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

In the Matter of	)	
	)	
The Telephone Consumer Protection Act of 1991	)	**CC Docket No. 92-90**
	)	
	)	

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MAY 26 1992

Federal Communications Commission
Office of the Secretary

COMMENTS OF THE
AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION

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The American Newspaper Publishers Association ("ANPA"), by its attorneys, hereby submits its comments in response to the Commission's Notice of Proposed Rulemaking in this proceeding to implement the Telephone Consumer Protection Act of 1991 ("TCPA").[1]

I. INTRODUCTION AND EXECUTIVE SUMMARY

ANPA represents the interests of more than 1,300 member newspapers, which account for approximately 90 percent of the daily newspaper circulation in the United States and Canada.[2] Many ANPA member newspapers engage in telemarketing as an important means of renewing subscriptions and acquiring new

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[1] FCC 92-176 (Apr. 17, 1992), summary published 57 Fed. Reg. 18,445 (1992) ("Notice"). The TCPA amended the Communications Act of 1934 by creating a new Section 227. Pub.L. No. 102-243, 1991 U.S. Code Cong. & Admin. News (105 Stat.) 2394 (to be codified at 47 U.S.C. § 227).

[2] On June 1, 1992, the ANPA will complete its merger with the Newspaper Advertising Bureau and other newspaper associations to form the Newspaper Association of America ("NAA").

subscribers. ANPA generally supports the proposals and tentative conclusions in the Commission's Notice.

These comments address particular issues raised by the Notice that affect the telemarketing activities of ANPA member newspapers.[3] In particular, the Commission should:

- Recognize the importance of telemarketing to newspapers;
- Adopt, at least in the case of newspapers, company-specific "do not call" lists to protect telephone subscriber privacy at the least cost;
- Clarify that an "established business relationship" includes a relationship between a newspaper and its current or lapsed subscribers and its advertisers; and
- Exempt the use of autodialers with prerecorded messages for debt collection purposes.

ANPA believes these standards will appropriately and adequately accommodate the privacy concerns of telephone subscribers with the legitimate interests of newspapers and other businesses similarly engaged in local telephone solicitations.

II. LOCAL TELEMARKETING IS AN IMPORTANT BUSINESS PRACTICE TO MANY NEWSPAPERS AND BENEFITS THE PUBLIC

Telemarketing is a primary method by which many newspapers in the United States sell subscriptions. On

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[3] In addition, ANPA expects that individual newspapers will submit comments on their own behalf in this proceeding to describe the use of telemarketing in particular instances.

average, about 50 percent of new newspaper subscriptions in a given year come from telemarketing. The particular proportion of new subscribers acquired through telemarketing ranges from 30 percent to, in the case of some newspapers, 90 percent of all new subscriptions. For this reason, it is essential that the Commission's regulations implementing the TCPA do not unduly impair the ability of newspapers to sustain their lifeblood -- paid subscribers.[4]

Local newspapers often use automatic dialers to assist their operators in calling potential subscribers. These calls are placed to residences in the newspaper's circulation area. Once a call is connected, a live operator conducts the marketing portion of the call. In addition, like many other businesses, some newspapers use autodialers with prerecorded messages for debt collection purposes.

As publications that both cover and sell to well-defined localities, newspapers have a strong business incentive to be sensitive to community privacy standards when conducting telephone solicitations. As the Senate Committee Report observes, local telemarketing by newspapers and other local businesses are often subject to local "better business" or

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[4] Telemarketing is especially important for newspapers in states that prohibit or restrict door-to-door solicitations. In those states, newspapers have few alternatives to telemarketing for reaching potential subscribers.

similar community standards.[5] Having such substantial local ties, newspapers are unlikely to jeopardize their good community relations through abusive or unwelcome telemarketing.

In particular, newspapers generally maintain internal "do not call" (or "DNC") lists in order to avoid repeat calls to numbers at which the resident has expressed a desire not to be called. These lists are most commonly maintained in hard copy, although some newspapers have developed databases to screen numbers. Such lists enable a newspaper to respect the wishes of those not wanting to be called, while preserving an efficient way of communicating with most other members of the community. To ANPA's knowledge, only a very small percentage of newspaper telemarketing calls -- below 0.2 percent of all such calls -- result in "do not call" requests.

The very success of newspaper telemarketing in generating new subscriptions demonstrates the value of the practice to the public. Many recipients of newspaper telemarketing calls welcome the convenient opportunity to subscribe to a source of news and information regarding civic and community matters. Indeed, it is the experience of many

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[5] See Senate Comm. on Commerce, Science, and Transp., Telephone Advertising Consumer Rights Act, S. Rep. No. 177, 102d Cong., 1st Sess. 6 (1991), reprinted in 1991 U.S. Code Cong. & Admin. News 1968 ("Senate Report").

newspapers that residents -- such as newcomers to a community -- who generally might prefer not to receive most unsolicited telemarketing calls in fact do appreciate such calls from newspapers.

It is very important for the Commission to consider the importance of newspaper telemarketing in implementing the TCPA. In particular, the Commission should give substantial weight to the demonstrated usefulness of newspaper telemarketing to the public, and the success of newspaper practices in respecting subscriber privacy.

III. THE COMMISSION SHOULD PROTECT TELEPHONE SUBSCRIBERS' REASONABLE EXPECTATIONS OF PRIVACY BY ADOPTING THE COMPANY-SPECIFIC DO NOT CALL ALTERNATIVE

We urge the Commission to adopt a "company-specific" Do Not Call (or "DNC") method to protect against unwanted "telephone solicitations." In the event the Commission adopts a more restrictive alternative as its general rule, ANPA respectfully requests that it consider, as required by the TCPA, and adopt a DNC method for local telephone solicitations made by holders of second-class mail permits such as newspapers. In addition, we believe the Commission should interpret the term "established business relationship" to include present and past newspaper customers and advertisers.

A. The Commission Should Implement the Residential Subscriber Privacy Protection Through Adoption of a Company-Specific Do Not Call List

A company-specific Do Not Call list will provide the most appropriate protection against excessive "telephone solicitations" where no "established business relationship" exists.[6] Such lists have proven effective, and honor privacy interests without unduly limiting useful commercial speech.

1. Company-specific DNC lists balance customer privacy with legitimate telemarketing interests

The TCPA recognizes that telemarketing has many legitimate purposes and that there is no presumption that telephone subscribers need a method to shun all telephone solicitations. A company-specific DNC list is feasible today, has proven to be successful by many businesses, does not create unrealistic customer expectations, and establishes the minimal intrusion into socially useful telemarketing.

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[6] The Notice also mentions an "industry-wide" DNC list. Notice, ¶ 32. Aside from the practical difficulties inherent in defining an "industry" for this purpose, such a list could create substantial problems through the sharing of proprietary commercial information. For example, in the newspaper business alone, the administrator of such a list would have to determine whether daily newspapers, weekly community newspapers, "shoppers," and free distribution newspapers (who might call to establish a "requestor" list for purposes of obtaining a second-class mail permit) are parts of the same "industry."

As noted above, many newspapers engaged in telemarketing currently maintain DNC lists and honor the requests of telephone subscribers who do not wish to be called again. They generally are maintained either as hard copy or internal databases. These lists have developed as an effective means of preventing calls to those residents that have indicated a desire not to be disturbed. The evolution of DNC lists in the newspaper business attests to their effectiveness and cost-efficiency in protecting customer privacy.

At the same time, the Commission should recognize that people move, and that customer demographics and interests change over time. However, once a telephone number is placed on a DNC list, there is no procedure by which it may be removed if, for example, the requesting resident changes his or her mind, or moves and the number is reassigned to a new resident. Therefore, ANPA suggests the Commission provide a means by which the DNC preference expires, such as by prescribing a reasonable period of time for which a DNC request would remain effective.

The large percentage of newspaper subscription "new starts" from telemarketing demonstrates that significant numbers of residents in fact do appreciate receiving newspaper telemarketing calls, even where they might not wish to receive other types of calls. This is often especially true in the case of newcomers to a community, who find the

local newspaper to be a valuable source of civic news and information. Company-specific DNC lists reasonably accommodate these interests.

2. Other methods of protecting privacy described in the Notice would be overly intrusive and ineffective

Other methods described in the Notice, such as a national database, network technologies, and special directory markings would be overly intrusive and impair economic efficiency. Particularly since a less intrusive and less costly alternative is available, the Commission should not adopt these procedures.

Databases, network technologies, and directory markings would preclude newspaper telemarketing to many individuals who, experience has shown, would in fact be interested in subscribing to the local newspaper. For example, many subscribers that might elect to register in a national database would otherwise welcome a telemarketing call from the local newspaper. Unless newspapers (or local businesses) were somehow segregated from other categories of telemarketers, however, these calls would become prohibited. Preventing a first call to ascertain a potential subscriber's interest would cripple newspaper telemarketing. Indeed, the

Florida statewide do not call database cited in the Notice exempts newspapers from its prohibitions.[7]

The TCPA requires the Commission to consider, in addition to these advantages and disadvantages, the costs of alternative methods and procedures.[8] As the Notice suggests, a national database could prove quite costly and could generate numerous concerns about other privacy interests.[9] ANPA concurs with the concerns expressed in the Notice that telephone network technologies and special directory markings procedures are of questionable technical feasibility and cumbersome, and unreasonably deprive the public of beneficial telemarketing services. ANPA is also concerned that the time-of-day restriction method described in the Notice -- which is not mentioned specifically in the TCPA -- likely would cause little change in telemarketing practices nationwide, and therefore may prove inadequate. Conversely,

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[7] Fla. Stat. Ann. §§ 501.059(c)(4) & 501.604(6)(West Supp. 1992).

[8] Pub.L. No. 102-243, § 3, 1991 U.S. Code Cong. & Admin. News (105 Stat.) 2394, 2397 (to be codified at 47 U.S.C. § 227(c)(1)(A)).

[9] For example, the Subcommittee on Government Information, Justice and Agriculture of the House of Representatives' Committee on Government Operations recently held a hearing to explore the privacy ramifications of national databases compiled from, among other sources, a national Postal Service database. See "How Direct Mailers Get New Addresses; Through Sleet or Snow, Postal Service Hands Out 'New Movers' Data," The Washington Post, May 15, 1992, at A23, col. 1.

a danger also exists that such restrictions could be so tightly drawn as to unduly restrict telemarketing. After all, in most cases, telemarketing is effective only if the resident is at home at the time of the call.

Therefore, we believe the Commission should adopt company-specific Do Not Call lists as the optimum means of preserving consumer privacy while not unduly limiting telemarketing.

B. The Commission Should Consider Creating An Exemption for Local Telephone Solicitations by Holders of Second-Class Mail Permits

Congress directed the Commission to consider whether different procedures should apply for local telephone solicitations by small businesses or by holders of second-class mail permits. Such different procedures would appear unnecessary for newspapers in the event the Commission chooses to rely on company-specific DNC lists. However, if the Commission sees merit for some cases in the more restrictive alternatives -- including the national database, directory listings, or technological options -- we believe company-specific DNC lists should be adopted as the method applicable to local solicitations by newspapers.

Holders of second-class mail permits[10] and others

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[10] The Domestic Mail Classification Schedule establishes several tests for second-class mail eligibility. (continued...)

engaging in local solicitations are dependent on local goodwill and are sensitive to community standards and concerns. Not only has Congress acknowledged that such local solicitations may not give rise to the privacy problems underlying the TCPA, but numerous states have also exempted newspapers from provisions of their own telemarketing and/or autodialer legislation.[11] DNC lists provide an effective protection of subscriber privacy from local solicitations by newspapers.

C. Prior Relationships Between Newspapers and Their Subscribers and Advertisers Are "Established Business Relationships" Under the TCPA

The TCPA protects residential telephone subscribers from unwanted "telephone solicitations."[12] Subsection (a)(3) of the Act excludes from the definition of a "telephone

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[10](...continued)
A publication must be published at least four times annually, and it must distribute over fifty percent of its circulation to paid subscribers or requestors. In addition, it must comply with limits on the amount of advertising that it may contain. See generally 39 C.F.R. Appendix A to Subpart C, § 200.01 et seq.

[11] Telemarketing laws in some states exempt newspapers in whole or in part. E.g. Cal. Corp. Code § 29571(b)(8) (West Supp. 1992); Fla. Stat. Ann. §§ 501.059(c)(4) & 501.604(6) (West Supp. 1992); Or. Rev. Stat. § 646.551(2)(f) (1991); R.I. Gen. Laws § 5-61-2(i)(5) (Supp. 1991); Utah Code ann. § 13-26-4(2)(b) (Supp. 1991); Wash. Rev. Code Ann. § 19.158.020(3)(j) (West Supp. 1992).

[12] Pub.L. No. 102-243, § 3, 1991 U.S. Code Cong. & Admin. News (105 Stat.) 2394, 2396 (to be codified at 47 U.S.C. § 227(c)(1)).

solicitation" calls where an "established business relationship" exists between the calling and called parties.[13] The legislative history reflects a congressional intent that businesses should be allowed to call existing or previous customers to "build upon, follow up, or renew, within a reasonable period of time" the customer relationships.[14]

We believe it is clear that the relationships between newspapers and their subscribers and advertisers constitute "established business relationships" within the meaning of the TCPA. Indeed, the legislative history specifically discusses the applicability of the "established business relationship" to periodicals such as newspapers. In listing examples of calls pursuant to an "established business relationship," the House Report states that publications "could call their current subscribers to continue their subscriptions even if such subscribers objected to 'unsolicited' commercial calls."[15] Furthermore, publishers

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[13] Id. § 3, 1991 U.S. Code Cong. & Admin. News (105 Stat.) 2394, 2395 (to be codified at 47 U.S.C. § 227(a)(3)). Accordingly, the method ultimately selected from the five options described in the Notice to protect subscriber privacy would not apply to calls where such an "established business relationship" exists.

[14] See House Comm. on Energy and Commerce, Telephone Advertising Consumer Rights Act, H.R. Rep. No. 317, 102d Cong., 1st Sess. 14 (1991).

[15] Id. at 14.

"would be able to call someone who has let their subscription lapse."[16]

Accordingly, the term "established business relationship" should include current and previous subscribers and purchasers of the publication. Calls selling subscriptions to such individuals would be substantially related to the basis of the prior relationship. The term should also include calls to residents who have placed classified or other advertisements. For example, where a classified advertisement recently has been placed by someone who does not subscribe to the newspaper, a follow-up call to solicit a subscription may reasonably be considered "substantially related" to the prior relationship.[17] Similarly, a call to a subscriber to market advertising would also be consistent with subscribers' privacy expectations.

Under the Act, calls based upon an "established business relationship" must occur "within a reasonable period of time" of the basis of the relationship. Defining the "reasonable period of time" necessarily involves a balancing of business practices and customer expectations. Given the difficulties in reaching an individual, as well as in recognition of the fact that non-renewing subscribers often do not renew for economic or other reasons that may change, newspapers may

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[16] Id. at 14.

[17] See id. at 15.

take at least a year to determine whether the lapsed subscriber has a renewed or continued interest. ANPA is unaware that this practice has generated complaints.[18]

For these reasons, ANPA suggests that the "established business relationship" test not be defined so narrowly as to preclude newspapers from contacting their current and former subscribers and advertisers within a reasonable period.

IV. THE COMMISSION SHOULD ADOPT ITS PROPOSAL TO EXEMPT PRERECORDED DEBT COLLECTION CALLS

In paragraph 16 of the Notice, the Commission tentatively concludes that a debt collection call using a prerecorded message should be exempt from the TCPA prohibitions established in Section 227(b)(1)(B). This conclusion is supported by two separate provisions of the TCPA and we believe should be adopted in the final Report and Order.[19]

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[18] The legislative history suggests that a company should honor a "do not call" request even where an "established business relationship" exists. Senate Report at 15. If the Commission follows this interpretation, a DNC list could conceivably result in equivalent privacy protection, in these instances, as the "established business relationship" test.

[19] Neither the statute nor the proposed rule appears to forbid the use of autodialers with live operators. The prohibitions in proposed subsection 64.1100(a)(1) do not apply to autodialed calls to residences, and subsection (a)(2) forbids only calls using prerecorded voices. This regulatory treatment appears consistent with the Act. Autodialed calls using a voice operator does not impair the privacy interests the Act seeks to protect.

Debt collection calls, by definition, presuppose a prior "established customer relationship." Accordingly, the Commission is correct in tentatively concluding that such a call does not implicate the privacy interests protected by the Act and that the "established business relationship" exemption should apply.[20] In addition, since debt collection calls as a rule do not contain advertisements, the Commission may exempt them on the grounds that they "do not include the transmission of any unsolicited advertisement."[21]

Therefore, we urge the Commission to adopt proposed sections 64.1100(c)(2) and (3) of its rules, and ratify its tentative conclusion that prerecorded debt collection messages are exempt pursuant to those rules.

V. CONCLUSION

For the foregoing reasons, the American Newspaper Publishers Association respectfully requests the Commission to acknowledge the important role of telemarketing by newspapers and to implement the Telephone Consumer Protection

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[20] See Notice, ¶ 16.

[21] See Pub.L. No. 102-243, § 3, 1991 U.S. Code Cong. & Admin. News (105 Stat.) 2394, 2396 (to be codified at 47 U.S.C. § 227(b)(2)(B)(ii)(II)).

Act of 1991 consistent with the views set forth in these comments.

Respectfully submitted,

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