumer expectations or desires. Furthermore, the public policy effect of advertising such a blanket withdrawal will meet with consumer confusion when they continue to receive calls from charitable, political, non-profit and research organizations. The Commission should carefully consider whether such a blanket withdrawal would meet consumer expectations and be in the public's best interest.

It has been Olan Mills' experience that many consumers, who might not ordinarily want to receive telephone solicitations, do not object to receiving information about its services. Family portraits are often inexpensive and, while desired, are often forgotten until a reminder occurs. Furthermore, family portraits have to be arranged beforehand, and scheduled with many family members, and therefore require

the appointments in advance. In short, consumers might want to discontinue some types of telephone solicitations -- such as for real estate or insurance -- but might welcome solicitations for other types of businesses such as photography or cosmetic services.¹⁶ Moreover, even if some consumers want to discontinue all types of telephone solicitations, a national electronic database will not accomplish their expectations because the TCPA exempts solicitations by charitable and political institutions.¹⁷

In addition, as the Commission itself recognized, the time lags associated with a national database system might be significant.¹⁸ The Florida database is updated quarterly, resulting in at least a three-month delay before the subscriber's choice is implemented. Furthermore, when time delays such as assembling the lists, providing the names to telemarketers, and telemarketers matching these lists against their own internal marketing tools are considered, the time lag will inevitably be even greater. With a national database, or even a regionalized system, time delays from six

¹⁶ The House Energy and Commerce Committee Report stated that Congress specifically did not intend these lists to be broken into categories. See House Report at 23.

¹⁷ See TCPA at 3(a)(3)(C). The Commission has already recognized that these exceptions carved out by Congress will make it difficult for the Commission to adopt a system whereby consumers believe they can discontinue telephone solicitations. See NPRM at 13.

¹⁸ NPRM at 13.

months to a year should be anticipated. The Commission must calculate these factors into its decision determining the most appropriate method to adopt.

Finally, serious privacy implications arise any time the government creates -- or appoints another to create -- a nationwide privacy list. Consumers will wonder about the entity chosen by the Commission to create such a system, and despite the Commission's best efforts, these doubts and fears would never be eliminated. Even though Congress made clear that the database cannot be used for any purpose other than complying with the requirements of TCPA,¹⁹ telemarketers that purchase the list may be tempted to use it for other types of solicitations, such as direct mail.

3. Network Technologies Do Not Yet Exist Which Would Allow the Commission to Fulfill its Statutory Obligations

The NPRM seeks comments on whether existing network technologies can be utilized to allow consumers to screen or block telemarketing calls. One suggestion contained in the NPRM would require telemarketers to be assigned the same telephone number exchange (NXX), which could be blocked at the LEC central office on a per line basis, either at the point of access or egress. Unfortunately, Olan Mills is not aware of any current network technologies that would allow

¹⁹ TCPA at § 3(c)(3)(K).

the Commission to fulfill its mandate under the TCPA. Furthermore, Olan Mills urges the Commission to refrain from forcing any costly network changes, such as major SS7 expansion, upon LECs or telemarketers in order to comply with the TCPA.

For example, the technology discussed in the NPRM would probably not be even a feasible solution for protecting subscribers' privacy rights in the near future. Designating a special exchange for telemarketers would impose unreasonable costs on companies and individuals by forcing them to switch to new telephone numbers. LECs would have to purchase new equipment and overhaul software. Even if such an expense were undertaken, Olan Mills is unsure whether this option technically can be undertaken in any reasonable time frame, if at all. Moreover, there is no evidence that the North American Numbering Plan ("NANP") could support a dedicated exchange exclusively for telemarketers, particularly given upcoming priorities such as interchangeable area codes (NPAs). If such an exchange were identified, the Commission would have to require carriers to police the use of their lines to ensure that every telemarketer conducting business complies with the rules by using only this designated exchange. Next, the Commission would have to require LECs to install equipment which could

screen the exchange.²⁰ To the best of our knowledge, technology which can separate traffic using the same exchange on a jurisdictional basis is not readily available in LEC central offices. Such jurisdictional segregation would be necessary where states enact even more restrictive provisions than the Federal requirement.

In short, Olan Mills supports the Commission's tentative conclusion that current technologies could not support this type of screening system. Nor is Olan Mills aware of any other network technology currently existing or under development that would allow the Commission to fulfill its obligations under the TCPA.

4. Other Alternatives Suggested By the Commission Would Not Be In the Public Interest

The NPRM suggests that telephone directories might be used to restrict telemarketing to unreceptive consumers. Indeed, this approach has been utilized by states in the past, with varying degrees of success. However, Olan Mills does not believe that a telephone directory system could be

²⁰ The Commission must ensure that this technology is capable of screening interstate calls using this exchange from an intrastate toll call. If this cannot be done, the Commission would need to designate two prefixes, one to be used at an interstate level, and one to be used for intrastate calling. This would require telemarketers to install telephone trunks using two separate exchanges, and to separate their telemarketing activities jurisdictionally. The additional costs imposed on telemarketers to comply with this type of system would obviously be great.

effectively utilized on a national level. This system has all the deficiencies of a national database plus more delay and costs.

Olan Mills cannot envision an accurate or reasonable mechanism whereby national telemarketers can comply with the TCPA by using telephone directories. Because directories are printed on a local basis, national telemarketers could conceivably be required to obtain every telephone directory published by the LECs.²¹ Telemarketers conducting business on the national level would need this information in some type of computerized format, thus imposing additional costs on the carrier publishing the directory. Furthermore, many state public utility commissions regulate the provision and use of local telephone directories. The Commission must ensure that any rule regulating the use of these directories be consistent with state law.

Moreover, there would be a significant period from the time when the consumer opts to discontinue solicitations to the time when his decision is actually effectuated. Because telephone directories typically are published on a yearly basis, consumers could face delays of as much as two years before their decision to discontinue telephone solicitations

²¹ There are over 2,000 telephone directories published annually.