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1919 M Street, N.W.
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CC Docket No. 92-90, FCC 92-176
Telephone Consumer Protection Act of 1991

On behalf of the American Civil Liberties Union (ACLU), we submit these comments to the Federal Communication Commission's (FCC) proposed rules to the Telephone Consumer Protection Act of 1991 (TCPA). We support the FCC's proposed rulemaking with regard to tailoring restrictions on the use of autodialers. In addition, we urge the FCC to toughen its rulemaking regarding telephone solicitations to establish an "opt-out, do-not-call" database for people who do not wish to receive unsolicited commercial calls.

AUTO DIALERS

The TCPA properly recognizes the free-speech implications of restrictions on autodialer use for non-commercial messages, and the Commission should not attempt to regulate this usage. Freedom of speech would become a hollow guarantee if the messages could not find an audience. For that reason, streets and parks have been considered traditional public forums, allowing speakers to

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communicate with citizens they might never otherwise reach.

Increasingly, devices such as autodialers provide the avenue to an audience that the streets and parks once represented. Given the enormous costs associated with most means of mass communications, autodialers serve as a technologically feasible, cost-effective method by which grassroots campaigns, issue-oriented advocacy, and urgent information can be communicated to large audiences otherwise unreachable. Moreover, the Commission's records indicate that these types of calls have not generated significant complaints about intrusiveness sufficient to justify further inquiry into, let alone action concerning, the non-commercial use of autodialers. We note in passing that even if statistical evidence of a greater magnitude was present, that alone would not be of sufficient constitutional significance to justify burdening the free-speech rights of organizations that might use autodialers to communicate their non-commercial messages.

Still, the ACLU urges caution if the Commission intends to treat federal, state and local government autodialer users in the same manner as other non-commercial users. When an autodialer is used by a governmental unit, which may have access to extensive personal files on those it calls and where, most importantly, the constitutional protection of privacy applies, the potential for intrusiveness may be greater than with either a commercial or

non-commercial enterprise. (paras. 10, 12).

When commercial callers use autodialers to transmit information to those with which there is an existing relationship, such as employees or customers, use of the devices would not violate privacy interests and would be consistent with recognizing the free speech interests at stake. Existing customers could easily include anyone who has a pending order, as well as those who have ordered products from the caller in the past. It is not a burden to require past customers to signal affirmatively their desire to be placed on a "do not call" list for future telephone solicitations. The ACLU urges the Commission to interpret existing relationships between sellers and customers broadly in order to preserve the substantial free-speech rights of commercial users. As the Supreme Court has recognized, "the consumer's concern for the free flow of commercial speech may often be far keener than his concern for urgent political dialogue." Bates v. State Bar of Arizona, 433 U.S. 350, 364 (1977). The Commission should recognize, as well, the important and constitutionally cognizable interests of those who desire to receive information by autodialer, whether commercial in nature or not, by placing no burdens on their right to receive information. (paras. 11, 13).

We see no problems with the Commission's proposal with respect to emergency autodialer calls. (para. 17).

Given that the bulk of complaints the Commission has received involve autodialer, as opposed to live, solicitations and given that solicitation is generally regarded as a pure free speech activity, it is important that all who rely on telephones for communication not be subject to governmentally imposed flat prohibitions on the use of live solicitations. Regulation of live solicitations in a manner that amounts to a ban would suppress speech unconstitutionally and would involve significant regulatory problems. For example, when calls have both social and commercial purposes, the commercial speech doctrine would treat them as fully protected non-commercial speech. Drawing these fine lines would enmesh the Commission in determinations that neither administrative agencies nor the judicial system is equipped to do. The proper approach to the issue -- the constitutional approach -- is to permit the speech without burdensome governmental regulation. (para. 23).

TELEPHONE SOLICITATION TO RESIDENTIAL SUBSCRIBERS

The ACLU supports the section of the TCPA as enacted regulating telephone solicitation to residential subscribers. We believe that it is a narrowly-drawn, minimal restriction on speech that provides a measure of privacy protection to residential telephone subscribers. Therefore, we urge the FCC to adopt

implementing regulations that give full effect to the intent of the TCPA by requiring that a "do not call" list be created and adhered to by any commercial entities making unsolicited commercial calls. The TCPA requires the creation of a national database of the telephone numbers of people who actively seek to limit unsolicited commercial telephone calls and faxes. Under the law, anyone making an unsolicited commercial call for a commercial purpose is required to delete from their list any telephone number appearing on the national "opt-out" list. This appears to be a reasonable response to the problem identified in the legislation. We believe that the First Amendment interest in all other communications (i.e., charitable solicitations) outweighs any privacy intrusion that may be suffered by the receiver when the call is not for a commercial purpose.

The ACLU supports the principle that people have the right to opt-out of receiving commercial telephone solicitations. Similarly, we support peoples' right to have their names removed from mailing lists. Further, we believe that personal information obtained by both the government and the private sector for one purpose should not be used for another purpose without the individual's consent. These rights of people to maintain some degree of control over personal information that they disclose and receive is at the heart of privacy policy.

Advances in information technology have made possible the creation of numerous, and detailed databases containing personal information and profiles on millions of people. Using the names and phone numbers of people in these databases, commercial entities are calling people at home with greater frequency. For those people who feel that these calls are an intrusion into their homes, the TCPA proposes a mechanism that would allow them to opt-out of receiving unsolicited calls from commercial entities.

In this context, privacy claims must be balanced against the First Amendment interest in the dissemination and receipt of information. The TCPA takes into account the important value of sending and receiving commercial solicitations by placing the burden on individuals to place their telephone numbers on a "do not call" list.

Opt-out databases already exist in the private sector, but many of them are ineffective and unenforceable. The Direct Marketing Association (DMA) operates a telephone and mail preference service of computerized lists of people who have contacted the association to request that their names be removed from telephone and mailing lists. While the DMA encourages member companies to purchase and use the list to delete people who do not want to receive commercial solicitations, use of the list is voluntary. In addition, many people are unaware that the DMA

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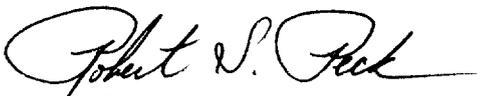
compiles an opt-out list. Opt-out mechanisms do benefit the industry by removing from marketing lists those people who actively express an unwillingness to receive unsolicited calls, mailings and faxes. Thus, we urge the FCC to go beyond the status quo of voluntary, limited participation in opt-out schemes to a system that requires mandatory use of such lists.

In addition, we urge that strict privacy and security safeguards be built into the creation of any "electronic database of objecting persons" telephone numbers, and the use of the list should be limited to list deletion purposes only. The FCC should consider designing a system that avoids having to disclose the actual list of numbers, and permitting senders to pay for the cost of using the list without having to purchase it. The ACLU takes no position on whether the database should be operated by the government or the private sector.

The ACLU is also concerned about the cost that may be imposed on those required to use the database. We urge the FCC to design a system that will not create an unreasonable financial burden on telemarketers.

We appreciate your consideration of our comments.

Sincerely,


Robert S. Peck
Legislative Counsel


Janlori Goldman
Director, Privacy and
Technology Project