

Office of the Secretary  
ATTN: Marlene H. Dortch  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, D.C. 20554

RE:           Comment on Proposed Rulemaking for the Telephone Consumer  
              Protection Act of 1991; CG Docket No. 18-152; CG Docket No. 02-278

Dear Secretary Dortch:

I, Jeffrey A. Hansen, comment as follows concerning the petition for rulemaking regarding the interpretation of the Telephone Consumer Protection Act in light of the D.C. Circuit's *ACA International* decision:

1. My name is Jeffrey A. Hansen. I am an adult over the age of 18, a resident of the state of California. Unless indicated otherwise, I have personal knowledge of each of the matters stated herein, and if called to testify I could and would testify competently about them.

**Experience and Credentials.**

2. I am the principal of Hansen Legal Technologies, Inc. My firm is in the business of handling Information Technology, including investigations and analysis of electronic data. I have served as an expert or consultant in more than 150 class action lawsuits under the Telephone Consumer Protection Act (“TCPA”), and as an expert or consultant in numerous other civil cases.

3. With regard to my experience as an expert and consultant in legal matters, generally, I have frequently served as an expert witness and consultant to law firms in conducting computer forensic analysis. I have also assisted in electronic discovery issues.

4. I also frequently act as a consultant to companies that engage in the use of autodialers, and I am familiar with their use and procedures, and the technical aspects of that business. In that capacity, I have assembled, configured, maintained, operated all aspects of autodialers, and interfaced with the telecommunications providers through whose networks the autodialers operate.

5. I have set up and maintained all aspects of predictive dialers and autodialers, from predictive dialers operating with just three telephone lines to outbound call centers, run from three locations, capable of generating over 1 million calls per hour. When building these systems, I have used various software and hardware solutions for predictive and autodialers, both proprietary and open source, and customized those systems for their particular uses. I myself have used and maintained predictive and autodialers, and trained others to do the same.

6. Over the last twenty-nine (29) years, I have also had extensive experience in a broad range of other areas in the electronic and information technology fields and obtained many certifications such as MCP 4.0, A+, Network+, MCP 2000, MCSA, MCSE, Linux+, I-Net+, Security+, CIW Security Analyst. From the hardware perspective, I have extensive experience in troubleshooting and repairing at the component level, and building various systems for various purposes. I have designed, built and maintained computer networks in a variety of environments from commercial businesses to very large DoD networks. I have taught approximately 1,000 others the skills to become computer network engineers themselves.

7. I have had extensive experience in dealing with security breaches and hardening computer networks against those breaches. I have handled many computer forensic and E-Discovery matters, including internal investigations in companies, volunteering at the FBI sponsored Regional Computer Forensics Laboratory, and founding a computer forensics and E-Discovery firm over 10 years ago. I have also had extensive experience with the set-up and use of predictive and autodialers. (*See Exhibit A – Resume of Jeffrey A. Hansen*).

8. A list of cases in which I have been called to testify is set out in paragraph 38 below.

**What constitutes an “automatic telephone dialing system.”**

9. An “automatic telephone dialing system” (“ATDS”) is an industry term used by those in call centers. A “predictive dialer” also is also an industry term for an autodialer that places agent-calls. Within the industry, we also created the name “autodialer” to be synonymous to “automatic telephone dialing system” which literally means “self-dialer.” These terms were not only common parlance within the industry, but were widely understood by lay persons. (*See Exhibit B - Wash Times 1991*) The meaning of an “autodialer” and “predictive dialer” was understood very well by the

FCC in 1992. (See *Exhibit D - 1992 FCC Order ¶¶8-9*; *Exhibit C - 1992 comments to FCC*) It was well understood by all interested parties that an “automatic telephone dialing system” or “autodialer” was something that automatically dials telephone numbers. It was also common sense that a list of phone numbers was involved whether that list was generated or produced. “Predictive dialers” naturally were designed to call from a list of phone numbers rather than generated lists. It was well understood by those in the debt collection and telemarketing industry understood that a predictive dialer that calls from a defined list of numbers was an ATDS (See *Exhibit C - 1992 comments to FCC* ). Calling generated lists naturally would defeat the purpose of the predictive algorithm with unassigned blocks of phone numbers. “Autodialers” and “Predictive dialers” are a simple piece of software that runs on a standard computer. “Autodialers” and “predictive dialers” are defined by what they are, not how they are used. Every consumer product is defined by its designed purpose, not how it is actually used. Even Charles Messer (TCPA defense attorney) and his expert has made the case that predictive dialers have remained unchanged in their functionality in his Amicus Brief in ACA v FCC matter, (See *Exhibit F - Charles Messer Amicus Brief*), but like the FCC, he failed to consider that the predictive dialer was addressed in 1992 (See *Exhibit C - 1992 comments to FCC*; *Exhibit D - 1992 FCC Order ¶¶ 8-9*).

**The FCC has become confused about a simple software program**

10. In 2000, when I first started setting up “predictive dialers” and “autodialers,” there was **no** confusion about what software was in view. By the 1960’s, “autodialers” that delivered agent-less messages were well understood. Some were designed to call lists of phone numbers, but at that time computer storage was very expensive. As a result of the cost of computer storage, many were designed to generate numbers, temporarily store them, then call them. (I would note that there is no such thing as generating a list of numbers and calling them without storing them –



generated numbers must exist somewhere even if temporarily.) By the mid 1970's, computer storage became affordable to the point that desktop computers found their way into consumers' homes. The breakthrough in computer storage replaced the need to generate phone numbers. The only software to have a need to generate telephone numbers were "war dialers" used for finding modems and fax machines, not to place telephone calls. (*See 2003 FCC Report and Order released July 3, 2003 ¶135*) The affordability of computer storage in the mid 1970's lead to "predictive dialers."

11. In 2003, I was still a dialer administrator when the 2002 Request for Comments and the resulting 2003 FCC Order was published. In those Requests for Comments and 2003 Order, the FCC refers to "predictive dialers" as new technology. (*See FCC 02-250 NOTICE OF PROPOSED RULEMAKING AND MEMORANDUM OPINION AND ORDER dated Sep 18, 2002 ¶¶ 1, 11, 24*) It would also seem that at this time the FCC made the determination that the list could be stored or produced. Perhaps the FCC was confused, as this issue was already addressed in 1992. (*See Exhibit D - 1992 FCC Order ¶¶ 8-9*) In 1992, commenters pointed out that their predictive dialers were an "ATDS" under the statute and were asking for an exemption for the pre-recorded message left when answering machine detection detected an answering machine. (*See Exhibit C - 1992 comments to FCC*) Perhaps the FCC forgot they specifically named the "predictive dialer" in the 1992 Order as the only system involving "live-agents" and the only system identified by the test in the statute. (All other "agent-less" dialers were obvious to the consumer that they were called with an "autodialer.") (*See FCC 92-443 1992 FCC Order ¶¶ 8-9*) Perhaps the FCC was confused that these dialers had remained unchanged in their basic functionality for the last half century until now. (Rather than referring to the "predictive dialer" as "new and emerging" technology, it would have been more appropriate to refer to them as "ancient technology" in light of how fast technology generally changes within the computer industry.)

12. Before 2003, as a dialer administrator for a telemarketer, I saw no argument to say that the TCPA and 1992 FCC Order were not addressing “predictive dialers” and “autodialers” as they were designed several decades before the TCPA, because those dialers have not changed at all in their functionality even until now. I saw from the telemarketers’ perspective, the industry exploiting the FCC’s confusion. Telemarketers and others that used predictive dialers also saw the opportunity to exploit the FCC’s use of technical language in their 2003 Report and Order with various requests for clarification. The FCC did accurately describe how a predictive dialer operated as if they copied it from a technical manual. This technical discussion of how the system operated, went way beyond the basics of defining whether the system was an autodialer and created a flurry of requests to clarify in an area the FCC was not prepared to, not to mention, those requests had nothing to do with whether the system can store or produce numbers and automatically call them. The FCC, believing the “predictive dialer” was “new and emerging” technology from their 2002 Request for Comments, gave way to the argument that the TCPA was outdated and the FCC expanded the definition. From the FCC’s apparent mis-understanding, in those 2002 Requests for Comments, that dialing from a list of numbers was new rather than the norm since the mid 1970’s gave rise to the argument that lists of phone numbers were not in view in the TCPA, only generated numbers. This argument was then full of technical details intended to confuse their audience and redefine the “autodialer” not only as something that does not exist, but something that can never exist. In my expert reports, I have attempt to eliminate the need to discuss the system’s ability to generate numbers by illustrating that every computer is designed to generate numbers, giving the exact command in my report<sup>1</sup>, and having the defense counsel or judge type that command on their own computer and view the list of 10,000 sequentially generated numbers. The commenters’ argument then is that the system must generate those

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<sup>1</sup> For a Linux system type "seq 6192486000 6192486999 > sequential\_numbers\_to\_call.csv" For a Microsoft Windows system type "for /L %i in (2480000,1,2489999) do @echo 619%i >> sequential\_numbers\_to\_call.csv"

numbers without storing them first. That's impossible; numbers can not exist nowhere, they must be stored, even if temporarily.

13. Commenters take redefining the ATDS as something that can not exist further, by exploiting the FCC's confusion from their statement in their 2003 Order, "it has the capacity to dial numbers without human intervention." (*FCC 03-153 FCC 2003 Report and Order* ¶ 132) Commenters have pushed the idea that a certain amount of "human intervention" will make the system a non-ATDS system. The key to the commenters' argument is that they will not relate the "human intervention" with anything other than general human activity within a call center. These autodialers are a machine and no machine operates without an operator. The FCC has already attributed "human intervention" to the "dialing numbers" in their 2003 Report and Order. This is consistent with the industry definition of an "autodialer" ("self-dialer" from the Greek root, or "Automatic Telephone Dialing System"; both terms, created by the industry, the definition was the same as the name.) It is entirely irrelevant whether there is so-called "human intervention" in any aspect that precedes the actual dialing of the telephone numbers by the machine.

14. After rebutting the above arguments, the next argument by commenters is, "that would make everything including a cell phone an "ATDS." As a computer professional and dialer administrator, I was confused how they could justify such a statement. Commenters would attempt to justify this statement by saying that one could download and install software that makes the cell phone an "ATDS." I would point out that an "autodialer" is a piece of software, either one has the software or they do not. A cell phone without autodialing software can not be determined to be an autodialer. Commenters attempt to use the contact list and the fact that you can speed dial as their justification for such an absurd claim, (this was already exempted in the 1992 FCC order (See *See Exhibit D - 1992 FCC Order* ¶47; *Exhibit E - 1992 FCC Order part 2* ¶47)), but they ignore that there is no "automatically dialing" in the examples they use to justify that the industry's strict definition would encompass cell phones. Again,

confused, the FCC answers this in their 2015 Order by introducing future potential capacity to include installing software. I remind, however, that the “autodialer” is a piece of software, and if you do not have the software you do not have an ATDS. Simply because it is easy to download software and install it, does not mean that one has an “autodialer.” The entire FCC 2015 Order is confusing in all their attempts to describe the technical features of an “autodialer,” and as a technical expert, I can not reconcile any technical explanation from the FCC 2015 Order. I would emphasize that the FCC should stay away from the technicalities of how the system operates and stay with the basic function of an autodialer. It would be helpful for the FCC to again clarify, as they did in their 1992 Order, that autodialers do not include systems that were designed to call a single number such as a home security system or speed dial. (*See Exhibit D - 1992 FCC Order ¶47; Exhibit E - 1992 FCC Order part 2 ¶47*) The FCC should also include that it is specific to systems capable of automatically dialing phone numbers such as those found in outbound call centers. This would likely eliminate the “is the cell phone an ATDS” discussion. I would note that in 1992 the FCC has made a distinction between autodialers and non-autodialers that utilize random or sequential numbers. (*See Exhibit D - 1992 FCC Order ¶47; Exhibit E - 1992 FCC Order part 2 ¶47*)

15. The next argument by some commenters, comes in two forms: 1) To be an autodialer, one must be using the “autodialing” feature and 2) The TCPA only regulates making autodialed calls, not using an “autodialer.” Addressing the first position, there is no consumer product defined by how it is used, but rather what it is designed to be used for. Simply stated, one could use a wrench as a hammer; it is still a wrench. If I push my automobile down the road rather than drive it, it is still an automobile (automobile). Addressing the second position, while I am not a legal expert, the term “capacity” speaks to its designed purpose not how it is actually used. As a lay person reading the plain language, I would expect that if Congress intended to regulate the method in which the “autodialer” is used rather than using an “autodialer,” they would

have stated something similar to “to make autodialed calls,” rather than giving a definition of an “ATDS” and stating that one can not make calls “using an ATDS.”

16. Another method by which some commenters cause confusion is regarding “capacity” and by redefining the terms of “system,” “configure,” “code” and “program.” This argument is used as a follow up to the one in the previous paragraph. Within the industry, a “system” is something made up of components that work together to perform a single function. Merriam-Webster defines it as “a regularly interacting or interdependent group of items forming a unified whole.” Some commenters will go as far as defining “system” as a certain feature within a complete system. The strategy is quite simple; take the term “automobile” for example. If a person is only limited to looking at the wheel and not the rest of the system, that individual will never find anything with the capacity to transport someone. Commenters redefine the term “configure,” “code” and “program” to mean install, or create software that otherwise is not installed on the system. They will use these terms interchangeably to cause more confusion. Within the industry, “configure” would mean to select which features to use that are currently installed and present. “Code” and “Program” is defined by the industry as creating software that doesn’t currently exist. The strategy again, is simple; introduce the term “configure” and later replace it with “program” or “code.” Such commenters then take it further to demand that it require an analysis on that code, akin to doing an analysis on the alloy composition of the wheels on a car to determine if it is an automobile. This is in error.

**How to interpret “capacity” in light of the court’s guidance.**

17. The term “capacity” should be defined the same way as it is commonly defined, which is, “the ability or power to do.” That does not mean that it actually “did,” rather it has the “ability” to do so. For example, if a court says that I have the

“capacity” to testify, that does not mean that I actually did testify, merely that I have the “capacity” to testify. I cannot think of a product sold to consumers or industry that is defined by how it is used, but everything is defined by what is actually is. I also cannot think of an alternate use of the word “capacity” other than how it is used in common parlance. Additionally, Predictive dialers and autodialers were specifically named by the industry by what they are capable of doing. In fact, the names were chosen to have the definition and the name to be the same.

18. Some commenters confuse this issue by re-defining the system to a “manual” system, when the dialing mode is set to another mode. That is done within the campaign settings page by selecting a “radio” button or selecting from a dropdown list. This is akin to placing the selector switch of a fully automatic weapon on semi-auto and claiming that it is no longer a machine gun.

19. To support commenters re-defining of “system,” they will get into the weeds (so to speak) of the different modes and define them as a deferent system, which is not accurate. This argument only causes confusion as they are falsely saying that there are actually two phone systems in view, a “manual” system and an “automatic system.” Those commenters are actually saying that the selector switch creates two separate systems. An autodialer does not cease to be an autodialer merely because the autodialing functionality can be turned off or suppressed, as the potential for, or ability to use, the autodialing functionality remains present, as the word “capacity” reasonably indicates.

20. Thus, the term “capacity” in terms of the statute should be defined as “the ability or power to do”, which means that a device, or an online platform, that has the ability to place automated calls or send automated text messages to stored phone numbers is an ATDS. The D.C. Circuit’s concerns relating to smartphones can be addressed by stating that the autodialer software must be installed, which is consistent with the meaning of “capacity.”

**The functions a device must be able to perform to qualify as an automatic telephone dialing system. Again, the TCPA defines an “automatic telephone dialing system” as “equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.”**

21. I again do not claim to be a legal expert, however, I am an expert on “autodialers” and computer systems in general. Autodialers, from the time they were created, until now, are known by those in the call center industry as any system capable of automatically dialing phone numbers. The term “Automatic Telephone Dialing System” as created by the industry means exactly what the name implies. In the mid 1970’s, predictive dialers were invented, and again, the name was the definition. Some commenters tend to try to get into the technical details of what a random or sequential number generator is and how it could interact with other components of a system; in addition to re-defining a system. Quite simply, if I were presented with that definition in the technical manual of an ATDS, deciphering it is quite simple. I would see if the application of random or sequential number generator to both storage and production of telephone numbers was plausible. The production of numbers is synonymous to generation of numbers and not at all related to storage. To say otherwise, would define the ATDS as something that can not possibly ever exist. A number generator is not responsible for storage within a computer system, nor can it ever be. Coming from the telemarketing industry myself, I can say that the intent is to re-define the ATDS to something that can never exist so that the TCPA will become nullified. Commenters creating confusion in this area have led to some federal district courts ruling that a system used by telemarketers, that can broadcast a message to millions of phone users in a fraction of a second, is not an ATDS. (See *Jordan Marks v Crunch San Diego*,

*LLC*, Case No. 14-CV-0348-BAS (BLM) (S.D. Cal.); and *Herrick v Godaddy.com*, Case No. 2:16-cv-00254-DJH (D. AZ))

22. Within the industry, anything that can automatically dial (stored) telephone numbers is an ATDS or autodialer. It is a given that in order to automatically dial telephone numbers a list is used, whether stored or generated. Keep in mind that even if generated, it is then stored then called; generated phone numbers must be stored somewhere or they do not exist. Pointing this out usually leads to commenters again redefining the term ATDS to something that does not resemble the text of the statute at all.

***“Which is it?” If equipment cannot itself dial random or sequential numbers, can that equipment be an automatic telephone dialing system?***

23. Again, ATDS or autodialer software and predictive dialer software are installed on a computer system. They are installed on either Microsoft Windows or Linux. The operating system is part of the dialing system, because the dialing system can not exist unless it is installed on a computer with an operating system. All computer systems can generate phone numbers. This can be tested by any lay person simply by typing in “seq 6192486000 6192486999 > sequential\_numbers\_to\_call.csv” on a Linux system or “for /L %i in (2480000,1,2489999) do @echo 619%i >> sequential\_numbers\_to\_call.csv” on a Microsoft Windows system to generate a sequential list of 10,000 Sprint Wireless numbers. Again, commenters re-define the system to its individual components to try to escape this fact.

24. Since long before the TCPA was enacted, an ATDS or autodialer has been defined as a system that can either store or produce numbers and automatically call them. The only methods of producing numbers is either with a random or sequential number generator. Computer storage is in no way related to random or sequential number generators. Virtually all autodialers since the mid 1970’s called lists of



numbers (all predictive dialers from the time they were invented in the mid 1970's called from a list of numbers), not generated numbers, but by the very nature of computer systems, they can never lose their ability to generate numbers. Simply stated, the number generation aspect is a red herring. I would note that abandoned calls are exclusive to predictive dialers (*See 47 C.F.R. §§ 64.1200(a)(5),(6),(7)*).

25. Additionally, if lists of numbers were not in view, how would the FCC reconcile the DNC lists or other suppression lists for a system that supposedly does not store lists of numbers? How would the FCC reconcile abandoned call rates, which are exclusive to predictive dialers, as discussed in the FTC's Telemarketing Sales Rules and the FCC 2003 Report and Order (*See 2003 FCC Report and Order released July 3, 2003 ¶¶ 1, 8, 11, 87, 91, 134, 146-159; also 2003 FCC Report and Order released July 3, 2003 footnotes 28, 32 39, 452, 513, 521, 523, 524, 525, 526, 529, 531, 532, 534, 538, 540, 548, 552, 556, 559, 565, 566; 47 C.F.R. §§ 64.1200(a)(5),(6),(7)*)

**“Does the bar against ‘making any call using’ an [automatic telephone dialing system] apply only to calls made using the equipment’s [automatic telephone dialing system] functionality?”**

26. Since the mid 1970's, the only systems that actually rely on number generators to make phone calls are “war dialers” which were addressed separately in the FCC 2003 Report and Order. (*See 2003 FCC Report and Order released July 3, 2003 ¶135*) “War dialers” are not used by telemarketers, but were used by hackers to identify modems and fax machines. Since at least 15 years before the TCPA, telemarketers relied on lists of phone numbers. When I was running autodialers for telemarketing, I would purchase a list of every residential phone number in the country for \$400. This would eliminate the unnecessary calls to modems, faxes and unassigned blocks of numbers. At a phone rate of \$0.007 and over 1 million calls per hour, this saved enormous amounts of money. The point is, once computer storage became affordable in

the mid 1970's, the cost effectiveness of calling from a list of numbers is an understatement. In the FCC 2003 Report and Order, the FCC was correct that calling lists of phone numbers was more cost effective, but the FCC failed to realize that calling from lists of phone numbers was not a new practice, but pre-existed the TCPA by at least 15 years. Additionally, predictive dialers were intended to only call from stored lists of numbers, because unassigned blocks of numbers could not be handled by the predictive algorithm.

27. Some commenters have said that the TCPA only applies to actually using random or sequential number generators, because that would overwhelm the phone company. This is misleading. First, under that theory, numbers generated randomly would not have that effect. However, if I used a list from the Registrar of voters to send agent-less calls for my friend running for office in National City, CA, I would likely overwhelm the single Central Office.

28. Moreover, to say that the “using an Automatic Telephone Dialing System” means to actually autodial the calls would require redefining the system based on how it is used rather than what it is. On a technical level, if I choose to set the campaign to autodial all numbers, and preview mode for Indiana phone numbers, I would still overwhelm a Central Office.

29. The mountain of verbiage which many telemarketers and debt collectors must deploy to explain their definition of an "ATDS" refutes their thesis far more convincingly than anything I could say. I would highlight how such commenters have consolidated all these methods to cause confusion surrounding a proposed “ATDS” definition to describe a system that could not possibly exist in their attempt to nullify the TCPA in their PETITION FOR DECLARATORY RULING, dated May 3, 2018, in this matter. In their petition, Section II bears the heading “THE COMMISSION SHOULD CONFIRM THAT TO BE AN ATDS, EQUIPMENT MUST USE A RANDOM OR SEQUENTIAL NUMBER GENERATOR TO STORE OR PRODUCE NUMBERS AND DIAL THOSE NUMBERS WITHOUT HUMAN

INTERVENTION.” Again, random or sequential number generators cannot store numbers. Computer storage has no processing function and is incapable of producing anything. This statement alone would prevent anything in the real world from ever being defined as an “ATDS,” because it is impossible for any such device to exist.

30. Continuing in that section, petitioners state, “A device must be able to generate numbers in either random order or in sequential order to satisfy the definition. **Otherwise, the device cannot do anything ‘using a random or sequential number generator.’**” (emphasis added). This statement falsely conflates the number generator with number storage and takes the focus away from the production of numbers. Again, random or sequential number generators do not have any ability to store anything but are used in production of numbers. Then, after switching those terms and their usage, petitioners repeat this claim where grammatically it seems to make sense, but on the technical level it is absurd, “This ability to store or produce telephone numbers to be called, alone, is insufficient; the clause ‘using a random or sequential number generator’ modifies this phrase, requiring that the phone numbers stored or produced be generated using a random or sequential number generator.” The absurdity of this argument can also be demonstrated by the example of loading every number listed in the Chicago White Pages into a predictive dialer, and dialing every number 10 times an hour for three days straight. Because the phone numbers came from a list rather than a sequential or random number generator, the Petitioners would argue that the dialer cannot be defined as an ATDS. Next, petitioners state their goal of excluding their systems from being within the definition of an ATDS by inserting the false notion that predictive dialers were an expansion of the ATDS definition in the FCC’s 2003 Order, “Clarifying this definition (and rejecting earlier expansions that sweep all predictive dialers into the category of 'ATDS').” This statement exploits the Commissions oversight that the “predictive dialer” was specifically addressed in its 1992 order (*See Exhibit D - 1992 FCC Order ¶¶ 8-9; Exhibit C - 1992 comments to FCC*).

31. In their next statement, petitioners again artfully re-enforce this impossible technical description, “Such a clarification would help businesses and other legitimate callers by confirming that both elements must be satisfied for a device to constitute an ATDS.” Next, commenters re-define “capacity” to mean “actually use” by defining it to active, present, and used at the same time, “To further remove any confusion, the Commission should also make clear that both functions must be actually—not theoretically—present and active in a device at the time the call is made.” This takes the basic understanding of “capacity” from its designed capabilities to a level that consumers receiving these calls could never ascertain. For example, had the NFA defined a machine gun in this manner, no ATF agent would find a machine gun as nobody would demonstrate its use in full-auto mode in the presence of that ATF agent. Next, after redefining the terms, re-writing history and inappropriately attributing number generators to storage, petitioners tell the Commission they are bound to their claims, “The FCC lacks the authority to go beyond the requirements of the clear statutory language.” Again, re-writing history by exploiting the FCC overlooking that the “predictive dialer” was the focus in 1992 and is “ancient technology” verses “new technology,” petitioners attempt to commit the Commission to their re-written history, “if the FCC wishes to take action against newer technologies beyond the TCPA’s bailiwick, it must get express authorization from Congress—not make up the law as it goes along.” Next, petitioners define the system’s “capacity” by its method of use rather than its actual capacity, “In clarifying which devices qualify as an ATDS, the Commission should hold that devices that require alteration to add autodialing capability are not ATDS.” Next, petitioners re-enforce this by stating a fact, “To illustrate, smartphones require downloading an app or changing software code to gain autodialing capabilities. Those capabilities are not built in.” This statement is in opposition to petitioners’ statement they are relating it to. Petitioners are trying to relate the need to actually possess the autodialing software to having the software, but using it in another fashion. The idea is to validate a false statement by making a true statement

and convincing the lay person both statements say the same thing when they most certainly do not.

32. Petitioners' next statement is rather clever, they contradict themselves to attempt to overcome a rebuttal, but then artfully use that to support their claim that "capacity" is not "capacity" but actual use, "By contrast, other calling equipment can become an autodialer simply by clicking a button on a drop-down menu. That function is already part of the device and requires a simple change in setting rather an alteration of the device. Devices with these inherent capabilities are an ATDS when these capabilities are in use." They then re-enforce this by comparing their predictive dialer with a smart phone (which in reality bear no resemblance), "Adopting this distinction would significantly narrow the range of devices considered ATDS, excluding smartphones, and comport with the statutory language."

33. Next, petitioners move on to the "human intervention" argument, "The FCC can take this opportunity to clarify that the absence of human intervention is what makes an automatic telephone dialing system automatic." Notice that petitioners will not apply "human intervention" to anything. I remind that there is a lot of human activity in a call center and autodialers, while they autodial phone numbers, they need to be instructed to dial those phone numbers before the system can actually dial them; a person will always be required to configure the autodialer to autodial phone numbers. Human activity will always be required to turn on the autodialer, load the list, set the schedule and press the "go" button. As I pointed out earlier, the Commission has applied "human intervention" to "dialing" only. Petitioners immediately follow up with quoting the Commission as they applied "human intervention" to "dialing" but ignoring that the Commission did so. Then petitioners apply "human intervention" to the generation of phone numbers, "The FCC should make clear that if human intervention is required in generating the list of numbers." On a technical level, this is an absurd statement. Petitioners are actually saying the system needs to generate phone numbers without being instructed to do so. I can not imagine a scenario where the autodialer will

turn itself on, generate its own list of numbers, store that list of numbers and call that list of numbers all with no human involvement. Petitioners then justify this definition of “ATDS” with, “This comports with the commonsense understanding of the word “automatic,” and the FCC’s original understanding of that word.” Petitioners have it all wrong.

**What telemarketers and debt collectors can do to make phone calls to wireless numbers without using an ATDS.**

34. As mentioned above, I came from the telemarketing industry and maintained the autodialers. Making phone calls at a rate of 1 million calls per hour is a very costly endeavor. The rates that we were paying were \$0.007 cents per minute billed at 6 second increments. I would modify the dialers to stop dialing at a certain amount of time to prevent answering machines answering, but giving plenty of time for consumers to answer. In addition, I would have to take steps to prevent being charged for short duration calls. The idea is that while I had answering machine detection, the calls to answering machines are very expensive as outgoing answering machine messages are roughly 30 seconds long. This creates an astronomical phone bill. The profit margin that we were looking at was only about \$0.003 per call. Other types of campaigns such as agent-calls (predictive dialing) still required a very small “cost per lead” to make those calls at all profitable. Predictive dialers have about a 400% increase in productivity, and a telemarketer needs that much to come close to making a profit. This is why some business who run call centers have become so creative in trying to re-define an autodialer.

35. The solution to this problem is to call wireless numbers with a separate system that does not have the capability to autodial. At this time, most dialer vendors have such a solution aside from their predictive dialers such as Livevox, Ontario Systems, Interactive Intelligence, Five9, Noble Systems and Avaya just to name a few.

I have seen some use just plain phone systems (PBX) to make calls to wireless numbers. Thus, there is a reasonable and relatively simply mean for businesses to avoid calling cell phones with an ATDS, if they desire to call cell phone without first having obtained the required prior express consent or they are concerned that they might be calling a re-assigned number.<sup>2</sup>

### **How should the FCC clarify an ATDS?**

36. The FCC should clarify an ATDS based upon how an ATDS has been defined since the mid 1970's. The FCC had it right in their 1992 Order. (*See Exhibit D - 1992 FCC Order ¶¶8-9*) The FCC needs to define what a system is to prevent commenters from re-defining the system and asking for clarification of their new made up system. The system needs to be defined as "having all the components to perform a single function." The FCC should stop getting into the issue of all the technical sub parts of the system; doing so would allow SMS Blasting systems, used by telemarketers, to be redefined as a NON-ATDS as in *Jordan Marks v Crunch San Diego, LLC*, Case No. 14-CV-0348-BAS (BLM) (S.D. Cal.), and *Herrick v Godaddy.com*, Case No. 2:16-cv-00254-DJH (D.AZ). The FCC needs to clarify "systems used primarily for outbound call centers" to eliminate the "is the cell phone an ATDS discussion" (not to exclude the possibility of the cell phone from having software that would have actual autodialing capabilities; again, it is the software that defines the autodialer, not the hardware). The FCC needs to build from its 1992 Order and not limit themselves to pre-recorded voice or artificial voice. Those just happened to be the only type of agent-less calls at the time. Since that time, SMS blasting has emerged as an agent-less call, and as a result, SMS Blasting, has required the "test" as it applies to "agent" calls.

37. The FCC kept it simple in 1992 which did not lead to any misunderstanding. Some consumers (such as from the telemarketing and debt collection

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<sup>2</sup> The FCC could create a re-assigned number database, similar to the national Do-Not-Call Database.

industries) are not confused as to what an autodialer is, however, the FCC introduced confusion in the technicalities of each possible line of programming code in their 2003 Report and Order, such as with the predictive algorithm which has nothing to do with storage or production of numbers. This is akin to introducing the alloy composition of the wheel of the car to determine if it is an automobile. The point is, if it is irrelevant, do not spend several paragraphs getting into the technical details which create avenues for argument that the definition of an ATDS is unclear. I should not be needed as an expert to clarify that a particular system is an autodialer, but this confusion demanded an expert. All those on both sides of the argument would agree that litigation has skyrocketed since 2003 after the FCC 2003 Order. After the FCC 2003 Order, telemarketers and those that use them saw the opportunity to exploit the FCC's confusion and spin the FCC's use of technical terms. I believe if the FCC were to adopt their 1992 Order, simply clarify what a "system" is and not limit the "agent" calls and "agent-less" call to a particular system, my need to serve as an expert in TCPA litigation would likely become unnecessary.

**List of cases in which I have been called to testify**

38. I have been called to testify in the following civil matters: *Craig Casey v. Valley Center Insurance Agency Inc.*, Case No. 37-2008-00004378-SC-SC-CTL (San Diego Superior Court); *Stemple v. QC Holdings, Inc.*, Case No. 12-CV-1997-CAB-WVG (S.D. Cal.); *Hahn v. Massage Envy Franchising*, Case No: 3:12-cv-00153-DMS-BGS (S.D. Cal.); *Abdeljalil v. General Electric Capital Corporation*, Case No: 12-cv-02078-JAH-MDD (S.D. Cal.); *Jasmina Webb v. Healthcare Revenue Recovery Group, LLC* Case No: C 13-0737 JD (N.D. Cal.); *Balschmiter v TD Auto Finance, LLC*, Case No: 2:13-cv-01186 (E.D. Wisc.); *Jordan Marks v Crunch San Diego, LLC*, Case No. 14-CV-0348-BAS (BLM) (S.D. Cal.); *Peter Olney v Job.com*, Case No: 1:12-cv-01724-



LJO-SKO (E.D. Cal.); *Carlos Guarisma v ADCAHB Medical Coverages, Inc. and Blue Cross and Blue Shield of Florida, Inc.*, Case No: 1:13-cv-21016-JLK (S.D. Fla.); *Farid Mashiri v Ocwen Loan Servicing, LLC*, Case No: 3:12-cv-02838 (S.D. Cal.); *Monty J. Booth, Attorney at Law, P.S. v Appstack, Inc.*, Case No. 2:13-cv-01533-JLR (W.D. Wash.); *Rinky Dink, Inc. d/b/a Pet Stop v World Business Lenders, LLC*, Case No. 2:14-cv-00268-JCC (W.D. Wash.); *Michael Reid and Dave Vacarro v. I.C. Systems, Inc.*, Case No. 2:12-cv-02661-ROS (D. Ariz.); *Jeffrey Molar v NCO Financial Systems* Case No. 3:13-cv-00131-BAS-JLB (S.D. Cal.); *Latonya Simms v Simply Fashion Stores LTD, and ExactTarget, Inc.*, Case No. 1:14-CV-00737-WTL-DKL (D. Ind.); *Sueann Swaney v Regions Bank*, Case No. CV-13-RRA-0544-S (N.D. Ala.); *Hooker v SiriusXM*, Case No. 4:13-cv-00003 (AWA) (E.D. Va.); *Diana Mey v Frontier Communications*, Case No. 13-cv-01191-RNC (D. Conn.); *Rachel Johnson v Yahoo! Zenaida Calderin v Yahoo!* Case No. 14-cv-2028 14-cv-2753 (N.D. IL); *Philip Charvat v Elizabeth Valente*, Case No. 12-cv-5746 (N.D. IL); *Robert Zani v Rite Aid Hdqtrs. Corp.*, Case No. 14-cv-9701(AJN)(RLE)(S.D. NY), *A.D. v Credit One Bank* Case No. 1:14-cv-10106 (N.D. IL); *Oerge Stoba, and Daphne Stoba v Saveology.com, LLC, Elephant Group, Inc.; Time Warner Cable, Inc.*, Case No. 13-cv-2925-BAS-NLS (S.D. Cal.); *Shyriaa Henderson v United Student Aid Funds, Inc.* Case Number: 3:13-cv-1845-L-BLM (S.D. Cal.); *Marciano v Fairwinds Financial Services* Case No. 6:15-CV-1907-ORL-41 KRS (M.D. Fla); *Alice Lee v Global Tel\*Link Corporation*, Case No. 2:15-cv-02495-ODW-PLA [consolidated with 2:15-cv-03464-ODW-PLA (C.D. Cal.); *Alan Brinker v Normandin's*, Case No. 5:14-cv-03007-EJD-HRL (N.D. Cal.); *Spencer Ung v Universal Acceptance Corporation*, Case No. 15cv127 RHK/FLN (D. Minn); *Seana Goodson v Designed Receivable Solutions*, Case No. 2:15-cv-03308-MMM-JPR (C.D. Cal); *Dominguez v Yahoo!, Inc.*, Case No. 2:13-cv-01887 (E.D. Penn); *Eli Ashkenazi v Bloomingdales, Inc.*, Case No. 3:15-cv-02705-PGS-DEA (D. N.J.); *Abante Rooter and Plumbing, Inc. v Birch Communications, Inc.* Case No. 1:15-cv-03562 (N.D. GA); *Roark v Credit One Bank*, Case No. 0:16-cv-00173-RHK-FLN (D.Minn); *Carl Lowe And Kearby Kaiser v*

*CVS Pharmacy, Inc., Minuteclinic, LLC, and West Corporation*, Case No. 1:14-cv-03687 (N.D. Ill); *Zaklit v Nationstar Mortgage, LLC.*, Case No. 5:15-CV-02190-CAS-KK (C.D. Cal); *Charles Banks v Conn Appliance, Inc.*, Case No. 01-16-0001-0736 (American Arbitration Association); *Rajesh Verma v Memorial Healthcare Group*, Case No. 3:16-CV-00427-HLA-JRK (M.D. Fla); *Herrick v Godaddy.com*, Case No. 2:16-cv-00254-DJH (D.AZ); *In Re: Monitronics International, Inc., Telephone Consumer Protection Act Litigation*, Case No. 1:13-md-02493-IMK-JSK (N.D.W.V.); *Diana Mey v Ventura Data, LLC And Public Opinion Strategies*, Case No. 5:14-CV-123 (N.D.W.V.); *Lucero v Conn Appliances*, Case No. 01-16-0004-7141 (American Arbitration Association); *Dennis v Progressive Leasing*, Case No. 01-16-0002-8798 (American Arbitration Association – Final Hearing); *Shani Marcus and Frieda Esses Ashkenazi v CVS Pharmacy, Inc.*, Case No.: 3:15-cv-259 PGS-LHG (D. N.J.); *Donnell Webster v Conn Appliances, Inc.*, Case No.: 01-16-0003-3774 (American Arbitration Association - Final Hearing); *Snyder v Ocwen Loan Servicing*, Case No.: 1:14-cv-08461 (N.D. Ill); *Shamara Abrahams v First Premier Bank*, Case No. 01-16-0003-8128 (American Arbitration Association - Final Hearing); *Wooten v Conn Appliances, Inc.*, Case No.: 01-16-0003-5557 (American Arbitration Association – Final Hearing); *SANDRA WEST AND HECTOR MEMBRENO v CALIFORNIA SERICE BUREAU*, Case No.: 4:16-cv-03124-YGR (N.D. Cal.); *Summers v Conn Appliances*, Case No.: 01-16-0004-1183 (American Arbitration Association - Final Hearing); *Sheena Raffin v Medicredit*, Case No.: 2:15-cv-04912-GHK (C.D. Cal); *Verina Freeman and Valecea Diggs v Wilshire Commercial Capital*, Case No.: 2:15-cv-01428-WBS-AC (E.D. Cal); *Tomeo v Citigroup*, Case No.: 1:13-cv-04046 (N.D. Ill); *Douglas Jurist v Receivables Performance Management, LLC*, Case Number 1240022589 (JAMS ARBITRATION); *April Turner v Credit One Bank, N.A.*, Case No. 1440005239 (Arbitration Tribunals of JAMS - Final Hearing); *Frederick Luster and Narval Mangal v Green Tree Servicing. LLC*, Case No. 1:14-cv-01763-ELR (N.D. Georgia); *Jonathan Greisen v Credit One Bank* (JAMS Arbitration); *Isaac Saucedo v Credit One Bank* (JAMS Arbitration);

*Naomi Blocker v Credit One Bank* (JAMS Arbitration); *Winston Edwards III v Credit One Bank*, Case No. 1260004354 (JAMS Arbitration); *Timothy Levis Johnson v Credit One Bank* (JAMS Arbitration); *William Boden and Debra Boden v Credit One Bank*, Case Nos: 1220054604/1220054605 (JAMS Arbitration – Final Hearing); *Rebecca Sanders v Credit One Bank*, Case No.: 01-17-0001-6599 (American Arbitration Association - Final Hearing); *Donna Ace v. Credit One Bank* (JAMS Arbitration); *Lynette Alomar v. Credit One Bank* (JAMS Arbitration); *Tonya Anderson v. Credit One Bank* (JAMS Arbitration); *Gregory Andrews v. Credit One Bank* (JAMS Arbitration); *Alyce Baker v. Credit One Bank* (JAMS Arbitration); *Terry Bardwell v. Credit One Bank* (JAMS Arbitration); *Joshua Bare v. Credit One Bank* (JAMS Arbitration); *Lori Bason v. Credit One Bank* (JAMS Arbitration); *Christopher Batch v. Credit One* (JAMS Arbitration); *Tiffany Battle v. Credit One* (JAMS Arbitration); *Jean Bellingrodt v. Credit One Bank* (JAMS Arbitration); *Carolyn Bennett v. Credit One Bank* (JAMS Arbitration); *Shady Bennett v. Credit One Bank* (JAMS Arbitration); *Kelly Benson v. Credit One Bank* (JAMS Arbitration); *Dawn Berkey v. Credit One Bank* (JAMS Arbitration); *Sherry Best v. Credit One Bank* (JAMS Arbitration); *Daniel Blashack v. Credit One* (JAMS Arbitration); *Edith Blashack vs. Credit One* (JAMS Arbitration); *Takia Brandon v. Credit One* (JAMS Arbitration); *Jeffrey Brown v. Credit One Bank* (JAMS Arbitration); *Karen Brown v. Credit One* (JAMS Arbitration); *Rebecca Burt v. Credit One Bank* (JAMS Arbitration); *Jennifer Burton v. Credit One Bank* (JAMS Arbitration); *Janice Bushey v. Credit One Bank* (JAMS Arbitration); *Matthew Byers v. Credit One Bank* (JAMS Arbitration); *Darrell Byrom v. Credit One Bank* (JAMS Arbitration); *Eric Carlstedt v. Credit One Bank* (JAMS Arbitration); *Ronald Carnes v. Credit One Bank* (JAMS Arbitration); *Michelle Carter v. Credit One Bank* (JAMS Arbitration); *Brandon Chapman v. Credit One Bank* (JAMS Arbitration); *Derek Chism v. Credit One Bank* (JAMS Arbitration); *Bernard Combs v. Credit One Bank* (JAMS Arbitration); *Linda Cooper v. Credit One Bank* (JAMS Arbitration); *Janice Crenshaw v. Credit One Bank* (JAMS Arbitration); *Christopher Crisona v. Credit One Bank*

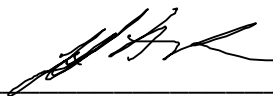
(JAMS Arbitration); *Brent Crompton v. Credit One Bank* (JAMS Arbitration); *Teresa Cruz v. Credit One Bank* (JAMS Arbitration); *Lisa Currey v. Credit One Bank* (JAMS Arbitration); *Kenneth Curtis v. Credit One Bank* (JAMS Arbitration); *Melissa Damron v. Credit One Bank* (JAMS Arbitration); *Mike Dane v. Credit One Bank* (JAMS Arbitration); *Ayanna Davis v. Credit One Bank* (JAMS Arbitration); *Bruce Davis v. Credit One Bank* (JAMS Arbitration); *Matthew Day v. Credit One Bank* (JAMS Arbitration); *Angela Deal v. Credit One Bank* (JAMS Arbitration); *Bettina Deleon v. Credit One Bank* (JAMS Arbitration); *Nathaniel and Rowena Depano v. Credit One Bank* (JAMS Arbitration); *Melissa Dibenedetto v. Credit One Bank* (JAMS Arbitration); *Juan Dillon v. Credit One Bank* (JAMS Arbitration); *Sarah Peacock v. Credit One Bank* (JAMS Arbitration); *Kristina Dorffer v. Credit One Bank* (JAMS Arbitration); *Michael Dorsey v. Credit One Bank* (JAMS Arbitration); *Dacia Drury v. Credit One Bank* (JAMS Arbitration); *Kelly Dubel v. Credit One Bank* (JAMS Arbitration); *Winston Edwards III v. Credit One Bank* (JAMS Arbitration); *Kristi Evans v. Credit One Bank* (JAMS Arbitration); *Herby Fequiere v. Credit One Bank* (JAMS Arbitration); *Patrick Fitch v. Credit One Bank* (JAMS Arbitration); *Sharon Flowers v. Credit One Bank* (JAMS Arbitration); *Michelle Fong v. Credit One Bank* (JAMS Arbitration); *Joy Williams Frazier v. Credit One Bank* (JAMS Arbitration); *Carol Galanos v. Credit One Bank* (JAMS Arbitration); *Lizette Garcia v. Credit One Bank* (JAMS Arbitration); *Olivia Garcia v. Credit One Bank* (JAMS Arbitration); *Corey Gill v. Credit One Bank* (JAMS Arbitration); *Amy Goetting v. Credit One Bank* (JAMS Arbitration); *Angel Gomez v. Credit One Bank* (JAMS Arbitration); *Derik Gonzalez v. Credit One Bank* (JAMS Arbitration); *Moises Govea v. Credit One Bank* (JAMS Arbitration); *Tonya Greer v. Credit One Bank* (JAMS Arbitration); *Melissa Grose v. Credit One Bank* (JAMS Arbitration); *Laurie Guerrattaz v. Credit One Bank* (JAMS Arbitration); *Scott Guntle v. Credit One Bank* (JAMS Arbitration); *Arlinda Hairston v. Credit One Bank* (JAMS Arbitration); *Bartley Harper v. Credit One Bank* (JAMS Arbitration); *Terrance Harris v. Credit One Bank* (JAMS Arbitration); *Cindy Hawkins*

*v. Credit One Bank (JAMS Arbitration); Daniel Hawkins v. Credit One Bank (JAMS Arbitration); Tara Hicks v. Credit One Bank (JAMS Arbitration); Theresa Hill v. Credit One Bank (JAMS Arbitration); Troy and Tammy Hill v. Credit One Bank (JAMS Arbitration); Gary and Angela Hlavacek v. Credit One Bank (JAMS Arbitration); Virginia Hubbell v. Credit One Bank (JAMS Arbitration); Ashley Jackson v. Credit One Bank (JAMS Arbitration); Joseph James v. Credit One Bank (JAMS Arbitration); Donald Johnson v. Credit One Bank (JAMS Arbitration); Janet Johnson v. Credit One Bank (JAMS Arbitration); John Johnson v. Credit One Bank (JAMS Arbitration); Sonya Johnson v. Credit One Bank (JAMS Arbitration); Stephanie Johnson v. Credit One Bank (JAMS Arbitration); Kenneth Jones v. Credit One Bank (JAMS Arbitration); Michael and Marianne Jordan v. Credit One Bank (JAMS Arbitration); Robert Ketterman v. Credit One Bank (JAMS Arbitration); Leila Kier v. Credit One Bank (JAMS Arbitration); Samantha King v. Credit One Bank (JAMS Arbitration); Jessica Kirksey v. Credit One Bank (JAMS Arbitration); Angelica Korchmaros v. Credit One Bank (JAMS Arbitration); Yaroslav Kut v. Credit One Bank (JAMS Arbitration); Brad Larsen v. Credit One Bank (JAMS Arbitration); Sarah Lawhead v. Credit One Bank (JAMS Arbitration); Gary Lawrence v. Credit One Bank (JAMS Arbitration); Timothy Levis Johnson v. Credit One Bank (JAMS Arbitration); Kemisha Levy v. Credit One Bank (JAMS Arbitration); Benjamin Lewis v. Credit One Bank (JAMS Arbitration); Jackie Likovic v. Credit One Bank (JAMS Arbitration); Lorenzo Lockwood v. Credit One Bank (JAMS Arbitration); Cathy Loreto v. Credit One Bank (JAMS Arbitration); Dawn Lowery v. Credit One Bank (JAMS Arbitration); Issac Lowery v. Credit One Bank (JAMS Arbitration); Leslie Malina v. Credit One Bank (JAMS Arbitration); Torre Mason v. Credit One Bank (JAMS Arbitration); Michael McDevitt v. Credit One Bank (JAMS Arbitration); Maya Christian McKeever v. Credit One Bank (JAMS Arbitration); Linda McNeal v. Credit One Bank (JAMS Arbitration); Amanda McNeill v. Credit One Bank (JAMS Arbitration); James McPartland v. Credit One Bank (JAMS Arbitration); Janice Metzger v. Credit One Bank (JAMS Arbitration); Dawn and*

*Anthony Mighaccio v. Credit One Bank* (JAMS Arbitration); *Adriane Miles v. Credit One Bank* (JAMS Arbitration); *Keith Miller v. Credit One Bank* (JAMS Arbitration); *Dixie Dawn Moore v. Credit One Bank* (JAMS Arbitration); *Sabrina Moore v. Credit One Bank* (JAMS Arbitration); *Estefany Morel v. Credit One Bank* (JAMS Arbitration); *Juan Moreno v. Credit One Bank* (JAMS Arbitration); *Michelle Morgan v. Credit One Bank* (JAMS Arbitration); *Darlene Morrison v. Credit One Bank* (JAMS Arbitration); *Bobbie Murray and Random Booth v. Credit One Bank* (JAMS Arbitration); *Charlene Myers v. Credit One Bank* (JAMS Arbitration); *Denise Myers v. Credit One Bank* (JAMS Arbitration); *Rebecca Naylor v. Credit One Bank* (JAMS Arbitration); *Sharon Neville v. Credit One Bank* (JAMS Arbitration); *Jessanna Nunnery (Mitchell) v. Credit One Bank* (JAMS Arbitration); *Anthony Ogline v. Credit One Bank, N.A. and Midland Funding, LLC* (JAMS Arbitration); *Agnes Ousley v. Credit One Bank* (JAMS Arbitration); *Kaitlyn Peace v. Credit One Bank* (JAMS Arbitration); *Thomas Piner v. Credit One Bank* (JAMS Arbitration); *Melissa Prieto v. Credit One Bank* (JAMS Arbitration); *Heather Pyle v. Credit One Bank* (JAMS Arbitration); *Nathan Quick v. Credit One Bank* (JAMS Arbitration); *Nikola Radojkovic v. Credit One Bank* (JAMS Arbitration); *Jessica Rainey v. Credit One Bank* (JAMS Arbitration); *Tyrone Randolph v. Credit One Bank* (JAMS Arbitration); *Derek Reid v. Credit One Bank* (JAMS Arbitration); *John Reyes v. Credit One Bank* (JAMS Arbitration); *Rich Richardson v. Credit One Bank* (JAMS Arbitration); *Deborah Ristoff v. Credit One Bank* (JAMS Arbitration); *David Robertson v. Credit One Bank* (JAMS Arbitration); *Heather Robertson v. Credit One Bank* (JAMS Arbitration); *Ryan Romero v. Credit One Bank* (JAMS Arbitration); *Kathy Rupp v. Credit One Bank* (JAMS Arbitration); *Camilla Sammons v. Credit One Bank* (JAMS Arbitration); *Paul Schaferling v. Credit One Bank* (JAMS Arbitration); *Christopher Shirley v. Credit One Bank* (JAMS Arbitration); *Jerryd Shoda v. Credit One Bank* (JAMS Arbitration); *Martha Gabriela Silva Canales v. Credit One Bank* (JAMS Arbitration); *Jay Simon v. Credit One Bank* (JAMS Arbitration); *Melissa Simpson v. Credit One Bank* (JAMS Arbitration); *Delisa Sims v.*

*Credit One Bank* (JAMS Arbitration); *Gween Sims v. Credit One Bank* (JAMS Arbitration); *Bridgette Fretz v. Credit One Bank* (JAMS Arbitration); *Christine Sokoloski v. Credit One Bank* (JAMS Arbitration); *Kyle Sorensen v. Credit One Bank* (JAMS Arbitration); *Paula Spivey v. Credit One Bank* (JAMS Arbitration); *Joshua Stack v. Credit One Bank* (JAMS Arbitration); *Anturuan Stallworth v. Credit One Bank* (JAMS Arbitration); *Rebecca Stanley v. Credit One Bank* (JAMS Arbitration); *Alisha Stewart v. Credit One Bank* (JAMS Arbitration); *Helen Stuber v. Credit One Bank* (JAMS Arbitration); *Pamela Swanson v. Credit One Bank* (JAMS Arbitration); *Shannon Taylor v. Credit One Bank* (JAMS Arbitration); *Angie Teneyck v. Credit One Bank* (JAMS Arbitration); *Stephanie Thornton v. Credit One Bank* (JAMS Arbitration); *Connie Tolbert v. Credit One Bank* (JAMS Arbitration); *Tamara Tuggle v. Credit One Bank* (JAMS Arbitration); *Leo Underhill v. Credit One Bank* (JAMS Arbitration); *Megan Veraldi v. Credit One Bank* (JAMS Arbitration); *Samantha Walters v. Credit One Bank* (JAMS Arbitration); *Brenda Walton v. Credit One Bank* (JAMS Arbitration); *Thomas Watson v. Credit One Bank* (JAMS Arbitration); *Anita Welch v. Credit One Bank* (JAMS Arbitration); *Trisha West v. Credit One Bank* (JAMS Arbitration); *Jill Williams v. Credit One Bank* (JAMS Arbitration); *Marie Wills v. Credit One Bank* (JAMS Arbitration); *Joy Wilson v. Credit One Bank* (JAMS Arbitration); *Christy Wineinger v. Credit One Bank* (JAMS Arbitration); *Sean Woodburn v. Credit One Bank* (JAMS Arbitration); *Michelle Robertson v Navient Solutions, Inc.*, Case No.: 8:17-cv-01077-RAL-MAP (M.D. Florida Tampa); *Cynthia Davis v Conn Appliances*, Case No.: 01-0000-9774 (American Arbitration Association); *Tonya Erin Stevens v Conn Appliances, Inc.*, Case No. 01-16-0003-2324, (American Arbitration Association).

39. I declare that the foregoing is true and correct, subject to the laws of perjury of the United States. Executed in Spring Valley, CA on this 12<sup>th</sup> day of June 2018.



Jeffrey A. Hansen

# Exhibit A



**Jeffrey A. Hansen**  
**Spring Valley, CA 91977**  
**(619) 270-2363**  
**Email: Jeff@TCPAwitness.com**

**SUMMARY OF QUALIFICATIONS:**

IT certified professional with over 28 years of extensive troubleshooting experience

**PROFESSIONAL EXPERIENCE:**

**Testified in the following:**

I have been called to testify in the following civil matters:

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2. *Stemple v. QC Holdings, Inc.*, Case No. 12-CV-1997-CAB-WVG (S.D. Cal.)
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11. *Monty J. Booth, Attorney at Law, P.S. v Appstack, Inc.*, Case No. 2:13-cv-01533-JLR (W.D. Wash.)
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20. *Philip Charvat v Elizabeth Valente*, Case No. 12-cv-5746 (N.D. IL)
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24. *Shyriaa Henderson v United Student Aid Funds, Inc.* Case Number: 3:13-cv-1845-L-BLM (S.D. Cal.)
25. *Marciano v Fairwinds Financial Services* Case No. 6:15-CV-1907-ORL-41 KRS (M.D. Fla)
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33. *Roark v Credit One Bank*, Case No. 0:16-cv-00173-RHK-FLN (D.Minn)
34. *Carl Lowe And Kearby Kaiser v CVS Pharmacy, Inc., Minuteclinic, LLC, and West Corporation*, Case No. 1:14-cv-03687 (N.D. Ill)
35. *Zaklit v Nationstar Mortgage, LLC.*, Case No. 5:15-CV-02190-CAS-KK (C.D. Cal)

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42. *Dennis v Progressive Leasing*, Case No. 01-16-0002-8798 (American Arbitration Association – Final Hearing)
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48. *SANDRA WEST AND HECTOR MEMBRENO v CALIFORNIA SERICE BUREAU*, Case No.: 4:16-cv-03124-YGR (N.D. Cal.)
49. *Summers v Conn Appliances*, Case No.: 01-16-0004-1183 (American Arbitration Association - Final Hearing)
50. *Sheena Raffin v Mediacredit*, Case No.: 2:15-cv-04912-GHK (C.D. Cal)
51. *Verina Freeman and Valecea Diggs v Wilshire Commercial Capital*, Case No.: 2:15-cv-01428-WBS-AC (E.D. Cal)
52. *Tomeo v Citigroup*, Case No.: 1:13-cv-04046 (N.D. Ill)
53. *Douglas Jurist v Receivables Performance Management, LLC*, Case Number 1240022589 (JAMS ARBITRATION)
54. *April Turner v Credit One Bank, N.A.*, Case No. 1440005239 (Arbitration Tribunals of JAMS - Final Hearing)
55. *Frederick Luster and Narval Mangal v Green Tree Servicing, LLC*, Case No. 1:14-cv-01763-ELR (N.D. Georgia)
56. *Jonathan Greisen v Credit One Bank* (JAMS Arbitration)
57. *Isaac Saucedo v Credit One Bank* (JAMS Arbitration)
58. *Naomi Blocker v Credit One Bank* (JAMS Arbitration)
59. *Winston Edwards III v Credit One Bank*, Case No. 1260004354 (JAMS Arbitration)
60. *Timothy Levis Johnson v Credit One Bank* (JAMS Arbitration)
61. *William Boden and Debra Boden v Credit One Bank*, Case Nos: 1220054604/1220054605 (JAMS Arbitration – Final Hearing)
62. *Rebecca Sanders v Credit One Bank*, Case No.: 01-17-0001-6599 (American Arbitration Association - Final Hearing)
63. *Donna Ace v. Credit One Bank* (JAMS Arbitration)
64. *Lynette Alomar v. Credit One Bank* (JAMS Arbitration)
65. *Tonya Anderson v. Credit One Bank* (JAMS Arbitration)
66. *Gregory Andrews v. Credit One Bank* (JAMS Arbitration)
67. *Alyce Baker v. Credit One Bank* (JAMS Arbitration)
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70. *Lori Bason v. Credit One Bank* (JAMS Arbitration)
71. *Christopher Batch v. Credit One* (JAMS Arbitration)
72. *Tiffany Battle v. Credit One* (JAMS Arbitration)
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81. Takia Brandon v. Credit One (JAMS Arbitration)
82. Jeffrey Brown v. Credit One Bank (JAMS Arbitration)
83. Karen Brown v. Credit One (JAMS Arbitration)
84. Rebecca Burt v. Credit One Bank (JAMS Arbitration)
85. Jennifer Burton v. Credit One Bank (JAMS Arbitration)
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90. Ronald Carnes v. Credit One Bank (JAMS Arbitration)
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108. Bettina Deleon v. Credit One Bank (JAMS Arbitration)
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110. Melissa Dibenedetto v. Credit One (JAMS Arbitration)
111. Juan Dillon v. Credit One Bank (JAMS Arbitration)
112. Sarah Peacock v. Credit One Bank (JAMS Arbitration)
113. Kristina Dorffer v. Credit One Bank (JAMS Arbitration)
114. Michael Dorsey v. Credit One Bank (JAMS Arbitration)
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122. Michelle Fong v. Credit One Bank (JAMS Arbitration)
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138. Terrance Harris v. Credit One Bank (JAMS Arbitration)

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140. Daniel Hawkins v. Credit One Bank (JAMS Arbitration)
141. Tara Hicks v. Credit One Bank (JAMS Arbitration)
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145. Virginia Hubbell v. Credit One Bank (JAMS Arbitration)
146. Ashley Jackson v. Credit One Bank (JAMS Arbitration)
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150. John Johnson v. Credit One Bank (JAMS Arbitration)
151. Sonya Johnson v. Credit One Bank (JAMS Arbitration)
152. Stephanie Johnson v. Credit One Bank (JAMS Arbitration)
153. Kenneth Jones v. Credit One Bank (JAMS Arbitration)
154. Michael and Marianne Jordan v. Credit One Bank (JAMS Arbitration)
155. Robert Ketterman v. Credit One Bank (JAMS Arbitration)
156. Leila Kier v. Credit One Bank (JAMS Arbitration)
157. Samantha King v. Credit One Bank (JAMS Arbitration)
158. Jessica Kirksey v. Credit One Bank (JAMS Arbitration)
159. Angelica Korchmaros v. Credit One Bank (JAMS Arbitration)
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189. Bobbie Murray and Random Booth v. Credit One Bank (JAMS Arbitration)
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201. Nathan Quick v. Credit One Bank (JAMS Arbitration)
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204. Tyrone Randolph v. Credit One Bank (JAMS Arbitration)
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213. Camilla Sammons v. Credit One Bank (JAMS Arbitration)
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215. Christopher Shirley v. Credit One Bank (JAMS Arbitration)
216. Jerryd Shoda v. Credit One Bank (JAMS Arbitration)
217. Martha Gabriela Silva Canales v. Credit One Bank (JAMS Arbitration)
218. Jay Simon v. Credit One Bank (JAMS Arbitration)
219. Melissa Simpson v. Credit One Bank (JAMS Arbitration)
220. Delisa Sims v. Credit One Bank (JAMS Arbitration)
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222. Bridgette Fretz v. Credit One Bank (JAMS Arbitration)
223. Christine Sokoloski v. Credit One Bank (JAMS Arbitration)
224. Kyle Sorensen v. Credit One Bank (JAMS Arbitration)
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250. *Cynthia Davis v Conn Appliances*, Case No.: 01-0000-9774 (American Arbitration Association)
251. *Tonya Erin Stevens v Conn Appliances, Inc.*, Case No. 01-16-0003-2324, (American Arbitration Association)



**Hansen Legal Technologies, Inc., San Diego, CA**

- Established and incorporated Hansen Legal Technologies, Inc. in 2013
- Developed operating procedures for computer forensic examinations.
- Developed proper protocols in preserving electronic evidence and following chain of custody.
- Provided Forensic services for clients for class action, civil, and other consumer cases.
- Oversee all discovery phase of cases.
- Assist counsel in interrogatories, depositions, and meet and confer meetings.
- Participated in Meet and Confer, 26f conferences and misc pre-trial meetings.
- Assisted counsel in developing litigation strategies in cases
- Assisted counsel in preparing discovery including interrogatories and document requests
- Assisted counsel in evaluating responses to interrogatories and document requests
- Assisted counsel in witness examination in depositions.
- Prepared declarations for Class Certifications, and for Motions for Summary Judgement.

**2007-2013 Co-Founder**

**Hansen and Levey Forensics, Ft Lauderdale, FL**

- Established and incorporated Hansen & Levey Forensics, Inc. in 2007
- Established secure forensics laboratory for the San Diego office.
- Developed operating procedures for computer forensic examinations.
- Developed proper protocols in preserving electronic evidence and following chain of custody.
- Provided Forensic services for clients for class action, employment, civil, domestic, and juvenile cases.
- Oversee all discovery phase of cases.
- Assist counsel in interrogatories, depositions, and meet and confer meetings, and preparation for sanction hearings against opposing counsel and parties.
- Participated in Meet and Confer, 26f conferences and misc pre-trial meetings.
- Assisted counsel in developing litigation strategies in cases
- Assisted counsel in preparing discovery including interrogatories and document requests
- Assisted counsel in evaluating responses to interrogatories and document requests
- Assisted counsel in witness examination in depositions
- Performed on site acquisitions.
- Participated in mediation sessions.
- Provided Expert Testimony in Craig Casey vs. Valley Center Insurance Agency Inc.

**2000-2016 Owner**

**Pns724 San Diego, CA**

- Provided complete IT solutions for hundreds of businesses and individuals including network design, configuration, forensics, and data recovery.
- Set up and maintained 864 line outbound call center with numerous auto dialers and predictive dialers. Maintained call lists, and DNC lists used to place hundreds of millions of calls over a five year period.
- Installed hundreds of POTS lines, "Turned up" at least 38 T1's and PRI's.

**2006 Volunteer**

**San Diego Regional Computer Forensics Laboratory (FBI sponsored computer forensics Lab)**

- Built several forensic machines with large fiber channel RAID assemblies for use in the field.
- Installed and configured systems for mobile laboratory
- Provided support in all areas from taking in evidence to calling case agents to pick up their evidence from finished cases gaining valuable experience in evidence handling.

**2004-Present Systems Analyst**

**Amsec San Diego, CA / Lateott Bremerton, WA / HP Enterprise Services / DXC Technologies**

- Provided ATM and Ethernet fiber connectivity for secure and unsecured DOD networks.
- Troubleshoot fiber connectivity issues on shore and ship facilities.

**2000-2004 Director of Training/ IT Director  
Laptop Training Solutions, San Diego, CA**

- Provided Intrusion detection, incident response, and forensic services in a continuing effort keep the network and workstations secure.
- Planned, designed, and implemented network security for vital network services for 4 facilities, that were heavily attacked by varying methods, saving the company hundreds of thousands of dollars.
- Performed security risk assessment, performed IT control audits, developed countermeasures and provided a security policy to insure confidentiality, integrity and availability of resources.
- Performed Gap Analysis of existing systems and desired systems and migrated from Windows 2000 DNS and Exchange 2000 servers to Linux servers running Postfix and BIND to provide a more scalable network for 4 facilities providing the company the means to achieve a 450% growth.
- Planned, installed and maintained several school networks involving numerous Domain Controllers, UNIX servers, print servers, multiple nodes and routers.
- Installed and programmed Nortel phone system improving the company's ability to handle calls.
- Planned, organized and instructed computer certification courses including Microsoft Certified Systems Engineer (NT4.0, Win2000 MCSE, 2003 MCSE), Cisco (CCNA), A+, N+, Linux+, I-Net+, Security+, MOUS and Web Page Design (HTML, Javascript, DHTML, Flash 4, Flash 5, Fireworks3, Photoshop 5) resulting in hundreds of certified students.
- Provided students with a hands on training environment involving networks with Multiple Windows NT and Windows 2000 Domain Controllers, several workstations (Windows 95,98,NT,ME, and 2000 Professional), Novell, Unix, and Exchange Servers, and Cisco routers.
- Planned, organized and instructed a corporate training environment for TCP/IP which included addressing, standards, troubleshooting, subnetting, routing and Frame Relay
- Provided long distance support via telephone to hundreds of MCSE students throughout the country.
- Managed other instructors on training techniques for the MCSE, CCNA, Linux+, A+, Security+ and Network + courses providing a consistent system of training in all facilities.

**1998-2000          Electronic Test Technician 3**  
**Action Instruments, San Diego, CA**

- Tested various types of electronics for industry and signal conditioning.
- Troubleshoot and documented nearly 10,000 component level repairs.
- Assisted in improvements to the manufacturing process.
- Identified problems in product design and provided solutions to correct the problems.

**1996-1997          Network, Computer and Computer Monitor Technician /Instructor**  
**United States Navy, Shore Intermediate Maintenance Activity, San Diego, CA**

- Installed and connectorized fiber optic computer networks throughout Naval Station San Diego and North Island.
- Provided network troubleshooting and management for large scale mission-critical DoD networks with over 600 nodes, routers, and servers.
- Provided upgrades, maintenance, troubleshooting, security, and repair of personal computers for 600 station LAN and the US Pacific Fleet.
- Troubleshoot and repaired over 100 computer monitors to component level without technical manuals.
- Increased successful monitor repair from 10% to 95%.
- Trained shop personnel on computer monitor troubleshooting and repair.
- Researched parts, materials and techniques for Computer Monitor repair.
- Developed curriculum and instructed monitor troubleshooting and repair for the Navy Microcomputer Repair course.

**1993-1996          Electronics Technician / Computer Technician**  
**United States Navy, USS Mahlon S. Tisdale (FFG-27), Combat Systems Division.**

- Provided incident response and performed forensic type of services for 36 computers following Employee sabotage.
- Troubleshoot and maintained Harris 300 AN/UYK-62(V) mini-mainframe, running Vulcan OS, and all terminals
- Troubleshoot, maintained, and upgraded hardware and software for 36 shipboard computers.
- Identified security threats, and developed countermeasures for computer systems on board.
- Troubleshoot, repaired and maintained – at component level - various Univac systems making up a complex network of computers used in communications, navigation, and weapons guidance.
- Assisted in planning and running work center.

**1990-1992      Radio, Television, VCR Technician****LBJ Television, Wheat Ridge, CO**

- Performed component level troubleshooting of televisions, VCRs, and stereos.
- Performed in home repair of televisions.
- Introduced the repair of CD players to the company.
- Provided technical support to customers over the telephone.
- Handled customer service issues related to television repair.

**CERTIFICATIONS:**

Since starting my career, I have obtained certifications in MCP 4.0, A+, Network+, MCP 2000, MCSA, MCSE, Linux+, I-Net+, Security+, CIW Security Analyst.

I was certified by Bureau For Private Postsecondary And Vocational Education, in the States of California and Oregon, as an Instructor for Computer Installation and Repair Technology, Computer Systems Networking and Telecommunications, Micro Computer Applications, Microsoft, Windows, Excel in relation to my work at Laptop Training Solutions.

**GUEST APPEARANCES:**

- Featured in Microsoft Redmond Magazine Sep 2007
- Computer Talk 760 KFMB San Diego, CA
- Computer Bits KBNP 1410AM and KOHI 1600 Portland, OR
- San Diego Profiler 760 KFMB San Diego, CA

**PUBLIC POSITIONS:****June 2012-Jan 2017      Board Member, Spring Valley Community Planning Group**

Elected board member of the Spring Valley Community Planning Group from April 2012 to Present. The purpose of the group is to advise the San Diego County Department of Planning and Land Use, the Planning Commission and the Board of Supervisors on matters of planning and land use affecting Spring Valley south of Highway 94. Members are volunteers and locally elected representing the interests of the people of Spring Valley. Items heard by the group include but are not limited to: Site Plans, Signs, Roads & Infrastructure, Parks & Recreation, Lot Splits, 2nd Dwelling Units, Day Care, Alcohol License, Tree Removal, Re-Zones.

**EDUCATION:**

- 2006    Access Data Forensic Toolkit  
San Diego Regional Computer Forensics Laboratory, San Diego, CA
- 2006    Guidance Software Encase Forensic Suite  
San Diego Regional Computer Forensics Laboratory, San Diego, CA
- 2005    E-discovery – Why Digital is different – by Craig Ball  
San Diego County Bar Association, San Diego, CA
- 2003    Security: Hardening MS Windows 2000 Server Family, IIS and Exchange 2000 Servers  
CBI Systems Integrators, San Diego, CA
- 1996    Navy Standard Microcomputer Repair  
PRC Inc., San Diego, CA
- 1996    Fundamentals of Total Quality Management/ Team Skills and Concepts  
Shore Intermediate Maintenance Activity, San Diego, CA
- 1993    AN/SPS-55 Surface Search Radar  
Service School Command, San Diego, CA
- 1993    Advanced Electronics School, Communication Systems and Radar Systems  
Naval Training Center, Great Lakes, IL
- 1992    Electronic Theory  
Naval Training Center, Orlando, FL



1990-1991      Radio, Television, VCR Repair  
                    Warren Occupational Technical Center, Golden, CO  
1989-1990      Electronic Theory  
                    Warren Occupational Technical Center, Golden, CO  
1991      Columbine Sr. High School, Littleton, CO

**SECURITY CLEARANCE:** Secret

References available on request

# Exhibit B

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## **CONGRESS TRIES TO SHIELD PUBLIC FROM DELUGE OF TELEMARKETING**

Washington Times, July 25, 1991

(By Jay Mallin)

The voice on the telephone line bubbled over with exciting news-a free trip to Hawaii, available just by calling a "900" number.

Being nothing but a mindless recording, however, the voice had no way of hearing the "click" as the recipient of the call hung up. And as the call was dialed by a computer that was probably picking phone numbers at random, no one knew that calling that particular phone number was probably a mistake.

The recipient of the call-perhaps the hundredth or thousandth such call placed by the computer that day-was Sen. Daniel K. Inouye. Being a Senator from Hawaii, he had no need of a free vacation in the islands, even if one was really available .

But as chairman of the Communications Subcommittee of the Senate's Commerce, Science and Transportation Committee, Mr. Inouye is likely to have considerable say on restrictions on telemarketing being considered by Congress.

The incident was just one of many that has everyone from consumer groups to the telemarketing industry association backing some kind of limit on telemarketing calls.

"Computerized calls are the scourge of modern civilization," Sen. Ernest Hollings, South Carolina Democrat, said recently on the Senate floor when he introduced a bill to limit the calls. "They wake us up in the morning, they interrupt our dinner at night, they force the sick and elderly out of bed, they hound us until we want to rip the telephone right out of the wall."

Several lawmakers have introduced bills to limit telemarketing calls. But the bills are still undergoing revision, and there is a range of choices Congress must make before it has a final version to consider-from whether to include non-profit organizations in any ban to exactly what kinds of calls should be prohibited.

Mr. Hollings' bill, for instance, would ban what everyone agrees are the most annoying calls-the ones that are placed by machines, often dialing random or sequential numbers, and that play pre-recorded messages with no involvement by a live person.

Stories about the disruptive effects of such machine calling abound. The " autodialers" have tied up cellular phone systems, rung every phone in a hospital, and once jammed the home phone line of a mother who was trying to call an ambulance for her sick child.

"They're not just a nuisance-they're just plain dangerous," said Sen. Larry Pressler, South Dakota Republican, during a hearing of Mr. Inouye's subcommittee yesterday.

A representative of the Direct Marketing Association, the industry trade group, agreed such calls should be stopped.

"We \* \* \* agree with the major thrust of the <Hollings> bill," said Richard Barton, senior vice president for government affairs at the Direct Marketing Association, a trade association with 3,500 member companies.

The Hollings bill, however, would do nothing to limit telemarketing calls by live operators. Other bills would go further.

Mr. Pressler has introduced a bill-similar to one offered in the House by Massachusetts Democrat Rep. Edward Markey-that would ask the Federal Communications Commission to look into the possibility of creating a national "Do Not Call" list.

Consumers who do not want to receive telemarketing calls would ask to be placed on the list, and telemarketers would then be prohibited from calling them.

The concept has been adopted by one state, Florida. But state legislation can't limit interstate calling, and so supporters of the idea say a national law is required.

In yesterday's hearing, though, Mr. Pressler's bill was attacked-from opposite sides-by both consumer representatives and the industry.

Michael Jacobson, who says his Center for the Study of Commercialism wants to halt the "permeation of advertising" in everyday life, argued the Pressler bill puts the burden to stop telemarketers on consumers, who must sign up to be on the list.

At the other end of the issue, Mr. Barton said the Direct Marketing Association questions the workability of maintaining a national "Do Not Call" database.

He suggested another alternative, one he said that has been adopted by South Carolina. That state requires organizations to maintain internal "Do Not Call" lists, so that people who receive an unwanted call can instruct the organization not to call again.

Mr. Pressler and Mr. Hollings said yesterday they may try to combine their bills, and on the House side Mr. Markey's proposal has already gone through a number of revisions. But members of Congress said they know their constituents are angry about the calls.

"I have received numerous complaints from Hawaiians who complain they are being called at all hours of the night by persons and computers who are calling from the East Coast" and who don't realize there is a time difference, said Mr. Inouye.

"This is a very emotional issue," Steve Hamm, administrator of South Carolina's Department of Consumer Affairs, told the subcommittee. "And I want you to know that you have hit the pulse of America" by considering the problem.

## HOW TO ESCAPE THOSE CALLS

Here are some ways you can avoid most telephone marketing pitches.

Write a letter.

The Direct Marketing Association, a trade group, keeps a list of people who do not want to be called and makes it available to member companies that agree to comply. This can stop about 80 percent of the pitches, but you have to renew your request every five years.

Telephone Preference Service, c/o the Direct Marketing Association, 11 West 42nd St., P.O. Box 3861, New York, N.Y. 10163-3861.

Tell them not to call again.

Believe it or not, this simple expedient actually works for awhile with some companies, whose officials figure it is better not to anger potential customers.

The national photographic portrait chain Olin Mills, for instance, says it keeps "Do Not Call" lists at each of its studios, but they might call again after two years.

Use their technology against them.

Many telemarketers now use "predictive autodialers." The machines dial the numbers and connect the call to a live operator only if someone picks up the phone and says "Hello."

If your "Hello" is followed by a long pause or a click or a beep, just hang up before the machine puts a live operator on the line.

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<p>This web site should by no means be taken as legal advise. If you wish to utilize the information contained on this site, it is always best to consult an attorney.</p>
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# Exhibit C

TeleCheck Services, Inc.

3025 South Parker Road, Suite 1100  
Aurora, Colorado 80014

Mailing Address  
P.O. Box 17370, Denver, CO 80217-0370  
303/752-5200

ORIGINAL  
FILE



May 22, 1992

RECEIVED

JUN - 2 1992

Ms. Olga Madruga-Forti  
Federal Communications Commission  
1919 M Street, NW, Room 518  
Washington, DC 20554

UNIC COMMISSION  
OF THE SECRETARY

RE: CC Docket No. 92-90  
Telephone Consumer Protection Act of 1991

Dear Ms. Madruga-Forti:

I am writing on behalf of TeleCheck Services, Inc. TeleCheck is a check acceptance and guarantee company. TeleCheck offers merchants a variety of services, guarantee, verification, and verification and collection. Via our guarantee product as well as our verification and collection product, TeleCheck uses the telephone to make collection calls in its own name and as the assignee for creditors. This is a formal submission of a rulemaking comment, pursuant to 5 U.S.C. sec. 553(c) (1976), on behalf of TeleCheck Services, Inc. in support of paragraph C of the Telephone Consumer Protection Act of 1991. "Exceptions to Prohibited Uses of Auto Dialers." TeleCheck supports the exceptions, and requests that debt collection calls be specifically exempted or the FCC issue a formal interpretation of the exceptions exempting debt collection calls.

Paragraph 15 and 16 of the proposed rulemaking discusses the need to exempt from liability debt collection calls. Debt collection is a non-commercial use. It is a non-telemarketing use of an autodialer or predictive dialer which is not intended to be protected under TCPA. One of the intended purposes of the TCPA is to protect the privacy rights of residential telephone subscribers to avoid receiving telephone solicitations. Debt collection is not a solicitation. Undoubtedly, when an individual owes money to a creditor, the creditor has every right to contact the debtor to try and collect the debt. The TCPA is not intended to insulate individuals from their financial obligations. In the collection business predictive dialer are often used to

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Ms. Olga Madruga Forti  
May 22, 1992  
page 2

expedite the collection process. The dialer randomly dials numbers entered into its system and connects an available live operator to the call when it is answered. Such practices are fully in compliance with the Fair Debt Collection Practices Act.

Debt collection calls do not offer a product or service which adversely affects the privacy concerns the TCPA seeks to protect. Thus debt collection calls would be exempt under the clause which exempts commercial calls which do not offer a product or service. Additionally, debt collection would fall under the exemption of the ongoing "business relationship." If the FCC does not feel it is necessary to specifically exempt debt collection calls from the TCPA due to the exemptions already in place, then TeleCheck requests that the FCC issue a formal opinion specifying that debt collection calls fall under the already existing exceptions.

Sincerely,

A handwritten signature in cursive script, appearing to read "Gretchen B. Michael".

Gretchen B. Michael  
Assistant Legal Counsel





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JUN - 2 1992

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

International Telesystems Corporation  
555 Herndon Parkway  
Herndon, VA 22070

## Facsimile Transmission

Attention:

Olga Madruza-Forti

Company:

FCC

From:

Bob Varney

Date:

5/26

Pages Sent:

4

(Including Cover Page)

Message:

ITC Main Phone Number: (703) 478-9808

ITC Fax Number: (703) 471-2836

# Transmitting To: (202) 653-8772



International TeleSystems Corporation

555 Herndon Parkway, Herndon, Virginia 22070  
(703) 318-6401 Fax (703) 471-2836

Robert C. Varney, Ph.D.  
Chairman  
Chief Executive Officer

May 26, 1992

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JUN - 2 1992

Ms. Olga Madruga-Forti  
Common Carrier Bureau  
Federal Communications Commission  
1919 M St. N W  
Washington, D C 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Dear Olga:

Attached are my comments on the proposed rulemaking for TCPA of 1991. For ease in cross-referencing, I have given them in outline form.

If you have any questions after reviewing the comments, please feel free to call me at 703-318-6401.

Sincerely,

A handwritten signature in dark ink, appearing to read "R. Varney", followed by a horizontal line.

Robert C. Varney  
President/Chairman of the Board

RCV:jp  
Enclosure

## FCC Proposed Rulemaking for TCPA of 1991

### Comments from:

**Robert C. Varney**  
**International Telesystems Corporation**  
**555 Herndon Parkway**  
**Herndon, VA 22070**  
**(703) 318-6401**

#### III.C.9

- confirm that Section 227 "permit legitimate telemarketing practices"

#### III.C.10

- confirm that "non-commercial messages" or "non-telemarketing uses of auto dialers" be permitted under Section 227

#### III.C.11

- confirm that "informational calls" using auto dialers be exempt from prohibitions of Section 227

#### III.C.12

- confirm that "live operator calls by a tax exempt nonprofit organization" be exempt from prohibitions; further confirm that predictive dialers used for this purpose also be exempt from prohibitions under Section 227, since they can immediately deliver answered calls to live operators.

#### III.C.13-14

- confirm that "a voluntary business relationship with a caller" is a "two-way communication between the client and the business" and that calls within such a relationship, including those placed by a predictive dialer, be exempt from prohibitions under Section 227.

#### III.C.15-16

- request that "debt collection calls" be specifically exempted, so that frivolous claims by parties trying to fight the "voluntary business relationship" be clearly eliminated. President Bush, in his state of the union address, emphatically desires to eliminate frivolous lawsuits, and, since "debt collection calls" by definition have "a prior or existing business relationship" and also "do not offer a product or service and do not adversely affect privacy", there is good reason to provide clarity for the broad category of debt collection by giving an exemption from prohibitions under Section 227.

#### III.C.17

- confirm that calls for "emergency purposes" be exempted from prohibitions under Section 227.

**III.D.18-19**

- suggest that solicitations to businesses using predictive dialers, because of the availability of live operators, be exempted from prohibitions under Section 227, but that auto dialers without live operators, playing only artificial or prerecorded messages be prohibited.

**III.E.21**

- confirm that initiators of solicitation calls assure that "all artificial or prerecorded telephone messages" comply with the stated restrictions provided that they do not conflict with the Fair Debt Collection Act.
- confirm that any such voice systems "automatically release the called party's line within 5 seconds of the time notification is transmitted" given, of course, that such notification is transmitted to the system after the called party hangs up.

**III.F.22-26**

- confirm that auto dialer calls which are most offensive are those which do not release the called party's line quickly and are message oriented solicitations; confirm that such auto dialer calls be restricted by compliance with do-not-call lists.
- suggest that solicitations conducted by live operators, whether initiated by live operators or predictive dialers, are not the subject of this legislation and should not suffer undue and costly do-not-call restrictions because of the abusive practices by a minority of auto dialing systems.

**III.F.27-33**

- suggest that a national data base is (a) too costly and (b) itself a dangerous precedent for a tool that could one day be used against the privacy of individual citizens.
- confirm that network technologies are insufficient at present to be viable
- confirm that most ATA members already use a company specific do-not-call list and that self-policing of such a mechanism is the most viable alternative to protect consumer privacy.
- suggest that the time of day restrictions are not necessary and do-not do the job of protecting privacy for consumers who object to solicitations.

# METROCALL

June 18, 1992

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JUN 24 1992

Federal Communications Commission  
Office of the Secretary

Donna R. Searcy  
Secretary  
Federal Communications Commission  
1919 M Street, NW  
Washington, DC 20554

In the Matter of

The Telephone Consumer Protection Act of 1991

)  
)  
)

CC Docket No. 92-90

Dear Ms. Searcy:

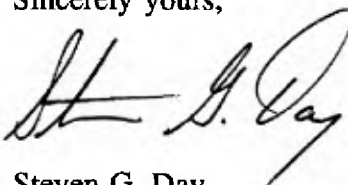
Metrocall of Delaware urges the FCC to adopt its proposed rules implementing the Telephone Consumer Protection Act of 1991. These rules prevent serious harm and disruption to the many paging networks in the United States.

Metrocall recently was subjected to a serious service outage that was caused by an autodialer device operated by a Newspaper Subscription Department. The customers and users of almost ten thousand phone numbers were prevented from their normal paging activities due to this outage. The autodialer tied-up the trunks and caused busy-signals to the caller. To compound the problem even further, the pager users received repeated false pages. These false pages, caused by the autodialer device, created frustration to the Metrocall customers.

The service outage occurred for 7 week days, during normal working hours. Thanks to the Security Department of Bell Atlantic, the calls were traced to a newspaper company. The newspaper company stopped the autodialer device. The autodialer was a "predictive dialer" used in a sales campaign for the newspaper.

Please ensure that this will not happen again by enacting the Telephone Consumer Protection Act of 1991. The Telephone Consumer Protection Act of 1991 specifically prohibits autodialed calls to pager numbers. Please do not exempt anyone from that prohibition.

Sincerely yours,



Steven G. Day  
Network Director

SGD/ll

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JUN 24 1992

June 23, 1992

Office of the Secretary  
Federal Communications Commission  
1919 M Street NW, Room 222  
Washington, DC 20554

Federal Communications Commission  
Office of the Secretary

Re: Telephone Consumer Protection Act of 1991  
CC Docket No. 92-90

To the Commission:

Mktg., Inc. respectfully submits these comments on issues presented in the Commission's Notice of Proposed Rulemaking in this matter. Mktg., Inc. is a firm professionally engaged in survey research regarding a wide variety of technical, scientific and other questions. Among Mktg., Inc.'s principal concerns is to promote professionalism in the survey research industry and to advance the public interest in activities relating to survey research/public opinion polling.

Mktg., Inc. respectfully requests that the Commission promulgate regulations expressly exempting survey research firms from the prohibited use of autodialers to initiate telephone calls to residential telephone lines pursuant to 47 U.S.C. § 227(b)(2)(B)(ii). Mktg., Inc. believes such an exemption is consistent with the aims of Congress in enacting the Telephone Consumer Protection Act.

47 U.S.C. § 227(b)(2)(B)(ii) permits the Commission to exempt from being prohibited such calls to residential telephone lines as the Commission determines fall within the class or category of calls that

"(I) will not adversely affect the privacy rights that this section is intended to protect; and (II) do not include the transmission of any unsolicited advertisement."

Telephone calls made by survey research companies fall within this category.

The Telephone Consumer Protection Act is aimed at the abuses that take place when automated telephone calls deliver artificial or prerecorded messages. The use of such artificial or prerecorded messages leads to such problems as: (1) the inability of the person called to interact

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with the caller and express his displeasure; (2) failure of the prerecorded message to disconnect the line even after the person has hung up, thus preventing the person from being able to use his own phone; and (3) answering machine tapes being filled with prerecorded messages, thus preventing other parties from leaving messages that may be of importance to the person owning the machine. These problems, which were cited by the Senate Committee on Commerce, Science and Technology in reporting the Senate Bill, surely constitute serious invasions of a residential telephone user's privacy. S. Rep. 102, 178, to accompany Bill S. 1462, September 19, 1991.

However, telephone calls made by survey research companies do not create any problems of these sorts. Telephone calls made by survey research companies utilize one of two methods, neither of which gives rise to the concerns raised by the Committee. The predominant method used by survey research companies is the manual call, in which a person makes the telephone call and speaks to the person answering the phone. This type of call is not covered by the Telephone Consumer Protection Act as it does not constitute an automatic telephone dialing system.

The other method uses what is known as predictive dialing. Predictive dialers automatically dial telephone numbers and immediately deliver answered calls to live representatives of the company. The live representative then asks the person answering the phone if he or she would be willing to take part in a survey. If the person consents, the representative continues the conversation. If the person declines, the representative thanks the person and immediately hangs up.

Thus, it should be apparent that survey research companies' use of predictive dialers in no way adversely affects any of the privacy concerns that prompted the Telephone Consumer Protection Act. First, the person answering the phone is talking to a live representative from the very beginning. If the person is displeased by receiving the call, he or she can immediately tell the representative. Second, because the live representative immediately hangs up upon request, the person's phone line is immediately restored to him or her. The person answering the phone is never denied the use of his phone once the call has ended. Third, because the predictive dialer only delivers calls answered by live people to the representative, answering machine tapes are not filled with messages from the survey research company.

The fact that survey research telephoning does not adversely affect privacy interests of residential telephone owners is corroborated by the finding of the House Committee on Energy and Commerce, which expressly stated "[survey] research has generated relatively few complaints from subscribers." H.R. Rep. No. 317, 102d Cong. 1st Sess. 13 (1991).

Because survey research firms' telephone calls do not adversely affect the privacy concerns implicated in the Telephone Consumer Protection Act, any calls that do not include the transmission of an unsolicited advertisement should be exempted from the restrictions of paragraph (b)1(B) of the Act regarding calls to residential telephone lines. It is true that some calls purporting to be survey research do include the transmission of an unsolicited advertisement. Such calls are clearly not exempted from the restrictions of paragraph (b)1(B). However, survey research, which according to survey research industry ethics, do not include


unsolicited advertisements, should be exempted from the restrictions of paragraph (b)1(B) inasmuch as they satisfy paragraph (b)2(B)(ii) in that they do not adversely affect protected privacy rights.

A regulation creating such an exemption would be consistent with the intent of Congress, not only under paragraph b(2)(B)(ii), but also under paragraph (a)(3) of the Act. Paragraph (a)(3) defines "telephone solicitation" as the "initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services...".

Survey research does not fall within this definition, as recognized by Congress. In its report to the House of Representatives, the House Committee on Energy and Commerce stated, "the Committee does not intend the term "telephone solicitation" to include public opinion polling, consumer or market surveys, or other research conducted by telephone." H.R. Rep. No. 317, 102d Cong. 1st Sess. 13 (1991). The Senate Committee on Commerce, Science and Energy also stated that "the Committee does not intend the term "unsolicited telephone solicitation" to include survey research." S. Rep. No. 177, 102d Cong., 1st Sess. 5 (1991).

Inasmuch as none of the privacy concerns addressed by Congress in the Telephone Consumer Protection Act are implicated by the use of predictive dialers in survey research telephoning, and inasmuch as Congress recognized that the Act should not include survey research that does not contain unsolicited advertisements, Mktg., Inc. respectfully requests that the Commission promulgate regulations expressly exempting survey research firms from the prohibited use of autodialers to initiate telephone calls to residential telephone lines pursuant to 47 U.S.C. § 227(b)(2)(B)(ii), or by extension, within the meaning of proposed Federal Regulation § 64.1100.

Respectfully,



Steven H. Gittelman, Ph.D.  
President



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JUN 24 1992

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C.

Federal Communications Commission  
Office of the Secretary

In the Matter of )  
 )  
The Telephone Consumer Protection )  
Act of 1991 )

CC Docket No. 92-90

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To: The Commission

REPLY COMMENTS OF  
AMERICAN FINANCIAL SERVICES ASSOCIATION

The AMERICAN FINANCIAL SERVICES ASSOCIATION (hereinafter "AFSA") is submitting the following reply comments in this rulemaking proceeding prior to the Commission's preparation of its regulations to implement the Telephone Consumer Protection Act ("TCPA") and the supplementary explanatory material that will accompany the final regulations. For its reply comments, AFSA states as follows:

Treating All Auto Dialer Calls As Prerecorded Voice Calls

1. The April 17, 1992 Notice of Proposed Rulemaking ("NPRM") provides identical treatment to calls made by automatic telephone dialing systems ("auto dialer calls") and to calls involving artificial or prerecorded voice messages ("prerecorded voice calls"). This treatment appears to be inconsistent with the TCPA. New §227 added to the Communications Act by the TCPA distinguishes between such calls by referring solely to prerecorded voice calls in §§227(b)(1)(B), (b)(2)(A), and (d)(3), by referring solely to auto dialer calls in §227(b)(1)(D), and by referring to both auto dialer and prerecorded voice calls in §227(b)(1)(A).

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2. Despite the above referenced statutory distinctions between auto dialer calls and prerecorded voice calls, it appears from a close review of the explanatory material and the proposed regulations included in the NPRM that the Commission has made a determination that all prerecorded voice calls involve auto dialers and that all auto dialer calls involve prerecorded voice messages.

3. In this regard, AFSA is not now aware of any prerecorded voice calls that do not involve auto dialers. However, the Commission's apparent conclusion that all auto dialer calls involve prerecorded voice messages is not well-founded. This position appears to be based on the view that predictive auto dialer calls which immediately put the called party in touch with a live operator (and which, therefore, do not involve any prerecorded hold message that is activated by the predictive auto dialer system when all live operators are busy) should, nevertheless, be treated as prerecorded voice calls for purposes of the TCPA and its implementing regulations.

4. The Commission's conclusions in this regard appear to misplaced since, as stated in paragraph 15 of the supplementary material in the NPRM, the prerecorded hold message is activated in only a small percentage of predictive auto dialer calls.

5. If this is not the Commission's conclusion, the final regulations or their accompanying supplementary material should clearly indicate the predictive auto dialer calls are not subject to the provisions of §§227(b)(1)(B), (b)(2)(A), and

(d)(3). If this is the Commission's conclusion, we believe it is imperative for the Commission to set out its views in this regard in the final regulations or in their accompanying supplementary material.

6. In either event, clarification is essential in order to avoid unnecessary confusion and conflicting judicial rulings which would otherwise inevitably follow in litigation for claimed violations of these provisions of the TCPA and its implementing regulations.

#### Incorporation Of AFSA's Prior Comments

7. In its prior comments to the Commission, AFSA agreed with the position expressed in the NPRM that privacy rights protected by the TCPA are not adversely affected by calls when there is or was a business relationship between the caller and the called party. Accordingly, AFSA supported the Commission's decision (as set out in §64.1100(c)(3) of the proposed regulation and supplementary paragraphs 13 through 16 of the NPRM) that prerecorded voice calls to residential phone lines should be permitted when there is a current or prior business relationship between the caller and the called party.

8. To further illustrate this business relationship exemption in the context of creditor-debtor transactions, we asked the Commission to incorporate provisions in the final rulemaking which state that (i) current credit relationships not only encompass contemporary contacts between the parties but extend over the duration of the credit agreement, and (ii) parties authorized to make calls under this exemption include


persons who acquired interests in credit transactions by purchase or assignment from prior creditors as well as persons who service "private label" credit accounts.

9. With respect to debt collection calls, AFSA also requested that the Commission state in the final regulations that a consumer's entry into a credit agreement constitutes the consumer's prior express consent to being called if the terms of the credit agreement were not met. Finally, because of the Commission's request for comment as to whether debt collection calls warranted a special exception apart from the business purpose exemption, AFSA urges the Commission to include an express exemption for debt collection calls in §64.1100(c).

10. Because AFSA believes that these prior comments remain valid and would be helpful to the credit industry without adversely affecting the protections afforded under the TCPA, we again request the Commission to consider and incorporate each of these points in its final rulemaking.

Respectfully submitted

AMERICAN FINANCIAL SERVICES ASSOCIATION

By   
Robert E. McKew  
Assistant General Counsel  
Director of Regulatory Affairs



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Federal Communications Commission  
Office of the Secretary

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Office of the Secretary  
Federal Communication Commission  
1919 M Street, N.W. Room 222  
Washington, DC 20554

June 22 1992

Ref: Docket CC 92-90  
The Telephone Consumer  
Protection Act of 1991

Greetings,

Per my discussion with your Mr. Bill Caton, please accept the enclosed  
correction and amplification of my comments concerning the referenced  
Docket Number 92-90.

With Respect,

Robert S. Bulmash  
President, Private Citizen, Inc.

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Encl: original and five copies of corrected and amplified comments

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JUN 24 1992

Federal Communications Commission  
Office of the Secretary

The Corrected and Amplified Comments  
of

Private Citizen, Inc.

Originally Submitted May 26, 1992

In a Matter presently before  
the Federal Communications Commission

CC Docket No. 92-90

Telephone Consumer Privacy Act  
of 1991

June 22, 1992

JUN 24 1992

Federal Communications Commission  
Office of the SecretaryCOMMENTS ON THE FEDERAL COMMUNICATIONS COMMISSION'S (FCC) PROPOSED  
IMPLEMENTATION OF REGULATIONS AND TENTATIVE DEFINITION OF EXEMPTIONS TO  
PROHIBITIONS OF THE TELEPHONE CONSUMER PROTECTION ACT. (TCPA or The Act).INTRODUCTION AND SUMMARY OF COMMENTS REGARDING THE ABOVE**IT STINKS !**

Due to public outcry, the TCPA was created (presumably) to protect consumers from the intrusions of telesolicitors. But its net effect will be to protect solicitors while it strips citizens of their basic right to be left alone.

In order to get Congress to pass, and President Bush to sign the TCPA, gaping loopholes (large enough to drive a "boiler-room" through) were added to it. Not satisfied with this, the FCC seems ready to take every advantage to further weaken The Act with proposals of wholesale exemptions, and avoidance of efficient, effective means by which a citizen could be protected from *junk* callers.

The carcass of this law should be buried. Effective legislation should be forged. Failing this, the FCC should eagerly help the America's majority who seek to effectively control intrusive, unwanted telesolicitations of either a sales, or non-commercial nature. Since the FCC's current TCPA proposal more closely reflects the interests of businesses (such as AT&T and Ameritech) than those promoted by citizens, it should be remembered that our's is supposed to be the best government "by the People"... not "that people can buy". [1a]

AN OVERVIEW

Private Citizen, Inc. (PCI) was formed in May 1988 to protect private citizens from unwanted fund-raising, political, survey, and business-related telephone solicitations. PCI effectuates our fundamental right to be left alone, free of such unwanted tele-intrusions, through written notifications sent on behalf of our members, to over 1000 telephone marketing related organizations. These include list compilers, telephone solicitation service agencies, firms that make such calls on their own behalf, and others. They are put on notice of our members' unwillingness to be freely disturbed by such calls, and that such calls will be received only on a *for hire* basis from such notified firms. [1] Currently, PCI has approximately 3000 subscribers nationwide.

Since 1985, PCI's president, Robert Bulmash has studied the "out-bound telesolicitation" industry; its effect on our rights, and our reaction to all incoming phone calls. Today, this Industry operates freely within a virtual legislative vacuum. Such telesolicitors (a.k.a., *junk* callers, telemarketers, phone-to-phone solicitors, telenuisance callers) barge into our homes at their convenience, for their own self-interest, in order to take advantage of our Pavlovian reaction to the ring of a telephone.

This *telenuisance* industry has effectively diminished our sense of sanctuary at home, an essential component of our residence, where we may retreat after a day's labor to spend time

- [1a] From 6/89 to 6/91, the following was given to each of two Illinois state senatorial campaigns.  
       from an Illinois Bell Telephone related PAC - \$10,300 to Democratic - \$10,000 to Republican  
       from an AT&T related PAC - \$ 6,500 to Democratic - \$10,000 to Republican  
       from the vast majority of citizens - \$ 0 to Democratic - \$ 0 to Republican

- [1] See PCI Authorization Form

as we see fit. [2] Perhaps Dante Cirilli of Grolier Communications (a telesolicitation firm) illustrated the problem best when he said, "[The public has] been conditioned to sit up and listen when the phone rings in our home. How natural is it for us to turn the TV down, or even to move into another room to give the caller our undivided attention. And when the caller is a telemarketer, the result is a concentrated commercial message to which we have no other choice but to respond." [3] (writer's emphasis)

Before, and since Mr. Cirilli's insight, we have abhorred live unsolicited sales calls:

- 68% very annoyed - The Roper Organization Am. Demographic Mag. 3/91
- 83% preferred not to be called - Public Pulse / Roper Inc. Mag. 1/89
- 78% find it unacceptable - Ebasco Consult. commissioned by Washington State Utility Comm. 1985
- 86% consider it annoying - Field Re'srch. commissioned by Pacific Telephone & Telegraph 1978
- 66% hang-up on, or cut off the pitchmen.- Public Pulse / Roper Inc. Mag. 1/89
- 70% see it as an invasion of privacy - Walker Research Telemarketing Mag. 3/91
- 69% consider such calls an offensive way to sell - Walker Research Telemarketing Mag. 3/91

The vast majority of Americans are fed up with this intrusive industry's concentrated messages to which we have no other choice but to respond! How has the American family come to deserve such insult?

PCI's efforts are driven by fundamental, therefore Constitutionally recognized (though unenumerated) right to be left alone; a right that Supreme Court Justice Louis Brandeis referred to as "*the most comprehensive of rights, and the one most valued by civilized man.*" [4] Furthermore, the U.S. Constitution's Preamble tells us that, "*We the People of the United States, in Order to form a more perfect Union, establish Justice, insure Domestic Tranquility...*" created our system of government.

If our right to enjoy peace and quite is to exist at all, it must at least exist in our domicile, our home. To effectuate that right, we may notify a telesoliciting entity of our unwillingness to be disturbed. And once notified, they have a duty to respect our request to be left alone. To do otherwise would be to violate a fundamental right, the spirit of the 9th Amendment [5], as well as the right to peacefully enjoy our own property.

Unwanted door-to-door, and phone-to-phone solicitation are strikingly similar.  
Both summon us while disguised as the familiar ring or knock of a family or friend.  
Both are intrusive strangers who know more about us than we of them.  
Both pull us from our private, family activity at home.  
Both demand a physical act in response to their summons.  
Both are personally upon us, and at their convenience.  
Both present themselves in "real-time", thus forcing us to deal with them.  
Both may defraud us, and disappear without a trace.  
Both know beforehand, that their act will likely serve only to disturb us.  
Both can do all this without gaining physical entrance to the home...

The phone-to-phone soliciting industry is spreading, with growth estimates ranging from 30

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[2] "Our decision reflects... the right... to be let alone in the privacy of the home. Sometimes the last citadel of the tired, the weary and the sick." Carey v Brown 447 US 455, 471 (1980)

[3] The Washington Monthly, December 1986 - Article titled "Dialing for Dollars".  
In Telemarketing Magazine of April 1991, "Grolier" was listed as one of the largest U.S. telesolicitors

[4] Harvard Law Review, 1890

[5] Constitution of the United States Ninth Amendment "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."



to 50% annually, while door-to-door soliciting fades into a memory. To date, our legal system has recognized only a means to effectively ward off the later. And our power in this regard is absolute, based solely on our discretion, not the nature of the solicitation. Now our government seems ready to formulate rules, based not on the protection we need, but instead on the minimum protection that can be given.

In Martin v. Struthers 63 S.Ct 982, the court stated, "*For centuries, it has been a common practice... for persons not specifically invited to go from home to home and ring doorbells... Whether such visiting shall be permitted has in general been deemed to depend upon the will of the individual master of each household...*" While in Pennsylvania Public Interest Coalition v. York Township 569 F.Supp. 1398 (1983) the court held, "*A city can punish those who call at a home in defiance of the previously expressed will of the occupant.*", and "*The township has the means at its disposal to protect those individual residents who indicate they do not wish to be disturbed.*"

As a proper base from which to regulate, Congress and the FCC should view phone-to-phone solicitation as the more intrusive electronic counterpart of door-to-door solicitations, with the added power to gain immediate electronic entrance to a home at the push of a button thousands of miles away. Sadly, the NO SOLICITATION sign our government is readying for us, will probably read more like OPEN HOUSE to the myriad of *junk* callers excluded from The Act.

The Telephone Consumer Privacy Act (TCPA) is supposed to help protect our right to be left alone, free from the intrusions of those we are unwilling to hear from. However, in light of the rainbow of exemptions allowed by the TCPA, and those tentatively proposed by the FCC, The Act seems to be shaping up as the antithesis of citizen protection. Private Citizen's fear is that once the FCC fulfills its seeming intention to bleed this already very weak legislation, the TCPA will be seen by the *telenuisance* industry as a license to disturb us. Worse yet, courts may wrongly view any civil action brought against unwanted tele-intruders as meritless unless brought pursuant to the TCPA (in the absence of "telephone solicitation" legislation on a state level).

Thus the TCPA, which was touted as a *citizen's privacy protector*, may actually become a *junk caller's legislative crowbar* for entering any home, while holding it up to shield themselves from repercussions which would otherwise result from their wrongful intrusions. Indeed, leaders of the Telephone Solicitation Industry are already talking about how the TCPA will legitimize the Industry [6].

Even if the TCPA is implemented in its most formidable version, with live calls included;

- † It will still let every *telenuisance* firm call every citizen annually without consequences,
  - Their are "*hundreds of thousands of local businesses that account for most of the calls...*" [7]. Thus it is reasonable to assume the majority of residences are each within the "telesolicitation firing range" of thousands of such firms.
- † If a *junker* repeatedly televiolates the law, and is sued as a result, the TCPA allows the intruder an "**affirmative defense**".
  - Essentially, under the TCPA, all the junker has to say in court is, "Your Honor, we tried not to call him!" Since *telenuisance* firms are commonly megalithic-like enterprises with financial and legal assets far beyond an average citizen's, once such a firm testifies it was a mistake, the televictim will have to prove otherwise.

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[6] TeleProfessional Magazine, March 1992: **Legislation Aimed at Telemarketing Has Positive Twist**, "*Legislation will have a legitimizing effect for telemarketing.*" Steve Idelman, Chrmn, ITI Mrktg. Svcs.

[7] DM News Richard Barton's May 27, 1991 column, **Inside the Beltway, Why the No-Call Bill Is Dangerous**

- Many telesoliciting firms have *telemarketing* software which enables "No Call" requests to be effectuated. Yet employees of such firms commonly report that people logged as a "No Call", continue to be called. Such request are indicated on predictive dialer terminal display screens. This seeming anomalous behavior (overriding "No Call" requests) can be understood in light of the Industry's willful nature of calling those who don't want to be called. (To do otherwise would only result in ever-more people wanting to take advantage of what would be an effective and easy means to stop the teleintrusions, and lead eventually to a crippling of the industry for lack of available targets.)

Unless the plaintiff and judge know of this common practice to override "No Call" software, a judge will most likely, and wrongly see the existence of the software itself as evidence of the caller's intent to heed a "No Call" request.

- † The citizen may also file a complaint with the FCC based on violations of 47 USC § 227.
  - **RUBBISH!** Unless complaints are against phone companies, the FCC will effectively do less than nothing about them. In practice, when the FCC was presented with allegations of the violation of a Communications Act criminal statute (47 USC § 223, [\$50,000 / 6 month penalty]), involving the WATS line of a Wall Street based investment firm, the FCC wasted 8+ months, and untold tax dollars to tell this writer that it was not the proper entity to enforce the law against *non-phone company* violators. The FCC could have said that within 8 minutes of my complaint's receipt... not 8 months. The result was an absolute, total waste of time and energy for all involved... and your taxes.

As it is with any powerful industry lobby, those that profit from telephone solicitations try to minimize the implementation of effective government regulation. In that regard, the Direct Marketing Association (DMA) tells lawmakers that its *self-regulatory policy* benefits the public. The DMA has even created a No Junk list they obliquely term the *Telephone Preference Service* (TPS). The DMA tells law-makers, citizens, and the media that those who are unwilling to be *junked* can put themselves on the TPS, which is "made available" (read "sold") to the Industry. At the same time, the DMA tells everyone that *junk* callers do not want to call anyone unwilling to be called... as such calls would not be productive.

On the surface this seems to make perfect sense. But what the DMA fails to effectively address is that the vast majority of phone sales solicitations are made to people who prefer not to be bothered with such calls. The *junk* call industry's first priority is finding a compliant *callee*. Since the odds of failure are so great for any one call attempt, they try to insure success by increasing the number of calls. This strategy results in a citizen's right of privacy suffer an outrageous increase of insult. At the same time, they often views a family as *just another number*, something they can handle wastefully as they please. [8] And why should the Industry do otherwise, when the injured are given no recourse by government?

There is no other societal circumstance which tolerates an unauthorized "real-time" entry into another's home based solely on the intruder's right of "free speech", or commerce. The fact that our home's front door faces the public way, does not constitute an invitation for others to enter in the exercise of their rights. Nor does our open window authorize others outside to gawk at the private activity within. Likewise, our residential telephone's

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[8] Encyclopedia of Telemarketing edited by Bencin & Jonovic, Published by Prentice Hall, **Handling Rejection**  
*"Humans are just not conditioned... to continually withstand the perceived head-bashing that is associated with the inevitable 'no's' telesales reps hear, day in, day out." "Yet those who continue to prosper in telephone selling have found ways to insulate themselves from the seeming endless barrage of 'no's'". "Accept the fact that you will get 'no's'. Many of them. And then more." "Don't be afraid to waste a few calls. So what if you got a 'no'? You have an effectively infinite number of calls available to you."* (this writer's emphasis - their writer's candor)

connection to the public network, does not constitute authorization for others to enter our home, and demand our physical involvement for their own self-interest, when they know (or should know), society's general displeasure with such behavior.

Indeed, in the world of telephone solicitations, where most are unwilling to be called, the only socially responsible method for the conduct of their business would be to solicit only those who have given their *prior affirmative consent* to that soliciting entity: a concept rejected out of hand by the Industry. [9]

Tellingly, in the face of clear evidence of our annoyance (and its own TPS list of 400,000+ citizens), last year the DMA's Senior Vice President of Governmental Affairs, and registered lobbyist, Richard Barton told Congress that the DMA has, *"no empirical data demonstrating that American consumers are generally opposed to current 'live operator' telemarketing practices..."*. Yet, this same DMA lobbyist seemed to recognize how the public could be opposed to such practices 10 weeks later, when he was quoted in a trade publication insisting that, *"...telemarketers must continually remind themselves that theirs is the most obtrusive of advertising media."*[10]

While the public clamors against phone-to-phone soliciting, the Direct Marketing Association's members allow the DMA to puff itself as the "the foremost advocate of direct marketers". Many major U.S. firms now filing TCPA comments are DMA members. To gain insight into the comments by these Industry / DMA members, let's examine how they view some of the basic problems collateral to the Industry's operation.

- ♦ In responding to the need for a national No Call database;
  - The DMA tells the FCC, *"a regulatory approach based upon third party administration of [such a] 'do not call' database simply will not work"*. Yet when the DMA touts its own national *Do Not Call* database to the public, the TPS (infra), we hear how effective it is. Perhaps the FCC can determine why the DMA seems to have two different opinions about a national 'No Call List'... depending on who its trying to persuade.
- ♦ Recently, Mr. Barton, the DMA lobbyist, chaired a *telemarketing* convention's, legislative panel discussion, at which the FCC Chairman's Chief of Staff delivered the Legislative Keynote on the TCPA. The convention, panel, and conference were sponsored by Telemarketing Magazine. When the panel was asked to relate the Industry's anthem, *"we don't want to call those who don't want to be called"*, to the Industry's behavior of calling a population that (surveys consistently find) generally don't want to be telesolicited at home, Mr. Barton responded as follows;
  - 1) **The Industry doesn't have statistical evidence that most don't want telesolicitation.**
    - Yet the statistical evidence above is available to anyone... whose concerned.
  - 2) **Surveys can be "torqued" in almost any way [to gain the statistical data desired].**
    - Yet two of the surveys mentioned above were generated by one of the industry's own, a telesoliciting firms, and published in Telemarketing Magazine, the conference's sponsor. This becomes more *peculiar* in light of Telemarketing Magazine's common, prominent reference, that it is regarded as the "Bible" of the industry, and considered "The only credible source of information in the industry." (What about being *torqued*?)
  - 3) **Telemarketing generated \$400 billion. Thus he doubts only a minority was involved.**
    - Yet the annual dollar figure cited by this Industry lobbyist is one that is inflated 25

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[9] DM News May 18, 1992, **AmEx Hit on Data Usage; NY Sets Privacy Hearing**; quote of Jonah Gitlitz, DMA president - *"Perhaps the most draconian legislative threat that could severely impact the direct marketing business, as we know it now, is the increased threat of positive consent - that consumers should not receive solicitations unless they specifically request them."*

[10] DM News - Sept. 30, 1991 Richard Barton's column, **Inside the Beltway; Tone it Down, Telemarketers**

times (see *infra* re: *paragraph 24*). In fact, on average an very small percentage of those telesolicited actually comply. Mr. Barton may now cast his doubts aside!

**4) Most shoppers don't want sales clerks approaching them in stores either.**

- This one takes the cake! Aside from an implied abandonment of the mendacious argument that "most folks don't mind *junk* calls", the Industry's Mr. Barton indicates that our right to be left alone at home is somehow comparable to our right to be left at a used car dealership, clothing boutique, od the like. Perhaps, in its frenzy to generate revenue, the telesoliciting industry has lost its sense of what a home is.

It would do well for the Industry clearly realize that the ancient concept of our home as our castle is still alive today. Phone-to-phone solicitors should not even begin to fantasize our home as their convenience store.

Their novel view of the world, and peculiar response to those who question it, seems to characterize a blindly defensive posture. Sadly, the success of this defense strategy speaks as much about our government, as it does about their intrusive industry.

The Industry (through lobbying entities like the DMA) has successfully thwarted government regulation. It has virtually cut the legs from under most state legislation that it couldn't stop. And it is now evidently doing the same federally. Their argument, "*We don't want to call those who don't want to be called*", has worked so well, that now when a telephone soliciting firm continues to bother a person who has repeatedly told that firm to stop, the solicitor will bark, "We will abide by the law... and only the law", leaving the televictim with no perceived recourse.

The TCPA, if effectuated with the proposed exemptions our homes will surely become their retail outlets. Indeed, the very best aspect of the TCPA is that would allows the FCC to ask Congress for the sweeping powers necessary to actually protect private citizens from the telenuisance industry. An action that is deserving, but not foreseen from the Federal Communications Commission under President Bush's leadership.

**ADRMP's (AutoDialing, Recorded Message Playing device)**

**AUTODIALERS** - The proposed TCPA bans AutoDialers from calling "911", hospital, police, and fire emergency numbers, as well as physician and poison control offices. For the purposes of this aspect of the TCPA, it should also ban calls to the homes of medical professionals who are "on emergency call". The proposed TCPA bans AutoDialers from calling the "rooms" of a hotel, hospital, health and elderly care home. For the purposes of this aspect of the TCPA, it should also ban calls to the private homes of elderly citizens.

Generally, the argument for allowing use of ADRMP's for non-commercial or fund-raising activity can be favorably compared to allowing assault weapons in the name of hunting. Use should be strictly regulated, with stiff penalties. All types of solicitations should be included in the TCPA, without exception.

It seems absurd that autodialers would be banned from calling hotel rooms, but not homes. The very nature of the legislation at this point is to protect the property rights of commercial concerns, and the privacy rights of those who pay an innkeeper. Yet nowhere else in the TCPA is this absolute blanket of protection given to citizens in their homes. (On the topic of hotels, at least one Hilton Hotel is soliciting collateral business by "live telesoliciting". In doing so, Hilton managed to repeat such calls to this writer, after my vigorous instruction to Hilton's pitchmen to stop. [If it happened here, it evidently must happen elsewhere.]

Presently, when predictive dialers are commonly used to autodial numbers in advance of staff availability to chat with the called party, the predictive dialer may now play a, "Please

hold for an important message" announcement to encourage called parties to wait for the next available *telesolicitor* to come on line. The provisions of the TCPA will not result in less annoyance, but rather just increase the number of citizens being hung-up on due to the calling firm's lack of available pitching staff. The industry term for this is "abandonment". One Industry leader recently said the industry considers it responsible to "abandon" up to 3% of all predictively dialed calls. The TCPA prevents the "Please hold" messages from being used, but does nothing to prohibit these (if I may) JERKS from calling us, only to hang up on us... because they are too busy. By the way... the Industry leader that mentioned the 3% figure is the operations manager of a firm that makes 5,000,000 *junk* calls a month. If his firm does what he says the Industry thinks is responsible, his firm may be hanging-up up on more than 6,000 a day.

I urge the prohibition AUTODIALER calls as described in the TCPA, to homes.

#### ADRMP's TO BUSINESSES

Small businesses may commonly get 10 phone solicitations a day. From bakers to book sellers, a businessman must stop profit making activity to answer a solicitor's summons, as he can't afford to miss the call of a potential customer. As a result, the added *telemisance* cost of doing business are the innumerable, useless interruptions of productive time. Once a business asks a telesoliciting entity to stop intruding, the solicitor should stop. Simple as that! And that's what the law should enable.

I strongly urge the FCC to prohibit ADRMP calls to all businesses.

#### COMMENTS ON THE TELEPHONE SALES PHILOSOPHY OF THE INVESTMENT INDUSTRY

The one industry singled out in the text of the FCC's NOTICE OF PROPOSED RULEMAKING is the "stockbroker[age]" industry. In that regard, it mentions 75,000 brokers making 1.5 billion calls per year. Possibly, this aspect of *junk* calling is the largest contributor to the nation's telemisance problem. As such, it is appropriate to point out specific incidents indicating this industry's view of a telephone subscriber's rights.

MERRILL LYNCH - In Massachusetts, after an attorney was repeatedly telesolicited by this firm's representatives he asked that Merrill Lynch stop bothering him in his office. [11]

When the calls continued, the attorney put his request in writing.

When the calls continued, the attorney threatened legal action.

When the calls continued, he asked for, and got a court order enjoining Merrill Lynch to stop.

Merrill Lynch appealed the ruling, claiming (in part) that:

Merrill Lynch "... has no practical ability to ensure that any person will not be called..."  
the attorney "... does not have to take any calls at his office, unless he chooses to do so."

(I am compelled to note my view of their argument here; that since they cannot effectively control who they solicit, citizens bear some responsibility for these intrusions by answering the phone.)

Remarkably, the State's Supreme Court took the appeal prior to its Appellate Court hearing, and found that the words of the state law on which the attorney based his original action, did not accurately reflect the state's intent. The court rejected the interpretation of the word "or" in the law's phrase requiring that the calls be an "unreasonable, substantial or serious interference", and ruled that the word "or" was used to really mean "and". Therefore, since the Merrill Lynch calls were not also serious and/or substantial, the standard was not met, and the injunction was overturned.

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[11] Commonwealth of Massachusetts Appeals Court - No. 89-P-1117 Middlesex County

DEAN WITTER - According to a marketing trade publication [12], regarding this firm's broker sales training practices, they test telemarketers in the following way; "*Bring them in on Saturday at 8 AM. Make them do 50 calls before lunch. For those who complete the calls calls, tell them 'we do it again on Sunday morning.'* Those who show no hesitation get the job."

PAINWEBBER - Their Senior VP and General Counsel (in response to issues raised due to the repeated solicitation of a person who tried to get them to stop) told this writer; "*At this time, however, there are only a few jurisdictions with current prohibitions against the use of telephone lines for legitimate purposes. To my knowledge [the subject televictim] does not reside in such a jurisdiction.*" After requesting that further correspondence from Private Citizen be directed to him, this gentle man and General Counsel went on to issue the following statement, "*... some organizations may feel it incumbent upon themselves to charge you for their time. Please bear that in mind.*" A copy of this remarkable letter is enclosed for review. It illuminates a screaming need for effective regulation of what seems to be a common telesoliciting philosophy in The Investment Industry. *When PaineWebber talks, people must listen...* until we get them off our phones. I strongly urge the FCC to remedy this situation.

It is fitting for others to *bear in mind* that a bully (even a subtle one) does his best work in a schoolyard... against children!

Generally, a growing *investment* industry practice is to hire "pre-callers", whose job is to dial phone numbers to get us on the line. Once on-line, they try to transfer those who don't hang up, and who may have an interest, to licensed stockbrokers for pitching. In this way stockbrokers don't have to waste their valuable time while wasting ours. Pre-callers do it for them.

Commonly, an investment industry telesolicitor will make 300 calls a day. The result will be 280 will not allow the caller to complete the pitch (by hanging-up or vigorously describing their displeasure). Of the 20 others, one will become a "client".

The above items provide only a glimpse of one corner of the telephone solicitation industry. We the People, need effective help in protecting ourselves from an industry driven by attitudes such as these! The FCC's anticipated neglect to include TCPA protection for businesses that have asked specific *live* soliciting firms to stop tele-annoying them, will **help to accelerate the frenzied sales practices of an industry whose leaders admit to its being out of control.**

#### GENERAL EXEMPTIONS PROPOSED FOR CALLS TO RESIDENCES

By excluding non-commercial solicitation, the TCPA regulates the content of speech. This may well be the TCPA's fatal flaw. The TCPA declares, "*The Congress finds that: (#8) The Constitution does not prohibit restrictions on commercial telemarketing solicitations.*" Indeed, the Constitution does not prohibit restrictions on any specific type of solicitation by telephone, while it commonly does prohibit restriction of speech based on its content. However, the Constitution does allow: Time, Place, and Manner restrictions on speech. *Grayned v. Rockford*, 408 U.S. 104 (1972). Certainly, a solicitor has ample alternatives to the use of our telephone, to interrupt our meals, wake us from our sleep, or drag us from our bathroom, in the exercise of his free speech.

**IT IS PROPOSED THAT ADRMP's WILL BE ALLOWED TO SOLICIT RESIDENTS FOR:**

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[12] INBOUND OUTBOUND MAGAZINE, July 1989, **Patches & Fixes**

#### Non-commercial purposes -

Such as tax-exempt organizations like those of Police and Fireman's Benevolent Assn., whose incessant solicitors commonly turn over less than 15% of the gross collected, to some union fund that is the actual beneficiary of the fund-raising drive.

#### Former and/or existing customers -

The FCC should clarify if a citizen's "call for product information" to an 800 number, would qualify as an existing relationship, when the caller refuses to knowingly release his phone number. (Note that callers to 800 lines commonly have their originating [home] numbers supplied to the called party.)

Notable here, AT&T staff has described to this writer, its criteria for judging if an entity is an AT&T customer; saying that such criteria includes those who accepted collect calls from AT&T.

The FCC should insist on a caller's duty to respect the rights of residents who ask to be left alone. Regardless of that person's status as a former or existing customer of the firm told to stop calling. Such soliciting firms can ask new customers for authorization to make future telesolicitations.

#### Debt collection

Although the FCC mentions that a predictive dialer "immediately delivers answered calls" to a telephone rep, I am commonly told by manufacturer's sales staff of such equipment that it is often seen as appropriate to set the speed of the predictive dialer so high that it will "abandon" (hang up) on 30% of the debtors called, for lack of a representative to talk to those answering. Although this may seem unreasonable, perhaps this is but another means of applying pressure to those unable or unwilling to pay bills in a timely manner.

In the case of debt collection, callers can easily get prior authorization to use an ADRMP at the time credit is extended.

#### Emergency purposes

This is interpreted to include health or safety information even if not of an emergency nature. As a result, phone scams that commonly use ADRMP's to pitch vitamin & water softeners will be allowed to continue. These scams first tell you of an "award" coming to the called party, if they purchase. Today, this is popular telefraud scam which preys predominantly on older citizens. I suggest that FCC take this opportunity to act to protect older citizens in this regard.

I strongly urge that (if all ADRMP's are not banned, as they should be), all ADRMP's users be required to have prior affirmative, fully informed authorization of the called parties.

#### ADRMP TECHNICAL STANDARDS

The FCC asks for comment on the following rules:

The name of the calling entity is to be stated at the beginning of the message.

Whose name?...

the principal or the soliciting agency that may have made the call under contract?

Televictims will likely not recognize the name of any firm that would use an ADRMP in any case.

The address or phone number of the caller can be given at the end of the solicitation.

This requires the resident to listen to the entire pitch in order to get enough information to complain.

I urge that name, phone number and address be given within the first 10 seconds of the solicitation. The phone number shall not be the ADRMP's, and shall be answered during ADRMP operation. The identifying information shall be given at a rate allowing it to be easily hand written as given.

The ADRMP shall release the line within 5 seconds of receiving "notification" of a hang up.



Note that some local telephone companies take 25 seconds to transmit that signal. [13]  
A dead line for 30 seconds, due to an ADRMP can result in a dead person forever.  
I urge that ADRMP's be required to "immediately release" the line.  
- if not, then ADRMP's should not be allowed on that local exchange switch!  
- that is, unless the law is meant to protect ADRMPs instead of people.

Generally, these rules seem to miss the point: **Most of us don't want *junk* phone callers to disturb us.** Instead of taking this opportunity to protect us, the FCC proposes to incorporate rules to:

Require ADRMP users to give their name - a minimal requirement at best.

Allow ADRMP users to force victims to listen to an entire pitch before giving their address.

Allow ADRMP's to tie up our telephone lines for up to 30 seconds AFTER WE HANG UP.

The FCC's proposals actually to protect the *junk* call industry, rather than its victims.

Whether telephone solicitations are made; to home or business, by machine or personally, to generate sales, or donations, or data, the FCC should make it clear that its rulemaking (or lack thereof) is not to be construed as a license to abuse the rights of others via the nation's telephone network. I strongly suggest that the FCC express its sense that an entity, once told to stop soliciting another firm or person, is unquestionably under a duty to stop making such calls.

#### TELEPHONE SOLICITATION TO RESIDENTIAL SUBSCRIBERS

The FCC's rulemaking procedure concerns the need to protect privacy rights, and avoid getting *junk* calls. While President Bush indicated his wish that the FCC implement the TCPA in a pro-business fashion, saying;

*"... I fully expect that the [FCC] will... ensure that the requirements of the [TCPA] will be met with the least possible cost to the economy."*

Thus the FCC's primary Presidential directive is to protect business. Though the TCPA was created to protect our right of privacy from *junk* call intrusions, the President seems to see the TCPA as a problem that citizen's created for business.

The FCC may either help unwilling victims of, *"the most obtrusive of advertising media"* (see Barton, cited above), or limit the protection of these victims by implementing the wholesale exemptions proposed.

This writer often hears from residential telephone subscribers who describe repeated solicitations from specific firms after the resident's request that they stop. Commonly, these callers are so brazen as to inform the televictims that their is **NOTHING** (short of removing their phone, or not answering it) that will stop the tele-intruders from calling.

At the same time, these callers know their next solicitation will likely result only in disturbing the person called. If our right to be left alone at home still exists, we need protection from these intruders. Beyond their disturbances, and blatant disregard for our rights (when they insist on their "right" to continue to bother us), note that most citizens consider even *proper telephone solicitation calls*, as an outright annoyance.

And by the way; repeat calls are not necessarily the specialty of "boiler-rooms". Indeed such boiler-room operations are often scams, and as such are short lived. Repeat *telenuisance* calls commonly involve the "board-rooms" of America's largest, and most respected firms.

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[13] see FCC document # 63203: ICB-FS-UNSOL-1 April 1990 UNSOLICITED CALLS



Examples of the above include:

CitiBank - has insisted on a policy of continuing to solicit citizens for up to six months after being asked to cease, and to effectively block the attempt of those who would try to stop these calls independently. In at least one incident they also refused to identify the firms they hired to carry out these tele-intrusions. To wit: Here CitiBank gave a list of phone numbers that appeared on their credit-card applications. One of these was a "wrong number" which happened to be mine. As a result, I began getting *junk* called from a variety of firms asking for a person that did not live at my residence. When I asked CitiBank to correct this, they told me it may take up to six months for the solicitations to stop. As I did not feel I was getting appropriate co-operation, I asked CitiBank to identify the firms they gave my "wrong number" to, so I could personally contact them with instructions not to bother me. CitiBank refused this request saying, **since I was not a CitiBank Card Holder, they had no duty to tell me who they gave my phone number to.**

Encyclopedia Britannica's Britcom (telemarketing) division has insisted it will telesolicit any person that its principal / client hires it to call. This will be the case, even in defiance of a citizen's previously expressed request that Britcom not call again. The rationale Britcom gave me for this behavior, was that they work for the firms that hire them, not for the citizens they call. Therefore, we have no right to tell them what to do.

Ameritech, and its local exchange carrier Illinois Bell Telephone, continues to multi-tele solicit residents that have repeatedly asked these firms, both orally and in writing, to not bother them with their *junk* calls. In more than one case, when Ameritech's televictim asked what other telesoliciting firms Ameritech hired, so the televictim could contact such firms directly to advise them not to *junk* call them, Ameritech refused. Thus these residents were forced to remain defenseless against firms that Ameritech / Illinois Bell kept hidden, until such time when they barged into our homes. Only after the firm tele-annoys a resident, will Ameritech / Illinois Bell acknowledge the identity of that particular contract tele-intruder, to the resident intruded upon. The net effect... Ameritech / Illinois Bell will act as a barrier to those who wish to protect themselves from Ameritech / Illinois Bell *junk* calls. **We need effective protection from "reputables" like Ameritech.** (Note that in the case described above, Ameritech / Illinois Bell was soliciting those with whom they had a business relationship.)

MCI once telesolicited an elderly woman the afternoon she returned from the hospital being diagnosed as having a malignancy. When the woman said "no" and hung up, the MCI solicitor quickly called back asking for the woman's husband (she had never been married). The solicitor readily admitted her earlier call, but insisted that she called back to 'talk to someone who could understand common sense'.

As horrific as this situation was, it became all the more so when this matter was brought to the attention of MCI's Washington Headquarters. The resulting investigation by MCI found that the MCI solicitor 'inadvertently marked the woman's card as a "busy", thus generating a second call'. As a result of this conclusion MCI was barred from having to deal with actual circumstance of the incident. In my view, as awful as the circumstance surrounding this particular tele-intrusion was, the worst aspect came with the result of MCI's investigation of it.

In October of 1990, it was reported to a Congressional Subcommittee; *Fraudulent Customer Acquisition Practices in the Long Distance Telephone Industry*, that MCI may place as many as 7 million phone solicitations a month. Since that time, trade magazines indicate that MCI's own available capacity to make such

calls has grown by approximately 50%. [14]

AT&T reportedly makes over 5 million telephone solicitations monthly. [15] Time and again I hear from folks about such AT&T calls. This month a Georgia resident described four such calls she received during the past year. Each time she told the caller she was unwilling to be disturbed again, and each time her request was met by the caller hanging up on her. When she and I called AT&T customer service, she learned that AT&T policy requires residents to call "customer service" if they are to get AT&T to stop barging into their homes. Since the solicitors' who called the Georgia resident had the training and supervision which allowed them to consistently hang up on her, rather than inform her of AT&T's policy and phone number to call, she was unaware of either. I see AT&T's policy as obstructive to privacy. To view this AT&T policy as indicative of a responsible industry, will force citizens to find the proper phone number of every firm that *junk* calls them in order to call them back, to tell them not to call.

Olan Mills' Chairman submitted his written statement for inclusion in the hearing record of the US Senate's Subcommittee on Communications last July which was looking into regulation of *telemarketing* industry. His closing remarks included, "We think the FCC should have some other options besides the national electronic data list. The option that we favor is the 'Do Not Call System' that we use now." In describing this *Do Not Call System* to Congress, Olan Mills wrote, "When someone indicates clearly that they do not want to be called again, we put their number on a list and don't call them again for 2 years."

Olan Mills has a peculiar sense of its right to barge into my home. When I say "Don't Ever Bother Me Again!", Olan effectively hears, "Call me again in a couple years!" A plea for privacy is met by Olan with some patience, and then more calls. Tellingly, Olan sees this policy as so responsible that it crow's about it to Congress. To me, Olan's policy seems both socially absurd, and indicative of the business philosophy necessary to support an obtrusive sales process that effectively treats our right to be left alone in our own homes, free of annoying intrusions, as but a quaint historical anomaly. It should be noted here that the TCPA will enable Olan to double its existing "Do Not Call" callback rate without legal burden.

All their assurances aside, this writer was solicited 3 times within a six month period by Olan Mills, Inc., twice after I told them to stop. Indeed, of all the firms complaints received here, regarding repeat calls after requests to stop... Olan Mills, Inc. is easily among the "Top Ten".

The FCC should require that once:

- a telesolicitor is told not to call a citizen, the firm is considered to have been put on notice,
- a firm, once *notified* not to disturb a citizen, it may not do so even once without burden,
- a citizen or business (or agent of either) may effectively give such notice prior to any telesolicitations from the notified firm.

In 1980, the FCC found regulation was not warranted. Now the FCC asks if additional authority is needed to protect consumers, The answer is YES, for:

Prior relationships, when a potential *callee* indicates unwillingness to be called.

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- [14] see: HEARING before the Government Information, Justice, and Agriculture Subcommittee of the (US House of Representatives) Committee on Government Operations. October 17, 1990, page 184  
see: Telemarketing Magazine April 1991, Top 50 Service Agencies... Page 43; #1 is Pioneer Teletechnologies, a firm doing +50% of its business with MCI, with a total of 4,698 "Outbound lines"  
see: Telemarketing Magazine May 1992, Top 50 Service Agencies... page 51, #1 is MCI Services Marketing (name changed from Pioneer Teletechnologies). Total "Outbound lines" = 6,694
- [15] see: HEARING before the Government Information, Justice, and Agriculture Subcommittee of the (US House of Representatives) Committee on Government Operations. October 17, 1990, page 185

Non-profit/tax exempt, when a potential *callee* indicates unwillingness to be called.  
Survey-research, when a potential *callee* indicates unwillingness to be called.  
Political, when a potential *callee* indicates unwillingness to be called.

THE OPPORTUNITY TO NOT BE *JUNK* CALLED MUST EXIST PRIOR TO A  
POTENTIAL TELE-SOLICITOR'S FIRST ATTEMPT TO SUMMON TO OUR PHONE.  
The FCC is body of the People of the United States. The People now need the FCC's help.

It is well recognized that solicitors have a duty to respect "No Solicitation" signs on doors.

Martin v. Struthers 63 S.Ct. 682 - "...homes are sanctuaries from intrusions upon privacy, and of opportunities for leading lives of health and safety. Door-knocking and bell-ringing by professed peddlers of things or ideas may therefore be... circumscribed so as not to sanctify the rights of these peddlers in disregard of the rights of those within doors."

Carey v. Brown 447 US 471 - "The state's interest in protecting the well being, tranquility & privacy of the home is of the highest order in a civilized society." "Our decision reflects the right to be let alone in the privacy of the home. Sometimes the last citadel of the tired, the weary and the sick."

Rowan v. US Post Office 397 US 728 - "A mailer's right to communicate must stop at the mailbox of an unreceptive addressee. To hold less would be to license a form of trespass." "That we are often captives outside the home to objectionable speech doesn't mean we must be captives everywhere."

Reasonable time, place, and manner restrictions may be placed on otherwise free speech.

See: In the Matter of Unsolicited Telephone Calls (FCC Docket No. 78-100)

Memorandum Opinion and Order of the FCC, 5/22/80, Page 16, Par. 35

See: Grayned v. Rockford, 408 U.S. 104

Therefore, telesoliciting restrictions may consist of: Any time, To a residence, By telephone.  
This would still the myriad of alternative forms of speech to be utilized.

The FCC asks if it should address the inherent difference between ADRMP, and live calls.

At the center of the entire matter is **our right to be left alone** - not to be unwillingly called from our activity to respond to another's unwanted summons. The harm is the loss of privacy, to those who know, or should know not to bother us. Whether calls are from people who dial phones, or program phone dialers, IT IS THE SAME RESULT!

Relating to paragraph #24 - NOTICE OF PROPOSED RULEMAKING, the FCC states:

- 1) "...unsolicited sales calls generated \$435,000,000,000 in sales in 1990".
- 2) "Thus many consumers find such contacts beneficial..."
- 3) "The [FCC] tentatively concludes that it is not in the public interest to eliminate this option for consumers."

- - - My comment on these particular FCC insights are as follows: - - -

- 1) The FCC wrongly relates the \$435 billion to consumer telephone sales solicitations.

The FCC cites the TCPA as the figure's source -

The TCPA, refers to 'total telemarketing sales'.

- Total telemarketing sales includes: industrial and commercial telemarketing sales, as well as calls *made by citizen-consumers*, to order merchandise.

The \$435 billion is not historical fact (as indicated), but rather a 1985 prediction.

- The figure appeared in 1985 as a prediction of Industry growth by 1990. [16]

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[16] A \$435 billion figure has been used through-out the TCPA legislative process. This figure's source has been attributed alternatively to a 1985 prediction of Technology Marketing Corp. (as reported in The Encyclopedia of Telemarketing), or the 1985 prediction of a consortium of the Direct Marketing Assoc., the U.S. Bureau of Economic Analysis, Forecasts Associates, and a Telemarketing Magazine.

Assuming the \$435 billion is correct, the FCC uses it to wildly overstate the TCPA's effect.

- Business-to-consumer telephone sales is only 4% of all telephone marketing. [17]

Thus, the FCC's figure is inflated by 25 to indicate the TCPA's regulative effect.

To illustrate what \$435 billion is; the entire U.S. deficit was \$400 billion last year.

By comparison, it is unreasonable for the FCC to believe that \$435 billion can be generated by bothering people at home.

- 2) The word "many" is a relative term: 1000 is "many", but against 1 million, it's a scintilla.)

Simply put, and in fact, **the vast majority of us** find unsolicited sales calls an annoyance.

- Adhering to the logic used by the FCC in its conclusion; we should all regularly undergo liposuction since it benefits many of us.

- 3) The FCC indicates its concern that regulation of telephone sales solicitations to residents, may "eliminate this option for consumers".

The TCPA should (in theory) protect only those residents that seek protection.

- The strong enactment of the TCPA will result in creation (not elimination) of options for consumers.

The FCC also notes it received 757 complaints on auto-dialers, and 74 about live *junk* calls. [18]

This relatively small number of complaints may be attributed to DMA diversionary tactics.

The DMA created the Telephone Preference Service (TPS), the Industry's euphemism for a "No Junk Call" list. The TPS's purpose... In their own words,

*"TPS will give consumers an alternative to running to their legislators for protection."*

*"We must develop a strong self-regulatory posture [?] if we are to prevent legislation."* [19]

The DMA is a trade group of many of the U.S.'s largest "for profit" firms who benefit from telesoliciting. *"The goal of the DMA is to discover and to thwart possible government regulation, and we have done it!"* [20] The FCC assists the DMA in thwarting government regulation by promoting the TPS to consumers [21]:

- without suggesting that unwilling citizens tell *junk* calling firms to stop bothering them.
- or suggesting that citizens write their legislators to demand effective regulation.
- or informing citizens that adherence to the TPS is voluntary on the part of the Industry.

DMA members who claim to use the TPS, continue to tele-annoy folks listed on the TPS.

This commonly occurs well after the *junk* calling firm had ample opportunity to purge those who have asked the DMA to be placed on its TPS. Excuses for the intrusions range from:

- "Your not on the TPS." (In one case of this excuse, the DMA got the citizen's listing request by certified mail far enough in advance of the call for the TPS to have been effective.)
- "We have no right to purge another's call list." (a telemarketing *service agency* favorite)
- "We will solicit our own customers as we please." (local phone companies use this a lot)

At least one list compiler actually used the TPS to *flag* those on it... and still sold their numbers.

Relating to paragraph #25 - NOTICE OF PROPOSED RULEMAKING, the FCC states:

The FCC cites Chairman Markey's comments to indicate that ADRMP's harm privacy more

---

[17] see Houston Chronicle: 9/16/91, Working the Phones quotes the 1990 Annual Guide to Telemarketing.

[18] As the FCC is now involved in telemarketing, Private Citizen, Inc. (PCI) is registering (under separate cover), the complaints of approximately 3000 citizens and businesses concerning "live telephone solicitation practices". In doing so, PCI is acting within the scope of its agency agreement with and on behalf of its subscribers.

[19] see Advertising Age: 5/20/85, R.Borders, chair-elect of DMA Telephone Mktg. Council, speaking during the first year of the TPS's operation.

[20] see DM News: interview published 10/22/90, Jonah Gitlitz, DMA President

[21] see FCC document # 63203: ICB-FS-UNSOL-1 April 1990 UNSOLICITED CALLS

than live calls. Yet the quotes cited make the point that, by comparison, both types of calls do very similar privacy damage.

To wit: Live solicitors call "more than 19 million" citizens per day.

ADRMP's "have the capacity to call 20 million" citizens per day.

Chairman Markey's comments also correctly noted that ADRMP's place calls randomly, thus calling unlisted numbers. But all too often, live callers call unlisted numbers when dialing sequentially. Sequential dialing is very popular with newspaper sales efforts. (What is the difference, if a machine or a person sequential dials a hotel room?)

Perhaps most complaints target ADRMP's because no one is on the line to yell at when they come in. Regardless, our right of privacy at home in the area of phone solicitation consists of our right to be left alone. How it is that we are summoned from our bath or bedroom by *junk* callers is of less concern than call itself. Since people are annoyed with both types, the FCC should enable citizens to protect themselves from both.

#### REGULATORY ALTERNATIVES TO RESTRICT LIVE OPERATOR SOLICITATIONS

Simply put, and in light of the overwhelming common disdain held by citizens for *junk* calls; the list that should be created by the FCC is a national Do Call List. The rationale for it is self-manifesting. It would be cheap, short, contain only those who do not mind having their phone numbers distributed, and extremely valuable to the telephone solicitation industry. Remember the telemarketer's cliché of, "We don't want to call anyone who doesn't want to be called"? Pursuant to Industry's own words, such a list should be more than they could ever hope for. Same goes for the vast majority of the people of the United States. As for the Constitutionality of such a "prior ban", other types of annoying exercise of free speech are commonly banned... such as blaring sound trucks on residential streets.

Failing the implementation of a Do Call list, a Do Not Call list should be instituted... without the exemptions. A Do Not Call list which exempts large segments of this intrusive industry, will inevitably be presented as their license to disturb us in defiance of our requests that such callers stop calling. As for anyone who wanted to be called by a banned entity, that citizen may contact the firm and authorize their calls to continue. Such a database can be easily maintained with "number only" information being supplied to the telesolicitors. Lejeune Associates of Florida already has a system it offers to the Industry that will serve a No Call Database quite nicely. The FCC is aware of Lejeune's capability. Indeed, Private Citizen, Inc. has been sending its Private Citizen [No Call] Directory to those involved in the *junk* call industry since 1988. It is not an exceedingly difficult technological feat.

Trade publications already report that the FCC is well on its way to effectively gutting the TCPA. The May 4th, 1992 issue of the DM News, wrote its preliminary epitaph: *"The [FCC], in giving surprising support to outbound telemarketing, has also taken a softer-than-expected stand on automatic dialers and recorded messages."*

*"Though tentative, it is clear the FCC favors 'as little regulation as possible,' said Richard Barton, senior vice president for government affairs with the [DMA], which has quietly pushed for many of these positions."*

The FCC has an opportunity to choose between success, failure, and calamity in the TCPA's implementation. Regardless of what is evident today, I hope it will protect the rights of residents who want to be left alone! I fear that, pursuant to President Bush's instructions, the FCC will accomplish the opposite.

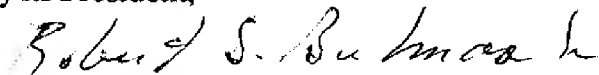
As a baseline, and unless otherwise advised by the FCC, I will assume the FCC's agreement with the following premise;

That any telephone calling entity - be it commercial, or non-commercial, having been advised by a telephone subscriber directly, by his or her agent or via a database, that the subscriber is unwilling to freely accept telephone calls from the notified calling entity, shall have a duty to respect the collateral rights of that subscriber, and the subscriber's exercise thereof, notwithstanding the involvement of an overdue lawful debt owed to the solicitor or agent thereof.

I urge the FCC to clearly state its sense of this important matter concerning our right to be left alone.

PRIVATE CITIZEN, INC.

By its President,



Robert S. Bulmash  
c/o Private Citizen, Inc.  
P.O. Box 233 Naperville, IL 60566

encl: Private Citizen, Inc. authorization form  
Letter from PaineWebber Sr. VP and General Counsel re: telephone solicitation

# Private Citizen, Inc.

P.O. Box 233 - Naperville, IL 60566 - 708/393-1555

## AUTHORIZATION FORM

*Yes, I'm fed up with junk phone calls. List me in the Private Citizen Directory for a year, and send it to telemarketers across America at least twice a year. Then send me a list of firms to whom it was sent. My **\$20** check is enclosed.\**

I/we \_\_\_\_\_

clearly print your full name (e.g. for spouses, John R. & Jane C. Doe) Note: Only one "Last" name or Firm name may appear on this line.

located at \_\_\_\_\_

print your street address, city, state, zip \* You can list one additional address for an added \$5

hereby adopt as my own, the NOTIFICATION & OFFER and DEFINITIONS on the back of this form, and appoint Private Citizen, Inc. (PCI), to be my agent to communicate this to firms involved in telemarketing, and advise them of my wish not to be junk called, and that such a call will be taken as acceptance of my *offer*, and their obligation to pay me for their use of my time and telephone. Accordingly, PCI will also advise such firms of my name, city, state, zip, and

phone number (\_\_\_\_) \_\_\_\_-\_\_\_\_

To further protect your privacy, the Directory lists phone numbers in a separate table, apart from subscriber names, city, state & zip.

(\_\_\_\_) \_\_\_\_-\_\_\_\_ (\_\_\_\_) \_\_\_\_-\_\_\_\_

\* You can list additional phone numbers for an added \$5 each.

X

SIGN HERE \_\_\_\_\_

DATE \_\_\_\_\_

Are particular junk calling firms annoying you? Tell us about them below.

If they are not already on our list, we can add them.

Firm name

Address

City - State - Zip

Phone #

To: Those involved in the *direct marketing / telenuisance / telemarketing / junk call* industry,  
From: See my listing in the Private Citizen Directory, or see the reverse of this document,  
Subject: The following is transmitted to you by my agent, Private Citizen, Inc., on my behalf:

## NOTIFICATION & OFFER

- I consider junk calls (as defined below), to be an annoying invasion of my privacy, and an interference with my ability to peacefully enjoy my property. You are now instructed to carefully respect my rights in this regard!
- I am unwilling to allow your free use of my time and telephone for such calls and offer you such use on the following terms:
- I will accept junk calls, placed by or on your behalf, for a \$100 fee, due within 30 days of such use.
- Each such call will be a separate acceptance of this offer, and upon its answer-ratification, all involved entities in receipt of this document will be bound by the resulting agreement and all terms contained herein.
- Your junk call to me will constitute your agreement to the reasonableness of my fee, my appropriate recording of such call, and your payment of all reasonable legal fees and/or collection costs as may be required.
- This offer extends for one (1), year from the date of its latest receipt by you, or until I may expressly modify it.
- Note that non-payment of charges billed as a result of your telemarketing activity, may be construed to indicate; your defiance of my request that you leave me alone and rejection of duty to respect my privacy, and/or your intent to unjustly enrich yourself at my expense, and/or your maintenance of a nuisance, and noisome trade at my expense.
- I may deem such wrongful, and/or tortious behavior as a cause of action based on, but not limited to implied, constructive, or quasi contractual obligation, and in which case I may endeavor to collect punitive, and/or exemplary damages as well.
- I consider the sale or rental of my name and any other identifying information to be a conversion of my property (name).  
A \$100 fee will be due within 30 days of each such conversion, payable to me by involved and notified entities.
- I hereby certify that I subscribe to PCI's NOTIFICATION & OFFER (below), and incorporate it with mine wherever possible.

Private Citizen, Inc. (PCI), for itself and its subscribers, hereby Notifies and Offers your organization as follows;

- The Private Citizen Directory is the property of PCI. It is not to be sold. A transfer of it must include this document.
- You may verify the intent and authenticity of those listed in PCI's Directory (details from PCI), by:
  - mailed inquiry to those listed in PCI's Directory (PCI can forward your request to those for whom you have no address),
  - inspection of original Authorization Forms at a location agreed upon by both PCI and the inspecting entity,
  - inspection of copies of Authorization Forms mailed to a location of your choice,
- Responding to a telephoned verification request is a service offered by those listed in PCI's Directory and obligates such callers to compensate called subscribers \$100 per call. The terms and conditions described above apply here as well.

## DEFINITION OF TERMS

PCI, and those listed in the Private Citizen Directory define the terms Telemarketing / Telenuisance / Junk call as:

- A telephone call to the premises of a PCI subscriber, delivered live or prerecorded, by voice or facsimile,
- by or on behalf of an organization, including but not limited to its agent, dealer, franchisee, contractor or subsidiary,
- without both an existing direct relationship with, and fully informed, affirmative authorization of the party called,
- whether such calling organization be of a commercial, non-profit, survey-research, or political nature and,
- dialed either randomly, sequentially, automatically, manually or intentionally targeted,
- intended to sell, rent, survey/poll, solicit information about, encourage donations to, generate/qualify sales leads for, create interest in or renew subscriptions for anything (tangible or intangible), of concern to the calling entity.

Junk calls include those by a firm having an established relationship with the called party, if the call is not related to the business established between them (ex. a city bank junk calling its credit card holders to peddle a city travel package).

Junk calls do not include calls made to collect debts if payment is not made per agreement, nor do they include calls made when both the calling and called individuals involved are personally acquainted with each other.



PaineWebber Incorporated  
1200 Harbor Blvd.  
Weehawken, NJ 07087  
201 902-6630

Robert M. Benson, Esq.  
Senior Vice President and General Counsel

## PaineWebber

July 10, 1991

Robert Bulmash  
Private Citizen, Inc.  
Box 233  
Naperville, IL 60566

Dear Mr. Bulmash:

Gail Wickes has referred this matter to me for further response. As I know you are aware, various consumer groups are working at the state and federal level to enact legislation governing the practice of "cold calling." At this time, however, there are only a few jurisdictions with current prohibitions against the use of telephone lines for legitimate purposes. To my knowledge, your "client" does not reside in such a jurisdiction.

Listing one's telephone number in an available public document such as a directory may invite desired as well as undesired contact. You and your clients know that. Persons desiring unwanted telephone calls from strangers can avail themselves of unlisted, hence unpublished, telephone numbers. Moreover, if one receives an undesired call, there is always the option of hanging up. A recent article in The Wall Street Journal respecting your organization makes it clear that there are a variety of equally effective defense tactics which can be employed.

Whatever response a caller from PaineWebber may receive, our approach is to be polite, inquiring, and informative. It is not our intent to annoy or to inconvenience anyone, but we currently have the same right to the telephone lines as do the members of Private Citizens, Inc. have to take steps to limit access, and indeed, to deny it by having unlisted numbers.

We regret that we cannot assure you that those who subscribe to your service for a small fee will, in fact, be assured of the privacy they believe you can afford them by your efforts.

Established 1879  
Member New York Stock Exchange, Inc.  
Other Principal Exchanges

PaineWebber

Letter to Mr. Bulmash  
July 10, 1991  
Page Two

You are requested to direct any future correspondence or inquiries to me. As The Wall Street Journal also reported, some organizations may feel it incumbent upon themselves to charge you for their time. Please bear that in mind.

Sincerely yours,

RMB:SP

0168e



SPAL  
IE

1850 M Street, N.W., 11th Floor  
Washington, D.C. 20036  
Telephone: (202) 828-7453

Jay C. Keithley  
Vice President  
Law and External Affairs  
United Telephone Companies

RECEIVED

JUN 25 1992

June 25, 1992

Federal Communications Commission  
Office of the Secretary

Ms. Donna R. Searcy  
Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Room 222  
Washington, D.C. 20554

92-90

RE: In the Matter of The Telephone Consumer Protection Act of 1991

Dear Ms. Searcy,

Attached are the original and five copies of the Reply Comments of Sprint Corporation in the proceeding referenced above.

Sincerely,

Jay C. Keithley  
Vice President  
Law and External Affairs

Attachments

JCK/mlm

No. of Copies rec'd  
List A B C D E

075

ORIGINAL  
FILE RECEIVED

JUN 25 1992

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

Federal Communications Commission  
Office of the Secretary

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

**REPLY COMMENTS OF SPRINT**

Sprint Corporation ("Sprint") on behalf of the United Telephone companies and Sprint Communications Company L.P. submits these Reply Comments. Sprint notes that many issues received extensive comment representing a variety of opinions. Sprint stands on its initial Comments. The Commission, in its proposed Rules in the NPRM,<sup>1</sup> does not propose a nationwide "do not call" database. Sprint continues to support the Commission in this decision. In Sprint's view, nothing submitted in the initial Comments justifies the creation of an unneeded nationwide "do not call" database. Two specific proposals dealing with a nationwide "do not call" database are flawed and Sprint believes comment on these proposals would be helpful to the Commission. Thus, Sprint provides this Reply to the Comments of Independent Telecommunications Network, Inc. ("ITN") and Lejeune Associates of Florida.

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1. In the Matter of The Telephone Consumer Protection Act of 1991, Notice of Proposed Rulemaking, CC Docket No. 92-90, April 17, 1992 ("NPRM").

**I. ITN's Proposal To Query All Telemarketing  
Calls Against a LIDB Database Is  
Incomplete and Unreasonable**

ITN proposes that each telemarketing company "be required to pre-screen each customer's line number (prior to making a telephone solicitation) against a line information database to determine whether that customer accepts or rejects commercial telephone solicitations."<sup>2</sup> ITN claims this would require "some minimal data entry by the LIDB operators, but little if any alteration of the existing LIDB software."<sup>3</sup> Some "additional equipment may be necessary to satisfy capacity requirements."<sup>4</sup> Access to LIDB query capability would be via X.25 "links" from "personal computer or other computer-based predictive or auto-dialers used by the telemarketing industry"<sup>5</sup> to the LEC SS7 supported LIDB. Protocol conversion from X.25 to SS7 would be performed by the LIDB provider.

ITN estimates the cost of the X.25 link at about \$10,000 per year<sup>6</sup> per telemarketer. This cost would be paid by "the telemarketer who wishes to utilize the telephone system to conduct

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2. ITN Comments at 3.

3. Id. at 4.

4. Id. at 4.

5. Id.

6. Id. at 7.

commercial solicitations."<sup>7</sup> ITN apparently assumes that commercial enterprises that use telemarketing can easily absorb this link charge. In addition, a per query charge of \$.06 and personal computer or other devices that have X.25 ports would be required.

Many businesses that utilize telemarketing do not use predictive dialers or personal computers. For instance, a local carpet cleaning company often uses a paper list, dials with the human hand the appropriate number, and calls the potential customer by name. These operations, and there are multitudes of them, are small, localized, and technologically unsophisticated. X.25 links hooked to PCs and other devices are not part of their routine business. Adding PCs or autodialers at several thousand dollars a machine, X.25 links at \$10,000 each, and a \$.06 per query charge may put small businesses that utilize telemarketing out of business. This disparate impact upon small business is sufficient reason to justify rejection of the ITN proposal.

Additionally, while LIDB database capabilities may be modified to accommodate telemarketing "do not call" queries, the actual software development for this application has not, to Sprint's knowledge, yet been developed. Thus, this application, while theoretically possible, is not available at this time.

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7. Id.

Further, X.25 protocol conversion is used by ITN, GTE and SNET, the three LIDB hub providers, but is not available at the other LEC LIDB databases. Thus, in order to obtain protocol conversion, a telemarketer would be forced to route all of its telemarketing queries through one of the three hub providers, that perform X.25 conversion to SS7.

ITN also ignores the additional costs to LECs that will arise from creation of "do not call" databases. No method of obtaining the initial database is proposed. No method of obtaining updates from the customer is proposed. These are significant problems that carry with them significant costs. For instance, the LIDB database on credit card accounts is updated from daily LEC service order and billing systems. This process is integrated and depends on multiple interdependent software programs. These programs and systems are neither designed for nor currently capable of handling "do not call" database entries. Significant development expenses would result. ITN downplays these significant LEC expenses.

Because the ITN plan favors large telemarketing firms, disadvantages small telemarketers, proposes the use of systems that are not yet developed, and ignores other significant costs, it should be rejected. As Sprint showed in its initial comments, each telemarketer should self police rather than bear the high

costs of an unneeded and unwarranted nationwide "do not call" database such as ITN proposes.

**II. A National "Do Not Call" Database  
As Proposed by Lejeune Associates Is  
Impractical and Imposes Excessive Costs  
on Telemarketers**

Lejeune Associates of Florida ("Lejeune") support the creation of a national "do not call" database. Lejeune is a hardware and software supplier of systems used in management of telemarketing operators. Lejeune also indicates that it is interested in being the contractor for any telemarketing funded "do not call" database.<sup>8</sup>

Many problems with a national database have been discussed in the initial comments submitted to the Commission. In addition to these general comments, the Commission must realize that the plan Lejeune proposes is seriously flawed because it will not produce an accurate nationwide database.

Lejeune suggests that creation of a "do not call" database is simple. All it takes is some administrative body accepting "orders" to be placed in the database, and a check that the account is a residential customer. This check is performed "instantly" via some unidentified technology.<sup>9</sup>

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8. Lejeune Comments at 20.

9. Id. at 22-23.

A fundamental flaw exists in this proposal. In the United Telephone companies 25 percent of the customer base churns each year.<sup>10</sup> Sprint believes this percentage could be even higher for the industry in general. In order to meet the need for telephone numbers for new installs, the telephone numbers of terminated accounts are reassigned. No provision to remove reassigned accounts from the nationwide database exists in the Lejeune proposal.

In order to keep the database that Lejeune contemplates current, LECs would need to provide a list of all disconnects to the database administrator. This would be a problem for both LECs and the administrator and would add significant costs and capacity problems.

Additionally, the Lejeune proposal would place significant hardware and software costs, as well as database purchase costs, on businesses using telemarketing. While large firms may be able to absorb these costs, small firms that use telemarketing to supplement their other local marketing efforts may be financially precluded from using telemarketing because of the up front capital required to implement the Lejeune proposal.

---

10. The United Telephone companies have slightly more than four million access lines. In 1991 over one million lines were installed and over 900,000 lines were disconnected.



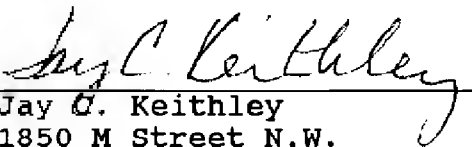
Because of the discriminatory impact on small business using telemarketing and the problems with database updates the Lejeune proposal for a national database should be rejected.

**Conclusion**

Nothing in the Comments to the NPRM justifies the creation of a nationwide "do not call" database. The Commission did not propose the creation of such a database when it issued the proposed Rules in the NPRM. The Commission should continue to reject the creation of such a database. The proposals of ITN and Lejeune are seriously flawed and should not be implemented.

Respectfully submitted,

SPRINT CORPORATION

By   
Jay C. Keithley  
1850 M Street N.W.  
Suite 1100  
Washington, DC 20036  
(202) 857-1030

W. Richard Morris  
P. O. Box 11315  
Kansas City, MO 64112  
(913) 624-3096

Phyllis Whitten  
1850 M Street, N.W.  
Suite 1100  
Washington, D.C. 20036  
(202) 828-7402

Its Attorneys

June 25, 1992

**CERTIFICATE OF SERVICE**

I, Melinda L. Mills, hereby certify that I have on this 25th day of June, 1992, sent via hand delivery a copy of the foregoing "Reply Comments of Sprint Corporation" CC Docket No. 92-90, In the Matter of The Telephone Consumer Protection Act of 1991, filed this date with the Secretary, Federal Communications Commission, to the persons listed below.

  
\_\_\_\_\_  
Melinda L. Mills

Ms. Cheryl Tritt  
Chief, Common Carrier Bureau  
Federal Communications Commission  
Room 500  
1919 M Street, N.W.  
Washington, D.C. 20554

Downtown Copy Center  
Room 246  
1919 M Street, N.W.  
Washington, D.C. 20554

Arthur E. Mayhew  
Bucks County Courier Times  
8400 Routh 13  
Levittown, PA 19057

Gary Hauser, President  
Coalition of Higher Education Assist. Organization  
1101 Vermont Avenue, N.W.  
Suite 400  
Washington, D.C. 20005-3521

J.C. Hickman  
The Bellingham Herald  
1155 State Street  
P.O. Box 1277  
Bellingham, WA 98227

Paul E. Jones  
The Orlando Sentinel  
633 North Orange Avenue  
Orlando, FL 32801

James B. Groff  
National Association of Water Companies  
1725 K Street, n.W.  
Suite 1212  
Washington, D.C. 20006-1401

Gary D. Wamsley  
Midland Daily News  
Box 432  
Midland, MI 48640

Tom Dickens  
Press Journal  
P.O. Box 1268  
Vero Beach, FL 32961

Richard D. Parlow  
United States Department of Commerce  
National Telecommunications and  
Information Administration  
Washington, D.C. 20230

Paul E. Nolting  
Division Counsel  
Unisys Corporation  
P.O. Box 500/MS B381  
Township Line and Union Meeting Roads  
Blue Bell, PA 19424

Peter D. O'Connell  
Kathleen A. Kirby  
Reed, Smith, Shaw & McClay  
1200 18th Street, N.W.  
Washington, D.C. 20036  
Attorneys for Gannett Co., Inc.

Thomas W. Kirby  
James T. Bruce, III  
Paul C. Smith  
Rachel J. Rothstein  
Wiley, Rein & Fielding  
1776 K Street, N.W.  
Washington, D.C. 20006  
Attorneys for Olan Mills, Inc.

James R. Cooke  
Harris, Beach & Wilcox  
1611 North Kent Street  
Arlington, VA 22209  
Attorney for Reese Brothers, Inc.

Mary J. Sisak  
Donald J. Elardo  
MCI Telecommunications Corporation  
1801 Pennsylvania Avenue, N.W.  
Washington, D.C. 20006

Aaron I. Fleischman  
Charles S. Walsh  
Matthew D. Emmer  
Fleischman and Walsh  
1400 16th Street, N.W.  
Washington, D.C. 20036  
Attorneys for Time Warner, Inc.

James S. Biddle  
Ohio Student Loan Commission  
309 South Fourth Street  
P.O. Box 16610  
Columbus, OH 43266-0610

Donald J. Belasco  
The Morning Call  
101 North Sixth Street  
P.O. Box 1260  
Allentown, PA 18105

Douglas E. Neel  
Vice President, Regulatory Affairs  
MessagePhone, Inc.  
5910 N. Central Expressway  
Suite 1575  
Dallas, Texas 75206

Ken McEldowney  
Executive Director  
Consumer Action  
116 New Montgomery Street, Suite 233  
San Francisco, CA 94105

Olga Madruga-Forti  
Domestic Facilities Division  
Federal Communications Commission  
2025 M Street, N.W., Room 6008  
Washington, D.C. 20554

Martin T. McCue  
Linda Kent  
United States Telephone Association  
900 19th Street, NW, Suite 800  
Washington, D.C. 20006-3100

Kelly A. McGinnis MD  
1024 South 286th Place  
Federal Way, WA 98003

Donald J. Byrne  
P.O. Box 431  
305 South Arthur  
Pocatello, Idaho 83204

Malcolm W. Applegate  
Vice President and General Manager  
P.O. Box 145  
Indianapolis, IN 46206-0145

Nancy Barthelmess  
10290 Vicksburg Dr.  
Cupertino, CA 95014

Orage Quarles III  
President and Publisher  
530 East Market Street  
Stockton, CA 95202

Debbie Fero  
Circulation Director  
116 Main Street  
P.O. Box 503  
Towanda, PA 18848

Will McClure  
1060A North Market Street  
Troy, Ohio 45373

Ashton Phelps, Jr.  
3800 Howard Avenue  
New Orleans, Louisiana 70140-1097

Alex Machaskee  
The Plain Dealer  
President and Publisher  
1801 Superior Ave.  
Cleveland, Ohio 44114

Joe Tarrer  
Santa Barbara News Press  
de la Guerra Plaza  
P.O. Box 1359  
Santa Barbara, CA 93102

Don D. Davidson  
CUNA Mutual Insurance Group  
5910 Mineral Point Road  
P.O. Box 391  
Madison, Wisconsin 53701-0391

Richard Ferris  
Circulation Director  
Lansing State Journal  
120 E. Lenawee St.  
Lansing, MI 48919

Buddy King  
General Manager  
Texarkana Gazette  
315 Pine Street  
Texarkana, TX 75504

Cheryl Issod  
Sales Manager  
Centre Daily Times  
P.O. Box 89  
State College, PA 16804

Ralph O'Henly  
Circulation Director  
The Facts  
P.O. Box 549  
Clute, Texas 77531

Sidney H. Bliss  
President and CEO  
Gazette Printing Company  
One South Parker Drive  
Janesville, Wisconsin 53545

Jodi Meryl Wallace  
Executive Director, Corporate Affairs  
Electronic Information Systems, Inc.  
1351 Washington Blvd.  
Stamford, CT 06902

Albert J. Holtzinger II  
Publisher and General Manager  
Altoona Mirror  
1000 Green Ave.  
P.O. Box 2008  
Altoona, PA 16603

Michael J. Coleman  
President & Publisher  
FLORIDA TODAY/USA TODAY  
P.O. Box 363000  
Melbourne, FL 32936

Mark A. Potts  
Circulation Director  
The Gleaner  
Box 4  
455 Klutey Park Plaza  
Henderson, Kentucky 42420-0004

John M. Roberts  
President & Publisher  
The Victoria advocate  
P.O. Box 1518  
Victoria, Texas 77902

Wallace Ballentine  
General Manager  
The Sentinel Record  
P.O. Box 580  
Hot Springs National Park, Arkansas 71902

Den Dickerson  
Thomasville Times  
P.O. Box 650  
106 South Street  
Thomasville, Georgia 31799

J. Frank Helderman Jr.  
Publisher  
Gadsden Times  
401 Locust Street  
P.O. Box 188  
Gadsden, Alabama 35999-00188

Kyle Fuller  
347 Richards Road  
Columbus, Ohio 43214

James F. Lentz  
Manager, Telemarketing  
Audio-Technica, INC.  
1221 Commerce Drive  
Stow, Ohio 44224-9971

Barrett M. & Shirley M. Kemp  
333 Prestonwood Drive #1410  
Richardson, Texas 77081

Chuck Schussman  
Daily News  
P.O. Box 4200  
Woodland Hills, CA 91365-4200

John W. Gemmer  
The Goshen News  
114 South Main Street  
P.O. Box 569  
Goshen, IN 46526-0569

Daniel L. Jaffe  
Executive Vice President, Government Relations  
1725 K Street, NW  
Suite 601  
Washington, DC 20006

William J. Cowan  
General Counsel  
State of New York  
Department of Public Service  
Three Empire State Plaza  
Albany, NY 12223

James B. Miller  
Corporate Counsel  
4343 South 96th Street  
Omaha, Nebraska 68127

Richard L. Holtz  
Publisher  
Journal and Courier  
217 N. Sixth Street  
Lafayette, IN 47901

David S. Dickson  
Circulation Marketing Manager  
501 North Calvert Street  
P.O. Box 1377  
Baltimore, Maryland 21278-0001

Kent R. Thomas  
General Manager  
The Grand Island Independent  
P.O. Box 1208  
Grand Island, NE 68802

Nick Nicks  
La Crosse Tribune  
Circulation Manager  
401 N. 3rd Street  
La Crosse, WI 54601

Robert Cannizzaro  
Circulation Director  
The Jersey Journal  
30 Journal Square  
Jersey City, NJ 07306

Sharon R. Kleehamer  
Manager, Information Services  
Clark County REMC  
7810 State Road 60  
P.O. Box L  
Sellersburg, IN 47172



William C. Green, Jr.  
Publisher  
Teh Huntsville Times  
P.O. Box 1487 - West Station  
Huntsville, Alabama 35807

Harold Higgins  
President & Publisher  
Aberdeen American News  
Box 4430  
124 S. Second St.  
Aberdeen, SD 57402-4430

David D. Stillwell  
General Manager  
The Montgomery Advertiser  
200 Washington Avenue  
P.O. Box 1000  
Montgomery, Alabama 36101

Jerry E. Smith  
Sales Coordinator  
The Courier Journal  
525 West Broadway  
Louisville, Kentucky 40202

Nadine S. Samter  
Attorney  
Division of Credit Practices  
Associated Credit Bureaus, Inc.  
1090 Vermont Avenue, NW Suite 200  
Washington, D.C. 20005-4905

Richard J. McClennen  
Senior Vice President/Marketing  
Detroit Newspaper Agency  
615 W. Lafayette Blvd.  
Detroit, MI 48226

W. Stacy Cowles  
Publisher  
The Spokane Chronicle  
P.O. Box 2160  
Spokane, WA 99210-1615

Frank E. Deaner  
Executive Director  
Ohio Newspaper Association  
1225 Dublin Road  
Columbus, OH 43215

Stephen A. Rogers  
Editor and Publisher  
The Syracuse Newspapers  
Clinton Square, P.O. Box 4915  
Syracuse, NY 13221-4915

Stephen M. Nelson  
Director of Marketing  
Community Benefits Corporation  
1109 N. Thompson Street  
Richmond, VA 23230

Rex D. Ledo  
Director of Circulation  
The Tampa Tribune  
P.O. Box 191  
Tampa, FL 33601

David A. Brune  
General Counsel  
Baltimore Gas and Electric  
Charles Center  
P.O. Box 1475  
Baltimore, MD 21203

Carole L. Heywood  
Circulation Sales Manager  
Worcester Telegram & Gazette  
20 Franklin Street  
Box 15012  
Worcester, MA 01615-0012

David Starr  
Publisher  
1860 Main Street  
Springfield, MA 01101

Joseph Marrone  
Customer Service Manager  
New Haven Register  
40 Sargent Drive  
New Haven, CT 06511-5918

Dwaine L. Canova  
Chairman/CEO  
Zacson corporation  
3825 Hopyard Rd., Suite 220  
Pleasanton, CA 94588

Mary Ann Dirzis  
Director, Government Affairs  
Avon Products, Inc.  
Nine West Fifty Seventh Street  
New York, NY 10019-2683

Donald A. Widder  
General Manager  
United Electric Cooperative, Inc.  
P.O. Box 688  
DuBois, PA 15801

Larry Fuller  
President and Publisher  
200 South Minnesota Avenue  
Box 5034  
Sioux Falls, South Dakota 57117-5034

Ann E. Henkener  
Assistant Attorney General  
Public Utilities Section  
180 East Broad Street  
Columbus, OH 43266-0573

Stephen D. Driesler  
Senior Vice President  
& Chief Lobbyist  
National Association of Realtors  
777 14th Street, N.W.  
Washington, D.C. 20005-3271

Fred A. Stickel  
President and Publisher  
Oregonian Publishing Company  
Portland, Oregon 97201

Raymond A. Jansen  
Publisher and Chief Executive Officer  
The Hartford Courant  
Hartford, CT 06115

Colin McWhinnie  
Marketing Manager, JBS  
131 Caledonia N.E.  
Grand Rapids, MI 49505

Gary Berkley  
President & Publisher  
Belleville News-Democrat  
120 South Illinois Street  
Belleville, IL 62220

George Arwady  
Publisher  
Kalamazoo Gazette/Weekly Gazette  
Hometown Gazette  
401 South Burdick St.  
P.O. Box 2007  
Kalamazoo, MI 49003

Jerry H. Wagner  
Senior Vice President  
Rocky Mountain BankCard System  
P.O. Box 5952  
Denver, CO 80217

Pipes Gaines  
Co-Publisher  
Daily News  
Post Office Box 90012  
Bowling Green, KY 42102-9012

Stephanie Grubert  
President  
Pennsylvania Newspaper  
Publishers' Association  
2717 North Front Street  
Harrisburg, PA 17110

Brian R. Moir  
Fisher, Wayland, Cooper & Leader  
1255 23rd Street, N.W.  
Suite 800  
Washington, D.C. 20037-1170

William B. Baker  
Wiley, Rein & Fielding  
1776 K Street, N.W.  
Washington, D.C. 20006

Thomas A. Stroup  
Telocator, the Personal Communications  
Industry Association  
1019 19th Street, N.W.  
Suite 1100  
Washington, D.C. 20036

William C. Marcil  
Publisher  
Forum Publishing CO.  
Box 2020  
Fargo, ND 58107

Gary W. Ostrum  
Publisher  
The Muskegon Chronicle  
981 Third Street  
P.O. Box 59  
Muskegon, MI 49443

John B. Raytis  
Vice President/Circulation  
San Francisco Newspaper Agency  
925 Mission Street  
San Francisco, CA 94103

John F. Dodd  
Brad I. Pearson  
Smith, Gill, Fisher & Butts  
One Kansas City Place  
1200 Main Street, 35th Floor  
Kansas City, MO 64105-2152

Kelly K. Kordzik  
Winstead Sechrest & Minick  
5400 Renaissance Tower  
1201 Elm Street  
Dallas, TX 75270

David D. Wierman  
Publisher  
The Ann Arbor News  
340 E. Huron Street  
Ann Arbor, MI 48106-1147

Maynard A. Buck, Jr.  
Publisher  
The Free Press Standard  
43 East Main Street  
P.O. Box 37  
Carrollton, OH 44615

Christine M. Yakulik  
Telemarketing Manager  
The Johnstown Tribune Publishing Company  
Johnstown, PA 15907

Albert D. Gittrich  
Circulation Director  
The Star-Ledger  
Star-Ledger Plaza  
Newark, NJ 07101

Ronald G. Doster  
Director of Client Services  
A/R Services  
One Jackson Square  
P.O. Box 3500  
Jackson, MI 49204-3500

John M. Goodman  
Lawrence W. Katz  
1710 H Street, N.W.  
Washington, D.C. 20006

Charles F. Wright  
Vice President - Corporate Development  
8725 Higgins Road  
Chicago, IL 60631

Albert H. Kramer  
Robert F. Aldrich  
Keck, Mahin & Cate  
1201 New York Avenue, N.W.  
Penthouse Suite  
Washington, D.C. 20005

John R. Cochran  
Vice Chairman  
MBNA America Bank N.A.  
400 Christiana Road  
Newark, DE 19713

Peter A. Rohrbach  
Hogan & Hartson  
555 13th Street, N.W.  
Washington, D.C. 20004

Francine J. Berry  
David P. Condit  
Sandra Williams Smith  
295 North Maple Avenue  
Room 3244J1  
Basking Ridge, NJ 07920

Helen M. O'Bryant  
1416 Pennsylvania Avenue  
Glenallen, VA 23060

September Wethington-Smith  
Norwest Card Services  
Regency 4, Suite 200  
4700 Westown Parkway  
West Des Moines, IA 50265

Andrew D. Lipman  
Margaret M. Charles  
Swidler & Berlin, CHTD.  
3000 K Street, N.W.  
Suite 300  
Washington, D.C. 20007

Bob Bergland  
Executive Vice President  
National Rural Electric Cooperative Association  
1800 Massachusetts Avenue, N.W.  
Washington, D.C. 20036

A. Thomas Carroccio  
Edward J. Smith, Jr.  
Santarelli, Smith & Carroccio  
1155 Connecticut Avenue, n.W.  
Suite 900  
Washington, D.C. 20036

William B. Barfield  
A. Kirven Gilbert III  
1155 Peachtree Street, N.E.  
Suite 1800  
Atlanta, Georgia 30367-6000

Randolf H. Aires  
Vice President  
Sears, Roebuck and Co.  
Corporat Governmental Affairs  
Sears House  
633 Pennsylvania Avenue, N.W.  
Suite 600  
Washington, D.C. 20004

Bruce E. Thompson, Jr.  
Vice President  
Director of Government Relations  
Merrill Lynch & Co., Inc.  
3000 K Street, N.W., Suite 620  
Washington, D.C. 20007

D. Keith Hancock  
Manager of Government Relations  
Direct Selling Association  
1776 K Street, N.W., Suite 600  
Washington, D.C. 20006

Ian D. Volner, Esq.  
Allan R. Adler, Esq.  
Michelle M. Shanahan, Esq.  
Cohn and Marks  
Suite 600  
1333 New Hampshire Avenue, N.W.  
Washington, D.C. 20036

Debra L. Lagapa  
Robert G. Ballen  
Mary K. O'Connell  
Morrison & Foerster  
2000 Pennsylvania Avenue, N.W.  
Washington, D.C. 20006

Diane S. Killory  
Susan H. Crandall  
Morrison & Foerster  
2000 Pennsylvania Avenue, N.W.  
Suite 5500  
Washington, D.C. 20006

Kathryn A. Ekeler, Esq.  
ITI Marketing Services, Inc.  
8712 W. Dodge Road  
Suite 200  
Omaha, NE 68114

Douglas L. Parker, Esq.  
Institute for Public Representation  
Georgetown University Law Center  
600 New Jersey Avenue, N.W., #312  
Washington, D.C. 20001

Kenneth O. Eikenberry  
Jeffrey D. Goltz  
Attorney General's Office  
1300 Dexter Horton Building  
Seattle, WA 98104

Melissa D. Fuller  
4707 A Cardinal Ct.  
Richmond, VA 23228

Laura Whitman  
1574 Boisseau Drive  
Price George, VA 23875

James P. Jacobson  
Special Assistant Attorney General  
State of Minnesota  
NCL Tower  
445 Minnesota Street  
Suite 1400  
St. Paul, MN 55101-2131

Brenda L. Fox  
Peter H. Feinberg  
Christine Bumpus  
Dow, Lohnes & Albertson  
1255 Twenty-Third Street, N.W.  
Suite 500  
Washington, D.C. 20037

James S. Blaszk  
Kevin S. DiLallo  
Gardner, Carton & Douglas  
1301 K Street, N.W.  
Suite 900  
Washington, D.C. 20005  
Attorneys for American Express Company

Michael Altschul  
Jack W. Whitley  
Cellular Telecommunications Industry Assoc.  
1133 21st Street, N.W.  
Suite 300  
Washington, D.C. 20036

Daniel L. Bart  
GTE Service Corporation  
1850 M Street, N.W.  
Suite 1200  
Washington, D.C. 20036

Mary McDermott  
Carlos J. Sandoval  
NYNEX  
120 Bloomingdale Road  
White Plains, NY 10605

Peter A. Rohrbach  
Hogan & Hartson  
555 13th Street, N.W.  
Washington, D.C. 20004  
Attorney for LeJeune Assoc.

Stephen G. Krakin  
Brian D. Robinson  
Blooston, Mordkofsky, Jackson & Dickens  
2120 L Street, N.W.  
Washington, D.C. 20037  
Attorneys for U.S. Intelco Networks, Inc.

Michael J. Altier  
National Retail Federation  
701 Pennsylvania Avenue, N.W.  
Suite 710  
Washington, D.C. 20004

William Jordan  
State Governmental Affairs  
Securities Industry Assoc.  
120 Broadway  
New York, NY 10271

Richard E. Wiley  
James T. Bruce, III  
Rachel J. Rothstein  
Wiley, Rein & Fielding  
1776 K Street, N.W.  
Washington, D.C. 20006  
Attorneys for Securities Industry Assoc.

Robert S. Bulmash  
Private Citizen, Inc.  
P.O. Box 233  
Naperville, IL 60566

Nancy C. Woolf  
James P. Tuthill  
Pacific Bell and Nevada Bell  
140 New Montgomery Street  
Room 1523  
San Francisco, CA 94105

James L. Wurtz  
1275 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004  
Attorneys for Pacific Bell and  
Nevada Bell

Frances M. Stadler  
Assistant Counsel  
Investment Company Institute  
1600 M Street, N.W.  
Washington, D.C. 20036



David Cosson  
L. Marie Guillory  
National Telephone Cooperative Assoc.  
2626 Pennsylvania Avenue, N.W.  
Washington, D.C. 20037

Basil J. Mezines  
American Collectors Association  
Stein, Mitchell & Mezines  
1100 Connecticut Avenue, N.W.  
Suite 1100  
Washington, D.C. 20036

Floyd S. Keene  
Pamela J. Andrews  
Ameritech Operating Companies  
2000 West Ameritech Center Drive  
Room 4H94  
Hoffman Estates, IL 60196-1025

Dirk C. Bloemendaal  
Amway Corporation  
7575 Fulton Street  
East Ada, MI 49355-7410

Durward D. Dupre  
Richard C. Hartgrove  
Michael J. Zpevak  
Robert J. Gryzmala  
Southwestern Bell Telephone Co.  
1010 Pine Street  
Room 2114  
St. Louis, MO 63101

David L. Jesse  
Pioneer Electric Cooperative  
West Highway 160  
Box 368  
Ulysses, KS 67880

Edward M. Kelley  
The Princeton Packet, Inc.  
300 Witherspoon Street  
Princeton, NJ 08540

Ms. Joyce A. Jewell  
416 East Second Street  
Bloomington, IN 47401

Dick Larson  
The Verde Independent  
P.O. Box 429  
116 South Main Street  
Cottonwood, AZ 86326

Lynne Hanchett  
Daily News - Los Angeles  
P.O. Box 4200  
Woodland Hills, CA 91365-4200

Mark Gursky  
Circulation Sales Manager  
Bucks County Courier Times  
8400 Route 13  
Levittown, PA 19057

Donald J. Belasco  
Circulation Director  
The Morning Call  
101 North Sixth Street  
P.O. Box 1260  
Allentown, PA 18105

September Wethington-Smith  
Norwest Card Services  
Regency 4, Suite 200  
4700 Westown Parkway  
West Des Moines, IA 50265

Daniel Brenner  
Dean Hansell  
Ari Kahan  
725 South Figueroa Street  
Suite 3600  
Los Angeles, CA 90017-5436

Peter Arth, Jr.  
Edward W. O'Neill  
Ellen S. LeVine  
505 Van Ness Avenue  
San Francisco, CA 94102  
Attorneys for the people of the State of California  
and the Public Utilities Commission of the State of  
California

John F. Barker  
Linda F. Golodner  
National Consumers League  
Suite 928N  
815 Fifteenth Street N.W.  
Washington, D.C. 20005

Philip S. Corwin  
American Bankers Association  
1120 Connecticut Avenue, N.W.  
Washington, D.C. 20036

Richard J. McClennen  
Senior Vice president/Marketing  
Detroit Newspaper Agency  
615 W. Lafayette Blvd  
Detroit, MI 48226

Evan Hendricks  
Editor/Publisher  
Privacy Times  
P.O. Box 21501  
Washington, D.C. 20009

Lawrence E. Sarjeant  
Kathryn Marie Krause  
1020 19th Street, N.W.  
Suite 700  
Washington, D.C. 20036  
Attorneys For US West Communications, Inc.

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

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In the Matter of  
  
The Telephone Consumer  
Protection Act of 1991

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CC Docket No. 92-90

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REPLY COMMENTS OF THE AMERITECH OPERATING COMPANIES

Floyd S. Keene  
Pamela J. Andrews  
Attorneys for the Ameritech  
Operating Companies  
Room 4H74  
2000 West Ameritech Center Drive  
Hoffman Estates, Illinois 60196-1025  
(708) 248-6082

Dated: June 25, 1992

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REPLY COMMENTS OF THE AMERITECH OPERATING COMPANIES

I. INTRODUCTION AND SUMMARY

The Ameritech Operating Companies<sup>1</sup> hereby submit these reply comments in response to the Commission's notice of proposed rulemaking ("NPRM") in the above-captioned docket. The NPRM requested comments on the Commission's proposed rules implementing the Telephone Consumer Protection Act of 1991, 47 U.S.C. Section 227 (the "Act").<sup>2</sup> In their initial Comments, the Ameritech Operating Companies generally endorsed the Commission's proposed rules, but sought clarification of a few issues.<sup>3</sup> The comments received from several other parties also requested clarification of some of the issues raised by the Companies.<sup>4</sup> With clarification of these

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<sup>1</sup> The Ameritech Operating Companies are: Illinois Bell Telephone Company, Indiana Bell Telephone, Incorporated, Michigan Bell Telephone Company, The Ohio Bell Telephone Company, and Wisconsin Bell, Inc., herein referred to as "the Companies."

<sup>2</sup> The Act was passed December 20, 1991.

<sup>3</sup> In addition to the issues discussed further in these Reply Comments, the Companies, in their initial Comments, sought clarification of the proposed rules with respect to Automated Operator Services and Automatic Meter Reading Service. Although the Companies do not raise those matters specifically in this pleading, our concerns with those issues still exist.

<sup>4</sup> See e.g., Sears Roebuck & Company at 2-3, Student Loan Marketing Association at 10-11, North American Telecommunications Association at 3-5, and Association of National Advertisers at 3.

issues, the Companies can endorse the proposed rules of the Commission in this docket. With respect to the issue of additional regulatory reform to address the problem of unsolicited telephone calls, the Companies support requiring each company that engages in telemarketing to maintain "do not call" lists.

The National Consumers League suggested that the NPRM be withdrawn and that the Commission start anew.<sup>5</sup> Such drastic action is unnecessary, and would further delay implementation of rules to address the concerns raised in this docket. The Commission's proposed rules are basically sound. With the relatively minor changes suggested by the Companies, consumers will have an effective and cost-efficient solution to this problem.

II. THE COMMISSION SHOULD CLARIFY THE TYPE OF EQUIPMENT AFFECTED BY THE ACT, THE PROHIBITIONS APPLICABLE TO TELEPHONE CALLS TO RESIDENCES AND THE STATUS OF VOICE MESSAGE DELIVERY SERVICES.

A. The Definition Of Autodialers

As noted in the comments of numerous parties,<sup>6</sup> there is a substantial difference between an automatic dialer with a recorded message player ("ADRM") and a predictive dialer. The definition of an "automatic telephone dialing system," as set forth in the Act ("autodialer"), is broad enough to include certain telephones, PBX systems, personal computers with a modem and other communication equipment.<sup>7</sup> "Autodialers," as

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<sup>5</sup> National Consumers League at 6.

<sup>6</sup> See, e.g., D. F. King & Co., Inc. at 1, Audio-Technica at 1, CUNA Mutual Insurance Group at 1, Digital Systems International, Inc. at 5-6.

<sup>7</sup> Once the Commission has clearly defined the autodialing equipment subject to the Act, that definition should be specifically stated in the rules. Currently, the proposed rules do not contain a definition of the equipment subject to the rules.

commonly understood, place calls to randomly selected or sequentially generated telephone numbers and may or may not use a prerecorded or artificial voice message. Predictive dialers are programmed to dial certain numbers and to connect to a live operator once the telephone call is answered. Predictive dialers are efficient, and result in cost savings to both companies and their customers. Most complaints received by the Commission arose from calls placed by ADRMPs. Therefore, the Commission should specifically exclude from the definition of “automatic telephone dialing systems” predictive dialers and autodialers that do not use prerecorded messages or artificial voices.

B. Any Additional Restrictions On Residential Calls Should Be Limited To Calls Placed Using An Autodialed Number And An Artificial Voice Or Prerecorded Message

Section 227(b)(1)(B) of the Act prohibits the “initiation” of a telephone call to a residential line using an artificial voice or prerecorded message without prior consent. It does not mention “automatic telephone dialing systems.” Consequently, on its face, the Act does not prohibit telephone calls to a residential line using an autodialer without an artificial or prerecorded voice message. This construction of Section 227(b)(1)(B) accurately reflects congressional intent to eliminate the abuses prevalent with ADRMPs. Nonetheless, the NPRM states that calls to a residential line using an autodialer will be prohibited.<sup>8</sup> Such a result would be unwarranted. Any regulation prohibiting calls to residential telephone lines should be limited to calls placed by ADRMPs.

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<sup>8</sup> NPRM at ¶ 8.

Other sections of the Act and the proposed rules address the concerns that have been levied against ADRMPs. For example, as a result of the Act and the proposed rules, consumers will no longer be troubled by ADRMPs that do not release a telephone line after the consumer has hung up. Further, the statute and proposed rules prohibit the placement of calls to emergency telephone lines, hospital rooms and other similar facilities using ADRMPs. Accordingly, there is no valid consumer interest in restricting autodialed calls without an artificial or prerecorded message to residential telephone lines.

C. Voice Message Delivery Services Meet Significant Consumer Needs and Should Not Be Prohibited

Several commenters noted that the legislative history strongly supports the exemption of voice message delivery services from the prohibitions of the Act.<sup>9</sup> To the extent the Commission's proposed rules fail to do so, a tremendous disservice is done to the thousands of consumers who would, and who do, utilize such services.<sup>10</sup> None of the abuses reported to Congress are caused by voice message delivery services. Public voice message delivery services represent a significant improvement of the public telecommunications network, and their availability should not be restricted or jeopardized without good cause.

Congressman Markey recognized the importance of such services. He stated that:

... the bill also allows the Federal Communications Commission to exempt, by rule or order, classes or categories of calls made for

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<sup>9</sup> See, e.g., MessagePhone, Inc. at 5-6, Bell Atlantic at 2, BellSouth at 2-3, Pacific Bell and Nevada Bell at 4-5.

<sup>10</sup> As noted in the initial comments of the Companies, Ameritech may offer such a voice message delivery service and Bell Atlantic currently offers several such services. Bell Atlantic at 2, Fn. 5.



commercial purposes that do not “adversely affect the privacy rights” that this section of the bill is intended to protect and, that “do not include the transmission of any unsolicited advertisement.” ... I fully expect the Commission to grant an exemption, for instance, for voice messaging services that forward calls.... Such a voice messaging service is a benefit to consumers and should not be hindered by this legislation.<sup>11</sup>

The Commission should acknowledge this and similar express statements of intent from Congress, and specifically exempt public voice message delivery services from the Act.

III. THE TECHNICAL REQUIREMENTS IN SECTION 68.318(c)(4) OF THE PROPOSED RULES SHOULD BE CLARIFIED WITH RESPECT TO FACSIMILE BROADCAST SERVICE PROVIDERS.

Ameritech Corporation, under the name Ameritech Faxtra,<sup>TM</sup> offers a “store and forward” facsimile delivery service. The proposed rules require the “sender” of a facsimile message to provide identification, including the telephone number of the sending machine on each facsimile.<sup>12</sup> Logically, this requirement should be met by the originator of the facsimile as opposed to the “store and forward” company. The recipient of the message is undoubtedly more interested in the identity of the originator of the facsimile message than the forwarding means. Thus, the Commission should clarify Section 68.318(c)(4) by specifically exempting the store and forward company from the obligation to comply with this section of the Act. The Companies endorse Bell Atlantic’s proposed modification of Section 68.318(c)(4) which would eliminate any confusion on this issue.<sup>13</sup>

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<sup>11</sup> Cong. Rec. at H11310.

<sup>12</sup> Proposed Rules, Section 68.318(c)(4).

<sup>13</sup> Bell Atlantic at 4.

IV. COMPANY-SPECIFIC "DO NOT CALL" LISTS ARE THE REGULATORY SOLUTION WHICH MEETS THE PRESIDENT'S ECONOMIC PARAMETERS AND PROTECTS THE CONCERNS OF CONSUMERS.

Commenters representing many different perspectives on this issue support company-specific "do not call" lists as a feasible and effective mechanism for minimizing consumer dissatisfaction in this area.<sup>14</sup> There are several significant advantages for such "do not call" lists. First, many Companies already utilize "do not call" lists. Also, the Direct Marketing Association ("DMA") offers its nationwide "Telephone Preference Service" to assist in the communication of a customer's desire not to receive telemarketing calls.<sup>15</sup> The DMA program could be easily expanded to accommodate the goals of the Act.

Second, "do not call" lists are relatively inexpensive to establish and maintain<sup>16</sup> compared with the cost of developing a nationwide database. In the case of "do not call" lists, the cost is clearly borne by the telemarketing industry, and, specifically, the companies that engage in telemarketing. Each company is able to develop a list with the level of sophistication for which it is willing to commit the resources. The Commission should develop minimum standards that all telemarketers would be required to adopt. Beyond that, each company could, to the extent required to maintain the goodwill of its potential customers, develop more sophisticated databases.

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<sup>14</sup> Southwestern Bell Telephone Company at 9-11, Citicorp at 23-28, Olan Mills, Inc. at 7-10 and Sprint Corporation at 9.

<sup>15</sup> See, DMA at 8-9.

<sup>16</sup> As noted by MCI, the costs would be minimal for training at those companies that do not currently maintain "do not call" lists. The list in most cases could probably be generated and maintained by existing telemarketing and customer service employees. See, MCI at 2-3.

Third, it would be easier to update individual company lists than it would be to update a national database. Most companies will try to avoid antagonizing customers in their local markets. Company-specific “do not call” lists facilitate resolution of problems on a local level, and in a timely manner.

Finally, and most importantly perhaps, from a consumer point of view, is the fact that “do not call” lists preserve consumer choice. Most of the other regulatory policing mechanisms described in the NPRM would force consumers into a Hobson’s Choice -- either receive an unrestricted number of telephone solicitations or receive none at all. Many consumers do not mind receiving telephone solicitations from certain favorite charities, causes or organizations. A substantial segment of the population should not be forced to forego the ability to receive some solicitations to accommodate the wishes of the few consumers who wish to ban all telephone solicitations.

The Companies would support a regulatory framework such as the one proposed by the DMA. The DMA proposal would require that a company’s policy regarding the operation of its “do not call” system: 1) be in writing; 2) set forth adequate practices to assure that telephone service representatives are informed of and trained in the use of the “do not call” system; 3) remove from the marketer’s calling list for a reasonable period of at least one year the names of persons who do not wish to receive calls; and 4) maintain records demonstrating that “do not call” requests are honored.<sup>17</sup>

Those opposed to company-specific “do not call” lists argue that “do not call” lists “would be an administrative nightmare and would only offer

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<sup>17</sup> DMA at 16.

the individual consumer a patchwork of protection.”<sup>18</sup> They raise potential problems such as the consumer having to notify every single company that might call him or her and the lack of standardization between companies in terms of how consumers are notified as to the existence of such lists.<sup>19</sup> Further, they argue that regulators would be unable to determine whether there had been a violation of a “do not call” request.<sup>20</sup>

To minimize the need to contact individual companies, consumers can register with the DMA and be placed on their list of consumers not to call. Many telemarketers refer to the DMA lists thereby significantly reducing the burden on the consumer. With respect to publicity about the rules, consumers could be notified of the new rules through the news, telephone directories, bill inserts, or a live preamble prior to soliciting the consumer. Enforcement of the rules would be as in every other judicial or quasi-judicial matter. The consumer would notify the appropriate regulatory body who would then investigate the matter.<sup>21</sup> In sum, the objections to company-specific “do not call lists” can be effectively handled by existing procedures and existing channels of communication.

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<sup>18</sup> Consumer Action at 13.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Consumers have numerous remedies under the Act. The federal law does not preempt state laws, so consumers will still have the protections available under state law. Additionally, the Act authorizes injunctive relief and a private right of action for monetary damages. 47 U.S.C. § 227(a)(3). The existing Commission complaint mechanism would be an additional option for those consumers who feel that the rules have not been honored.

V. A NATIONAL OR REGIONAL DATABASE WOULD BE COSTLY, DIFFICULT TO ADMINISTER AND SHOULD NOT BE ADOPTED.

Many commenters noted the many deficiencies inherent in a proposal to create a national database.<sup>22</sup> Probably first and foremost is the widespread acknowledgement that a national database would be costly to develop and administer.<sup>23</sup> An expensive national database would be wholly inconsistent with the Commission's tentative conclusion that the database would not be government sponsored.<sup>24</sup> Further, the President, in his signing statement, said that the Act should be implemented "at the least possible cost to the economy."<sup>25</sup> There is no way that a national database could be reconciled with that mandate from the President.

Second, not only would a national database be extremely costly, it would probably require the establishment of a federal agency to administer the database. Telemarketers would be required to submit their calling lists to such an agency that would then delete the names of individuals who did not wish to receive calls. This would be a mammoth undertaking. The majority of businesses in the country would probably have a "list" of some sort to submit to this central agency. This could substantially impede the free flow of commerce in this country. Further, the agency would also have to develop procedures to protect the confidentiality of customer lists and any other

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<sup>22</sup> See, DMA at 21-22, American Banker's Association at 4, Association of National Advertisers at 3, AT&T at 11-14, MCI at 5-6, Sprint Corporation at 8, and J.C. Penney at 22.

<sup>23</sup> The Center for the Study of Commercialism suggested establishment of a national database paid for by telephone companies and reimbursed by telemarketers (at 12). This suggestion should be rejected. The local telephone companies are not the source of the problem, and should not be required to invest time, money and other resources to resolve problems not of their making.

<sup>24</sup> NPRM at ¶ 29.

<sup>25</sup> Presidential Signing Statement, S.1462.

proprietary information submitted by companies throughout the nation. All of this would result in additional costs on the companies that use telemarketing which would, in turn, result in increased costs to consumers.

Several commenters pointed to the Florida experience as an example of the complications of a government-administered database.<sup>26</sup> In Florida, the database is maintained by a state sponsored agency. In addition to the administrative burden placed on small businesses, they must also bear the additional expense of purchasing the state-mandated list. The database is relatively costly for smaller companies. The cost is approximately \$1,600 per year.<sup>27</sup> All of the problems with the Florida program will be compounded in any attempt to transfer a similar program to the national level. Further, there appears to be acknowledgment by consumers that the Florida system is not working, as evidenced by the minimal, and perhaps declining, level of consumer participation.<sup>28</sup>

Third, unless it were supported by very sophisticated software, a national database would probably eliminate consumer flexibility. Consumers would not be able to identify companies from whom they wish to receive solicitations.

Finally, none of the commenters proposed a cost-effective mechanism whereby the database could be updated on a timely basis. It has been suggested that a time lag of several months would be acceptable to

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<sup>26</sup> Merrill Lynch, Pierce, Fenner & Smith, Inc., at 3-4, American Express Company at 12, Time Warner at 7, Fn. 9 and DMA at 25..

<sup>27</sup> The cost is \$1,000 annually for paper edition, but on a national level, paper copies might prove too unwieldy.

<sup>28</sup> See, American Express Company at 12.

consumers,<sup>29</sup> but such a time lag undoubtedly reduces the perceived effectiveness of such a system. Company-specific "do not call" lists are much more flexible and susceptible to accommodating frequent changes.

Although the Companies recognize that consumers have a legitimate concern about telemarketing calls, it quickly becomes apparent that a national database would require that very substantial resources be devoted to a relatively small consumer relations problem.<sup>30</sup> One that can be addressed in an effective and efficient manner by other less costly and less complex means.

#### **VI. THE OTHER REGULATORY PROPOSALS ARE NOT TECHNICALLY FEASIBLE OR WOULD BE INEFFECTIVE.**

As indicated in the initial Comments of the Companies, there are significant limitations to the other proposals discussed in the NPRM.<sup>31</sup> Time of day restrictions are generally honored by most telemarketers as "good business etiquette," but by themselves will not necessarily reduce the number of telephone solicitations actually received. Special directory markings would provide some relief to consumers who do not wish to receive any calls, however, this option also eliminates consumer choice. It is another "all or nothing" solution. Modification of the North American Numbering Plan to allow a unique seven digit number to be reserved or assigned in every area code would be an extravagant use of a finite resource. Further, current technology does not permit the called party to block all calls from a single prefix on a terminating basis. Thus, none of the alternatives discussed above

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<sup>29</sup> Consumer Action at 12.

<sup>30</sup> The Commission only received 757 complaints in 1991 and sales were \$435,000,000,000 the preceding year. NPRM ¶ 24. Moreover, the American Council of Life Insurance reported that its members received only 26 complaints out of 3.4 million calls in 1991.


<sup>31</sup> Ameritech Operating Companies at 16-17.

offer substantial promise as a solution to the problem of unwanted telephone solicitations.

VII. CONCLUSION.

In general, the Commission's proposed regulations in this matter represent a constitutionally sound and pragmatic solution to the problem of unwanted telephone solicitations. By clarifying exactly which types of equipment are to be categorized as autodialers and when their use in connection with residential phone calls will be permitted, the Commission will have set forth a workable outline for a solution to this problem. Significantly, by adopting a regulatory framework based on company-specific "do not call" lists, the Commission will place the costs of the reforms on the companies engaged in telemarketing, and will not unfairly burden third parties. Moreover, the foundation for a regulatory solution based on company-specific "do not call" lists is already in place.

Respectfully submitted,

  
Floyd S. Keene  
Pamela J. Andrews  
Attorneys for the Ameritech  
Operating Companies  
2000 West Ameritech Center Drive  
Room 4H74  
Hoffman Estates, Illinois 60125  
(708) 248-6082

June 25, 1992



# CERTIFICATE OF SERVICE

I, Jenell Thompson, do hereby certify that a copy of the Reply Comments of the Ameritech Operating Companies has been mailed this 25th day of June 1992, by first-class mail, postage prepaid, to the parties on the attached service list.

By: Jenell Thompson  
Jenell Thompson

SERVICE LIST

Debra L. Lagapa  
Robert G. Ballen  
Mary K. O'Connell  
Banc One Corporation, et. al.  
2000 Pennsylvania Avenue, NW  
Washington, DC 20006

John F. Sturm  
American Newspaper Publishers  
Association  
Box 17407 Dulles Airport  
Washington, DC 20041

Richard E. Wiley  
Michael Yourshaw  
William B. Baker  
WILEY, REIN & FIELDING  
1776 K Street, NW  
Washington, DC 20006

David S. Dickson  
The Baltimore Sun  
501 North Calvert Street  
P.O. Box 1377  
Baltimore, Maryland 21278-0001

Stephanie Grubert  
Pennsylvania Newspaper  
Publisher's Association  
2717 North Front Street  
Harrisburg, PA 17110

Stephen M. Nelson  
Community Benefits Corporation  
1109 N. Thompson Street  
Richmond, VA 23230

John F. Dodd  
Brad I. Pearson  
Attorneys for Independent  
Telecommunications Network, Inc.  
Smith, Gill, Fisher & Butts  
One Kansas City Place  
1200 Main Street, 35th Floor  
Kansas City, MO 64105-2152

Maury S. Kauffman  
The Kauffman Group  
324 Windsor Drive  
Cherry Hill, NJ 08002

James P. Tuthill  
Pacific Bell and Nevada Bell  
140 New Montgomery Street, Rm. 1529  
San Francisco, CA 94105

Nancy C. Woolf  
Pacific Bell and Nevada Bell  
140 New Montgomery Street, Rm. 1529  
San Francisco, CA 94105

James L. Wurtz  
1275 Pennsylvania Avenue, N. W.  
Washington, D.C. 20004

Linda D. Hershman  
The Southern New England Telephone Co.  
227 Church Street  
New Haven, CT 06506

Durward D. Dupre  
Richard C. Hartgrove  
Michael J. Zpevak  
Robert J. Gryzmala  
Attorneys for Southwestern Bell  
Telephone Company  
1010 Pine Street, Room 2114  
St. Louis, Missouri 63101

Lawrence E. Sargeant  
Kathryn Marie Krause  
U S West Communications, Inc.  
1020 19th Street, N.W., Suite 700  
Washington, D.C. 20036

Kathryn A. Ekeler  
ITI Marketing Services, Inc.  
8712 W. Dodge Road, Suite 200  
Omaha, NE 68114

Andrew D. Lipman  
Margaret M. Charles  
Swidler & Berlin, Chtd.  
3000 K Street, N.W., Suite 300  
Washington, D.C. 20007

Amy N. Lipton  
Senior Vice President and  
General Counsel  
CUC International Inc.  
707 Summer Street  
Stamford, CT 06904-2049

Diane S. Killory  
Susan H. Crandall  
Morrison & Foerster  
2000 Pennsylvania Avenue, N.W.  
Suite 5500  
Washington, D.C. 20006

Thomas C. Franks  
President  
American Resort Development Assoc.  
1220 L Street NW, Suite 510  
Washington, D.C. 20005

Daniel L. Jaffe  
Executive Vice President  
for Government Relations  
1725 K Street, NW, Suite 601  
Washington, D.C. 20006

Kyle Fuller  
347 Richards Road  
Columbus, OH 43214

Randolf H. Aires  
Vice President  
Sears, Roebuck and Co.  
833 Pennsylvania Avenue, NW, Suite 600  
Washington, D.C. 20004

Michael J. Altier  
Vice President, General Counsel  
National Retail Federation  
501 Pennsylvania Avenue, N.W., Suite 710  
Washington, D.C. 20004

Daniel E. Lungren  
Attorney General  
State of California  
Department of Justice  
300 S. Spring Street, Suite 5212  
Los Angeles, CA 90013

William J. Cowan  
State of New York  
Department of Public Service  
Three Empire State Plaza  
Albany, NY 12223

Jeremiah Courtney  
Stephen G. Kraskin  
Sylvia L. Lesse  
Attorneys for U.S. Intelco Networks, Inc.  
Blooston, Mordkofsky, Jackson & Dickens  
2120 L Street, N.W.  
Washington, D.C. 20037

Michael J. Tarner  
Teknekron-Infoswitch Corporation  
4425 Cambridge Road  
Ft. Worth, TX 76155

Albert H. Kramer  
Robert F. Aldrich  
Attorneys for the North American  
Telecommunications Association  
Keck, Mahin & Cate  
1201 New York Avenue, N.W.  
Penthouse Suite  
Washington, D.C. 20005

James R. Young  
Donald A. Widder  
United Electric Cooperative, Inc.  
P.O. Box 688  
DuBois, PA 15801

Jay C. Keithley  
Leon Kestenbaum  
Phyllis Whitten  
Sprint Corporation  
1850 M Street N.W.  
Washington, DC 20036

W. Richard Morris  
Sprint Corporation  
P.O. Box 11315  
Kansas City, MO 64112

Lee Fisher  
James B. Gainer  
Ann E. Henkener  
Public Utilities Commission of Ohio  
180 E. Broad Street  
Columbus, OH 43266-0573

Mary McDermott  
Carlos J. Sandoval  
New York Telephone Company and  
New England Telephone and Telegraph Co.  
120 Bloomingdale Road  
White Plains, NY 10605

John F. Barker  
Linda F. Golodner  
National Consumers League  
Suite 928N  
815 Fifteenth Street N.W.  
Washington, DC 20005

Mary J. Sisak  
Donald J. Elardo  
MCI Telecommunications Corporation  
1801 Pennsylvania Avenue N.W.  
Washington, DC 20006

James R. Cooke  
Harris, Beach & Wilcox  
Suite 1000  
1611 North Kent Street  
Arlington, VA 22209

Michael Altschul  
Jack W. Whitley  
Cellular Telecommunications Industry  
Association  
1133 21st Street, N.W.  
Suite 300  
Washington, DC 20036

Thomas A. Stroup  
Telocator, the Personal Communications  
Industry Association  
1019 19th Street, N.W.  
Suite 1100  
Washington, DC 20036

Brian R. Moir  
Fisher, Wayland, Cooper & Leader  
1255 23rd Street, N.W.  
Suite 800  
Washington, DC 20037-1170

Robert C. Varney  
International Telesystems Corporation  
555 Herndon Parkway  
Herndon, VA 22070

John M. Goodman  
Lawrence W. Katz  
The Bell Atlantic Telephone Companies  
1710 H Street, N.W.  
Washington, DC 20006

Peter Arth, Jr.  
Edward W. O'Neill  
Ellen S. Levin  
People of the State of California and  
Public Utilities Commission of the  
State of California  
505 Van Ness Avenue  
San Francisco, CA 94102

Martin T. McCue  
Linda Kent  
United States Telephone Association  
900 19th Street, NW, Suite 800  
Washington, DC 20006-2105

William Barfield  
A. Kirven Gilbert III  
BellSouth Corporation  
1155 Peachtree Street, N.E.  
Suite 1800  
Atlanta, GA 30367-6000

Charles F. Wright  
Centel Corporation  
8725 Higgins Road  
Chicago, IL 60631

Theodore D. Frank  
Vonya B. McCann  
Arent Fox Kintner Plotkin & Kahn  
1050 Connecticut Avenue, N.W.  
Washington, DC 20036-5339

Daniel L. Bart  
GTE Service Corporation  
Suite 1200  
1850 M. Street, N.W.  
Washington, DC 20036

David Cosson  
L. Marie Guillory  
National Telephone Cooperative Association  
2626 Pennsylvania Avenue, N.W.  
Washington, DC 20037

Stephen A. Rogers  
The Syracuse Newspapers  
Clinton Square  
PO Box 4915  
Syracuse, NY 13221-4915

Albert D. Gittrich  
The Star - Ledger  
Star-Ledger Plaza  
Newark, NJ 07101

Alex Machaskee  
The Plain Dealer  
1801 Superior Ave.  
Cleveland, OH 44114

Peter O'Connell  
Kathleen A. Kirby  
Reed, Smith, Shaw & McClay  
1200 18th Street, N. W.  
Washington, D. C. 20036

Brenda L. Fox  
Peter H. Feinberg  
Christine Bumpus  
Dow, Lohnes & Albertson  
1255 Twenty-Third Street, N. W.  
Suite 500  
Washington, D. C. 20037

Ian D. Volner  
Allan R. Adler  
Michelle M. Shanahan  
Cohn and Marks  
1333 New Hampshire Avenue, N. W.  
Suite 600  
Washington, D. C. 20036  
Direct Marketing Association

Fleischman and Walsh  
1400 16th Street, N. W.  
Suite 600  
Washington, D. C. 20036  
Time Warner Inc.

Daniel Brenner  
Dean Hansell  
Ari Kahan  
Counsel for Mr. Fax  
725 south Figueroa Street  
Suite 3600  
Los Angeles, CA 90017-5436

Mr. Fax  
4 Vanderbilt  
Irvine, California 92718

Peter D. O'Connell  
Kathleen A. Kirby  
Gannett Co., Inc.  
REED SMITH SHAW & MCCLAY  
1200 18th Street, NW  
Washington, DC 20036

Ann Marie Czulowski  
Lucy Weymouth  
Student Loan Marketing Association  
1025 Thomas Jefferson St., N. W.  
Washington, D. C. 20007

Peter A. Rohrbach  
Hogan & Hartson  
555 13th Street, N. W.  
Washington, D. C. 20004

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

Richard E. Wiley  
James T. Bruce, III  
Rachel J. Rothstein  
of Wiley, Rein & Fielding  
1776 K Street, N. W.  
Washington, D. C. 20006

Basil J. Mezines  
Stein, Mitchell, & Mezines  
General Counsel for  
American Collectors Association  
1100 Connecticut Avenue, N. W.  
Suite 1100  
Washington, D. C. 20036

Jeffrey L. Sheldon  
Mara J. Primosch  
Utilities Telecommunications  
Council  
1140 Connecticut Avenue, N. W.  
Suite 1140  
Washington, D. C. 20036

David A. Brune  
Baltimore Gas and Electric  
Charles Center  
PO Box 1475  
Baltimore, Maryland 21203

Ken McEldowney  
Consumer Action  
116 New Montgomery, Street, Suite 233  
San Francisco, CA 94105

Larry Fuller  
Argus Leader  
200 South Minnesota Avenue  
Box 5034  
Sioux Falls, SD 57117-5034

Ashton Phelps, Jr.  
The Times-Picayune  
3800 Howard Avenue  
New Orleans, LA 70140-1097



Dirk C. Bloemendaal, Counsel  
Corporate Government Affairs  
Amway Corporation  
7575 Fulton Street  
East Ada, Michigan 43559-7410

Jodi Meryl WALLace  
Executive Director, Corporate Affairs  
EIS Electronic Information Systems, Inc.  
1351 Washington Blvd.  
Stamford, CT 06902

David D. Wierman  
Publisher  
The Ann Arbor News  
340 E. Huron St.  
Ann Arbor, MI 48106-1147

Gary Berkley  
President and Publisher  
Belleville News- Democrat  
120 S. Illinois St.  
Belleville, IL 62220

J.C. Hickman  
Publisher  
The Bellingham Herald  
1155 State St.  
P.O. Box 1277  
Bellingham, WA 98227

Colin Mc Whinnie  
Marketing Manager, JBS  
J. Blenkarn Systems  
131 Caledonia N.E.  
Grand Rapids, MI 49505

Cheryl Issod  
Sales Manager  
Centre Daily Times  
P.O. Box 89  
State College, PA 16804

James L. Dimmitt  
Publisher  
Chico Enterprise-Record  
400 E. Park Ave.  
P.O. Box 9  
Chico, California 95927-0009

Arthur E. Mayhew  
Publisher  
Bucks County Courier Times  
8400 Route 13  
Levittown, PA 19057

Pipes Gaines  
Co-Publisher  
Daily News  
P.O. Box 90012  
Bowling Green, KY 42102-9012

Chuck Schussman  
Telemarketing Sales Manager  
Daily News, Los Angeles  
P.O. Box 4200  
Woodland Hills, CA 91365-4200

William C. Marcil  
Publisher  
The Forum, Fargo- Moorhead  
P.O. Box 2020  
Fargo, ND 58107

Maynard A. Buck  
Publisher  
The Free Press Standard  
Carrollton Publishing Company  
43 E. Main St.  
P.O. Box 37  
Carrollton, Ohio 44615

Harry M. Whipple  
President and Publisher  
The Cincinnati Enquirer  
617 Vine St.  
Cincinnati, Ohio 45201

Dan A. Martin  
Mike Huot  
News-Press  
2442 Dr. Martin Luther King Jr. Blvd.  
Fort Myers, FL 33901-3987

John W. Gemmer  
The Goshen News  
114 S. Main St.  
P.O. Box 569  
Goshen, IN 46526-0569

Richard A. Morton  
The Grand Rapids Press  
155 Michigan NW  
Grand Rapids, MI 49503

Harlan B. Ratzky  
Investor's Business Daily  
1941 Armacost Ave.  
Los Angeles, CA 90025

Raymond A. Jansen  
The Hartford Courant  
Hartford, CT 06115

Christine M. Yakulik  
The Johnstown Tribune Publishing Company  
The Tribune Democrat  
Johnstown, PA 15907

Richard L. Holtz  
Journal and Courier  
217 N. Sixth St.  
Lafayette, IN 47901

George Arwady  
Kalamazoo Gazette/Weekly Gazette/  
Hometown Gazette  
401 S. Burdick St.  
P.O. Box 2007  
Kalamazoo, MI 49003

Richard J. Ferris  
Lansing State Journal  
120 E. Lenawee st.  
Lansing, MI 48919

Gary W. Ostrom  
The Muskegon Chronicle  
981 Third St.  
P.O. Box 59  
Muskegon, MI 49443

Susan Dowler  
403 S. Cedar Lane  
Upper Darby, PA 19082

Joseph Marrone  
New Haven Register  
40 Sargent Drive  
New Haven, CT 06511-5918

Frank E. Deaner  
Ohio Newspaper Association  
1225 Dublin Road  
Columbus, Ohio 43215

Paul E. Jones  
The Orlando Sentinel  
633 North Orange Avenue  
Orlando, FL 32801

Edward M. Kelley  
The Princeton Packet, Inc.  
300 Witherspoon Street  
Princeton, NJ 08540

Eliot C. White  
The Record- Journal Publishing Company  
11 Crown Street  
Meriden, CT 06450

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**In the Matter of** )

**The Telephone Consumer** )  
**Protection Act of 1991** )

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Federal Communications Commission  
Office of the Secretary

**CC Docket No. 92-90**

**SECOND COMMENT OF  
DIGITAL SYSTEMS INTERNATIONAL, INC.,  
TO  
FCC NOTICE OF PROPOSED RULEMAKING  
(Adopted April 10, 1992; Released April 17, 1992)**

Wm. Bradford Weller  
Laura McMeuer  
Digital Systems International, Inc.  
6464 185th Ave NE  
Redmond, WA 98052-5032  
206-869-4582

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BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C.

FCC MAIL SECTION

JUN 25 10 40 AM '92

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

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SECOND COMMENT OF  
DIGITAL SYSTEMS INTERNATIONAL, INC.,  
TO  
FCC NOTICE OF PROPOSED RULEMAKING  
(Adopted April 10, 1992; Released April 17, 1992)

JUN 25 1992

Federal Communications Commission  
Office of the Secretary

Digital Systems International, Inc. ("Digital Systems"), again expresses its appreciation for the opportunity to comment on the work accomplished by the FCC in its Notice of Proposed Rulemaking (the "NPR") mandated by the Telephone Consumer Protection Act of 1991 (the "TCPA"). As stated in its first comment submitted May 26, 1992, Digital Systems supports the views voiced by Congress and the American people regarding the improper use of automated telephone dialing equipment. Digital Systems has reviewed the comments submitted by scores of business entities in the FCC's designated first comment round, and continues to believe, along with the majority of the entities who have commented on the proposed regulations, that reasonable controls can and should be placed on this technology so the American consumer is protected.

The purpose of this second comment, however, is to point out that a significant number of parties submitted comments remarkably similar to the comment of Digital Systems. Each of these parties is a user or vendor of predictive dialing systems, and each expressed concern that the proposed

regulations promulgated by the FCC are unnecessarily restrictive in connection with use of predictive dialer systems.

Common themes running through these comments include:

- The fact that, because predictive dialers are used to connect live operators with the called parties, predictive dialers are completely different from the kinds ADRMPs and ADADs that Congress intended to regulate with enactment of the TCPA.
- Many point out that telephone numbers are not randomly or sequentially generated by predictive dialers, and consequently predictive dialers are not or should not be subject to the TCPA at all. These parties ask the FCC to reflect this interpretation more clearly in its regulations.
- Similarly, many comment on the ambiguity of the regulations concerning the definition of auto dialers, and seek clarification of the kinds of systems and the types of use thereof that will trigger the restrictions imposed by §§227(b) and (d) of the TCPA. Several of these comments focus on the fact that predictive dialers are used to connect live operators to the called parties, are therefore more akin to live operator calls, and should be treated differently from auto dialers.
- Others focus specifically on issues addressed in Digital Systems' first comment -- that predictive dialers only deliver "messages" when playing a brief request to "hold the line" for an operator.

Attached as Exhibit A is a matrix of the various comments submitted by others that amplify or echo the comments submitted by Digital Systems. A review of these comments proves the importance of this issue to mainstream and responsible American businesses. This issue should be given an equal amount of attention to that which will be accorded the national do-no-call list issues, which was the focus of so many of the comments submitted.

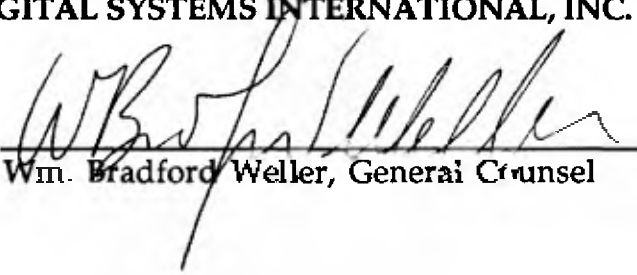
Digital Systems again urges the FCC to adopt a definition of the term "message" so that predictive dialer use of hold-queues is not restricted, or to

otherwise clarify or amend its regulations as suggested by others to alleviate the impact of the TCPA on responsible use of predictive dialers.<sup>1</sup>

Respectfully Submitted this 24th day of June, 1992.

**DIGITAL SYSTEMS INTERNATIONAL, INC.**

By

  
Wm. Bradford Weller, General Counsel

---

<sup>1</sup> Digital Systems suggested in its first comment that the term "message" be defined to exclude requests to hold the line for a live operator, or some similar request, where:

- a. the calling party intends to connect the called party with a live operator as soon as an operator is available;
- b. the duration of time the called party is placed on hold does not exceed sixty seconds;
- c. no solicitation or other request is made by the calling party in the recorded request; and
- d. where the system automatically releases the called party's line within 5 seconds of the time notification is transmitted to the system that the called party has hung up.

EXHIBIT A

SUMMARY OF COMMENTS RE PREDICTIVE DIALERS

COMMENTING ENTITY	SUMMARY OF COMMENTS
SEARS	<p>Final rule should draw a clear distinction between the ordinary use of automatic dialing equipment and the automated delivery of a recorded message.</p> <p><b>Calls merely utilizing a labor saving device to make live operator calls should not be subject to any of the ADRMP related rules since they pose no threat to privacy rights.</b></p> <p>Disconnection requirement: notification must be the signaling protocol that is transmitted from the called party back to the originating equipment. Also, any standards set should be consistent with technical capabilities.</p>



<p><b>NATIONAL RETAIL FEDERATION</b></p>	<p>Comment focused on debt collection exemption.</p> <p>Automatic dialing equipment greatly increases the efficiency of the collector and thereby reduces the cost of collection, alleviating unnecessary burdens on the American economy and the American public.</p> <p>Requirement for self identification in "message:" In the case of calls made using sophisticated dialers, the delivery of a complete preamble may not always be possible. A prerecorded message may be interrupted, before completion, when the live operator comes on the line. The literal requirement of the FCC's proposed rule could be satisfied by excluding use of a please hold request as a triggering issue. Either result is illogical, costly and unnecessary with respect to TCPA.</p> <p>The NRF believes the ideal solution is simply exempt collection calls.</p>
<p><b>SPRINT</b></p>	<p>Sprint uses autodialers to initially dial the potential customer, and the customer may occasionally be asked by a pre-recorded request to wait momentarily for a live operator during occasional overflow situations.</p> <p>The autodialer is used as a productivity tool that lowers the cost of providing services. In neither case (collections and telemarketing applications) is an unsolicited pre-recorded advertisement delivered to the customer.</p> <p>The potentially objectionable intrusion to the privacy of the customer is minimized through the use of live personnel that actually deliver the real content of the call.</p> <p>In light of the use of live personnel to deliver real content of any communication with the called party, and the cost savings inherent in the use of predictive dialers, the rules should clearly allow auto dialers to use pre-recorded "wait momentarily" for live cust. svc. reps. announcements.</p>

<p><b>JC PENNEY</b></p>	<p>It is critical to distinguish. between auto dialers generally and the sub class of dialers known as ADRMPs. Auto dialers are a 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.</p> <p>In most cases, when the calling party is a live operator, an auto dialer call is indistinguishable to the recipient from an manual call. An ADRMP essentially substitutes a pre-recorded message for the live operator. 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 op. In the case of sophisticated. dialers, delivering a complete hold msg. may not always be possible.</p> <p>When all operators are busy, a brief request to "please stand by for an important message might be delivered. Since the equipment is programmed to connect a called party to a live operator at the earliest opportunity means that the recorded msg. sometimes will be interrupted in order to deliver a live operator more quickly. Thus, even though the equipment might be programmed to deliver the self ID message required by the TCPA, there is no guarantee that a live operator will become available before message is complete.</p> <p>Since this interruption occurs as a result of the equipment's programmed desire to facilitate the communications between the called party and the live operator, to require that consumers 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 the purposes of the act.</p> <p>JC Penny recommends that in those cases where a live operator is delivered to the called party, the FCC should clarify that the phrase "beginning of the message" to state that it is satisfied when a live operator is offered for questioning as to the identity of the entity initiating the call.</p>
-------------------------	---

<p><b>VANGUARD CELLULAR</b></p>	<p>A predictive dialer is not an auto dialer because it does not and can not <u>generate</u> numbers. The numbers must be loaded into it.</p>
<p><b>NORTH AMERICAN TELECOMMUNICATIONS ASSOCIATIONS</b></p>	<p>In addressing consumer issues posed by certain uses of technology, it is important to preserve the ability of businesses to use new technology flexibly and efficiently in marketing activities which the FCC recognizes are generally beneficial to consumers.</p> <p>In the TCPA's statements, the term "auto dialer call" is apparently being used as a shorthand for "transmission of a pre-recorded message." It is important to distinguish predictive dialing, which does not involve pre-recorded messages and does not lead to the specific problems targeted by the TCPA, from the abusive transmission of prerecorded advertisements to randomly dialed number's--the primary abuse at which the legislation's prohibitions are aimed.</p> <p><b>NATA urges the FCC to avoid using the term autodialer in such as way that predictive dialers are regulated.</b></p>

**AMERICAN COLLECTORS  
ASSOCIATION**

Even with the most advanced predictive dialing systems, the situation arises in which a call is connected before an operator is available. If the system were to simply hang up because no operator is available, then the answering party is left with the annoyance or possible disturbing uncertainty of an unidentified call.

If the system leaves the party on the line with no message or indication of any kind for more than a few seconds, the answering party is likely to hang up.

To avoid delay-related problems, most predictive dialing systems used by collectors deliver a recorded message to the called party which asks the party to hold for a moment. As an adjunct to predictive dialing, the automated recorded message functions solely for the purpose of alerting the answering party that operator will be coming on the line. The message conveys no other information.

ACA believes that this kind of recorded message, which functions solely as a functional adjunct of predictive dialing, is distinct from prerecorded messages with informational or solicitation content. Sales solicitations or other uses in which delivery of the contents of the recorded message is itself the purpose of the call are not the equivalent of "please hold" or "all operators are busy" or "one moment please".

ACA believes the TCPA was clearly directed at the use of "artificial or pre-recorded voice systems" as distinct from the requirements applicable to automated predictive dialing.

<p><b>GTE SERVICE CORPORATION</b></p>	<p>The FCC needs to clearly characterize what types of equipment or systems are intended to be included within the scope of the TCPA and FCC's rules. The definitions are ambiguous. <b>In any instance where the FCC will allow a live operator call, GTE urges the FCC to allow predictive dialers or similar automation to make such operations efficient.</b> Use of a more efficient method of calling with live operators should not raise any TCPA privacy concerns.</p>
<p><b>AMERICAN EXPRESS COMPANY</b></p>	<p>Live telephone solicitations require less regulatory attention than artificial or pre-recorded voice solicitations. The use of automatic dialing devices not coupled with artificial or prerecorded voice solicitations need not be restricted.</p> <p>The language of the TCPA, its legislative history and the NPRM contain inconsistent terms regarding "automatic dialing devices" and "artificial or prerecorded voice machine."</p> <p>It seems clear from the text of the TCPA that Congress recognized that automatic dialing devices (i.e.: those which are not coupled with artificial or prerecorded voice machines) pose virtually no threat to residential privacy interests. <b>It is important that a distinction be made , as Congress intended, between autodialers and artificial or prerecorded voice machines. The former merely accomplish a function--dialing--which all callers must do, and therefore pose no added threat to privacy.</b></p>
<p><b>CUC INTERNATIONAL</b></p>	<p>Whether a live operator call is placed by use of an autodialer or an operator's fingers should be irrelevant to the FCC's analysis. The only relevant factor from the customer's perspective is whether a live operator or a prerecorded message is on the other end of the line.</p>

<b>TIME WARNER, INC.</b>	Time Warner submits that the FCC should take precaution not to view as interchangeable terms "automatic dialing systems," "autodialer," "artificial or prerecorded voice" and "automated call."
<b>BANK ONE CORP ET AL..</b>	<p>Calls that use an auto dialing device, but do not leave a prerecorded or artificial voice solicitation message, use a mechanism that is often referred to as a "predictive dialer".</p> <p>In certain circumstances, a predictive dialer may leave a brief, non-solicitation message for the called party, either requesting that the party hold for a live operator, or if the called party is not home, requesting that the party call a specified number.</p> <p>The FCC should state that such calls that leave a brief message fall within the exemption for commercial, non-solicitation calls. The FCC's draft regulations recognize the difference between autodialer calls leaving a prerecorded or artificial voice message and calls that switch to a human operator once the connection is made.</p> <p>In the NPRM however, the FCC treats these categories as interchangeable and certain language in the NPRM could mistakenly be interpreted to suggest that the use of a predictive dialer to make calls to residential subscribers, where the dialer switches to a human operator, is prohibited unless it falls within one of the exemptions defined in the regulations.</p> <p>This was clearly not the intent of the TCPA, and the FCC should clarify that its regulations concerning automatically dialed calls to residential subscribers apply only to auto dialing systems that leave a prerecorded or artificial message (more than a please hold request).</p>
<b>BALTIMORE GAS &amp; ELECTRIC</b>	Predictive dialers should not regulated because telephone numbers are not generated, either randomly or sequentially.

<b>CITICORP</b>	<p>Exclude live operator calls (using predictive dialers) from the prerecorded messaging delivery impacts of the TCPA.</p> <p>Predictive dialers should be treated differently from the types of machines Act intended to regulate. No number generation.</p>
<b>AMERICAN SERVICE TELEMARKETING</b>	Treat predictive dialers differently. Live operator calls should not be regulated as message devices.
<b>MERRILL LYNCH PIERCE</b>	Live operator calls should be permitted. Brokers make 1.5 billion calls per year, without significant complaints. Favors company specific do not call lists.
<b>CENTEL CORP</b>	<p>TCPA does not prohibit calls by predictive dialers: No random or sequential number generation.</p> <p>Requests clarification and confirmation from the FCC.</p>
<b>AMERITECH OPERATING CO. (ILLINOIS BELL; INDIANA BELL; MICHIGAN BELL; OHIO BELL; AND WISCONSIN BELL)</b>	<p>Statute and regulations are ambiguous regarding restrictions on use of auto dialers and messaging systems.</p> <p>FCC should distinguish between live operator calls (using predictive dialing systems) and the types of calls TCPA intended to regulate. 2% of calls put into their hold queues at even slowest calling setting. Need to use the please hold requests.</p> <p>Live operator calls less offensive to consumers.</p>
<b>SOUTHWESTERN BELL</b>	Predictive dialer calls, using hold-queue "please hold" requests, should be excepted from regulation of autodialer calls.

<b>STUDENT LOAN MARKETING ASSOCIATION</b>	<p>Raise issues re use of predictive dialer hold queue "please hold" requests:</p> <ul style="list-style-type: none"> <li>• calls transferred to operator before any ID message completed.</li> <li>• Rarely receive complaints.</li> </ul>
<b>CONSUMER BANKERS ASSOCIATION</b>	FCC should create an exception for predictive dialer use. <b>The please hold request is not a message; regulations should be clarified to make sure predictive dialing is not subject to rules and standards.</b>
<b>AMERICAN BANKERS ASSOCIATION</b>	<p>Requests clarification that predictive dialers not regulated since they just store and do not generate numbers to be called.</p> <p>Requests clarification over use of self ID rules and Fair Debt Collection Practice restrictions.</p>
<b>PACIFIC BELL &amp; NEVADA BELL</b>	Distinguish between predictive dialers and regulated auto dialers. No numbers generated.
<b>ELECTRONIC INFORMATION SYSTEMS</b>	<p>ADRMPS do not facilitate communication between caller and callee.</p> <p>There is no perceptual difference between predictive dialing and manual dialing. The fact that the process is automated is irrelevant from the standpoint of the telephone consumer. It is clear that there are several distinguishing factors between autodialers and predictive dialers.</p> <p><b>The laws regulating autodialers should reflect the different automated dialing systems, and the FCC needs to clarify the definition and use consistent industry terminology.</b></p>



EXHIBIT B

INDUSTRY STATISTICS

COMMENTING ENTITY	SUMMARY OF COMMENTS
Business Marketing, June 1992	The 100 top business to business marketers anticipate to increase spending in telemarketing by 49% during the next few years.
CITICORP	<p>\$5 Million per year spent on predictive dialing equipment credit card operations.</p> <p>\$5:\$1 return (they recover \$5 for every \$1 spent).</p> <p>\$26 Million per year in revenue resulting from use of predictive dialing equipment.</p>
AT&T	<p>Telemarketing industry supports 3.4 million jobs nationwide.</p> <p>Over 300,000 bus. actively telemarket to business &amp; residential consumers.</p> <p>Businesses make more than 300,000 tmktg. calls to more than 18 million Americans each day.</p> <p>One out of every 14 people called by a telemarketer makes a purchase.</p>
JC PENNEY	Penneys has invested more than \$13 million in auto dialer equipment for debt collection.

<b>AMERICAN COLLECTORS ASSOC.</b>	U.S. collection agencies handled betw. \$70 and \$80 billion in placements in 1991.
<b>CUC INTERNATIONAL</b>	More than 2 million of the potential customers called purchase one or more of CUC's services, generating approx. \$250 million revenues a year. Once potential customers become members, they purchase trips & merchandise worth over \$400 million per year.
<b>AMERICAN SERVICE TELEMARKETING</b>	300 Employees engaged in calling activities. Invested more than \$800,000 in predictive dialing equipment.
<b>AMERICAN COUNCIL OF LIFE INSURANCE COMPANIES</b>	Statistics of complaints generated by live operator calls by various members: <ul style="list-style-type: none"> <li>• 26 complaints in 3.4 million calls in 1991.</li> <li>• .53 complaints per 100,000 calls in 1991.</li> <li>• 125 complaints out of 22.1 million calls in 1991.</li> <li>• .0004% complaints in 1991</li> </ul>
<b>TIME WARNER, INC.</b>	More than 3.7 million people order Time Warner products annually via tmktg.



# Pitney Bowes

Executive Director, Corporate Communications  
and Public Affairs

FCC MAIL SECTION

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June 24, 1992

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Federal Communications Commission  
1919 M Street, N.W.  
Washington, DC 20554

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Re: Reply Comments to Proposed Rules  
47 CFR Parts 64 and 68  
CC Docket No. 92-90; FCC 92-176  
Telephone Consumer Protection Act of 1991

JUN 25 1992

Federal Communications Commission  
Office of the Secretary

Pitney Bowes would like to take this opportunity to comment on the rules which are proposed for compliance with the Telephone Consumer Protection Act of 1991 (TCPA).

The language of the TCPA restricts companies from initiating telephone calls to "residential" telephone lines using an "artificial or prerecorded voice to deliver a message" without prior consent of the party being called.

The TCPA does not clearly define the term "residential telephone line." Many people operate small businesses out of their homes, and use their telephone number for both business and residential purposes. Regulations should allow a presumption that telephone numbers provided under the terms of business agreements are business telephones. It would otherwise be overly burdensome for companies to determine that the number they are calling is not a residential telephone.

An additional concern involves the use of predictive dialers to place telephone calls to customers. These dialing systems are designed to connect outbound calls in a timely manner to live telephone operators. On some occasions, calls are placed by the system faster than operators can complete the preceding calls, resulting in a backlog. In such circumstances, predictive dialing systems play a brief recorded message which announces that a representative of the company will be on the line shortly.

This brief message is not part of a prerecorded sales pitch and should not be restricted by the regulations. To disallow such brief messages would require companies to slow down the rate at which their predictive dialers place calls. This would result in extensive periods of time during which operators would have to wait for calls, and would have a very negative impact on the productivity of marketing efforts.

Thank you for this opportunity to comment on the proposed rules.

Sincerely,

Henry J. Spring, Jr.

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

JUN 25 1992 ORIGINAL  
FILE

Federal Communications Commission  
Office of the Secretary

In the Matter of  
  
The Telephone Consumer  
Protection Act of 1991

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CC Docket No. 92-90

REPLY COMMENTS OF OLAN MILLS, INC.

Thomas W. Kirby  
James T. Bruce, III  
Paul C. Smith  
Rachel J. Rothstein  
of  
**WILEY, REIN & FIELDING**  
1776 K Street, N.W.  
Washington, D.C. 20006  
(202) 429-7000

June 25, 1992

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### Summary

Almost 200 parties filed comments in response to the Commission's NPRM. The comments overwhelmingly demonstrate that a company specific do not call ("DNC") mechanism would best allow the Commission to fulfill its statutory mandate under the TCPA without unduly burdening legitimate telemarketers and other entities. Furthermore, the DNC approach would be most consistent with the public's needs and expectations. Consumers would have the choice to discontinue unwanted solicitations, while continuing to receive information from favored companies. Finally, their decision to block certain future calls would be implemented quickly.

The comments also demonstrate that other proposals contained in the Commission's NPRM are not practical and would not promote the public interest. A national database would be a costly and burdensome measure, and would not allow consumers any real choice in which companies call them. A special directory marking system, as demonstrated by the LECs Comments, would also prove to be costly, slow, and would impose significant hardships on the carriers responsible for directory publishing.

Finally, Olan Mills urges the Commission to refrain from adopting further exemptions from the Act. A "de minimis" exemption from the live operator solicitation rules would seem impermissible under the statute, and would not result in

any additional benefits for consumers. Furthermore, the Commission's proposed exemptions to the provisions on commercial automatic calling appear to be at odds with the stringent statutory limitations on such exemptions.

Olan Mills urges the Commission to carefully consider all of its proposed options and to enact a flexible DNC mechanism to protect residential telephone subscribers from receiving solicitations to which they object.



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JUN 25 1992

Federal Communications Commission  
Office of the Secretary

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

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

**REPLY COMMENTS OF OLAN MILLS, INC.**

Olan Mills, Inc. ("Olan Mills"), by its attorneys, hereby submits its reply comments in the above-captioned proceeding.<sup>1</sup> The majority of the parties submitting comments to the Commission favor an approach that would place the responsibility for creating and maintaining systems to assure telephone subscriber privacy upon the telemarketing industry, rather than on the local exchange carriers or independent parties. Furthermore, as demonstrated by the comments, many of the Commission's proposed alternatives would be either ineffective in protecting subscriber privacy rights or prohibitively costly.

The overwhelming majority of parties favored Commission adoption of a company specific do not call ("DNC") option. Olan Mills agrees that this approach, while unquestionably a hardship on some companies engaged in telemarketing, would best allow the Commission to meet its statutory goals in an efficient and effective manner without being unduly

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<sup>1</sup> Telephone Consumer Protection Act of 1991, CC Docket No. 92-90 (rel. April 17, 1992) [hereinafter "NPRM"].

burdensome on the industry, the telephone companies or the public.

#### **I. Summary of Comments**

About 200 parties filed comments in response to the Commission's NPRM. Of these parties, all but a handful recommended that the Commission adopt a company-specific DNC mechanism to protect subscribers from receiving telephone solicitations to which they object. For example CUC International, commented "[s]uch a requirement would strike the appropriate balance between sufficiently protecting consumers' privacy interests while allowing companies to reach consumers who wish to take advantage of telemarketed goods and services."<sup>2</sup>

Of the remaining commenters, a few parties suggested that a national database would be the most appropriate option for the Commission to fulfill its mandate. Some of these commenters also expressed their interest in creating and developing the system. While Olan Mills would welcome a detailed discussion of the implementation of a national database, the comments were wholly devoid of such specifics. Several consumer organizations submitted comments suggesting that the Commission should seek to end all telemarketing,<sup>3</sup>

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<sup>2</sup> Comments of CUC International at 8.

<sup>3</sup> See Comments of Robert S. Bulmash at 5.

and that a national database may best effectuate this goal. However, based on the limitations contained in the statute, such a result is clearly not possible nor intended.<sup>4</sup>

Several parties also addressed the Commission's apparent confusion concerning the appropriate technological terminology for automated dialing equipment. These parties urged the Commission to clarify that the prohibitions discussed in the NPRM<sup>5</sup> apply only to solicitations utilizing automated dialing equipment in conjunction with an artificial or prerecorded voice, and not to live operator solicitations using automated dialing equipment. While the rules proposed by the Commission seem consistent with this approach, the NPRM often uses the term "auto dialer" as synonymous with dialing devices used in conjunction with prerecorded solicitations. Olan Mills is confident that the Commission will clarify its rules to remain consistent with Congress' intent.

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<sup>4</sup> The statute specifically exempts from the Commission's rules solicitations made by charitable, political and non-profit institutions and market surveys. See Pub. L. No. 102-243, § a(3), [hereinafter "TCPA"].

<sup>5</sup> NPRM at 3.

**II. A COMPANY SPECIFIC DO NOT CALL MECHANISM WOULD BEST ALLOW THE COMMISSION TO FULFILL ITS OBLIGATIONS UNDER THE ACT**

**A. The Comments Overwhelmingly Support a Company-Specific Do Not Call Approach**

The Commission's NPRM sought comments on five mechanisms which it believed might be useful in fulfilling its mandate under the TCPA. Of these alternatives, the comments overwhelmingly favor the adoption of a company-specific DNC approach. This system would provide an efficient method for telemarketers to end solicitations to consumers who do not wish to receive them, while promoting consumer choice.

Many of the commenting parties discussed their experience with DNC lists.<sup>6</sup> These parties have already voluntarily undertaken the expense necessary to develop these systems, and believe that if all telemarketers were forced to implement DNC lists, subscribers would be sufficiently protected from unwanted solicitations. Furthermore, the benefits associated with this system far outweigh the significant burdens and costs associated with the other Commission proposals.

There is no question that a DNC mechanism is the most "economical and consumer-result oriented approach to

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<sup>6</sup> See Comments of ITI Marketing Services at 2, Comments of JBlenkarn Systems at 1; Comments of King Teleservices at 2.

addressing concerns about unwanted telephone solicitations."<sup>7</sup> This is because the costs associated with implementation of the system are directly proportional to the amount of soliciting engaged in by the company. Small companies will not be forced to undertake unnecessarily large capital investments in order to comply with the Commission's rules. They remain free to develop a system that would reflect their individualized business needs. In addition, this system would place the costs -- and the burden of compliance -- on the telemarketer, rather than on the LEC or an independent third party.

Furthermore, a company-specific DNC promotes consumer choice. Consumers would have the right to discontinue solicitations from certain companies, while continuing to receive solicitations from favorite entities. Other systems proposed by the Commission present an all-or-nothing approach for consumers, and seem overbroad considering the amount of sales generated last year by telemarketing.<sup>8</sup> Obviously, many consumers choose to purchase goods and services as a result of telephone solicitations from certain companies. The DNC approach would allow the Commission to foster this choice, while allowing other consumers to end selected unwanted solicitations.

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<sup>7</sup> Comments of American Telemarketing Association ("ATA") at 2.

<sup>8</sup> As recognized by Congress, unsolicited sales calls generated \$435,000,000,000 in sales in 1990. TCPA at § 2.

Finally, a DNC list would allow a telephone subscriber's choice to be effectuated almost immediately. Once a consumer indicates his desire to discontinue further solicitations, there is no reason why a telemarketer cannot implement it in a realistic timeframe. Even if the DNC list is maintained by a corporate central office to which local offices report, it is unlikely that the DNC approach would result in the time lags associated with other Commission proposals.

Olan Mills urges the Commission to consider the benefits of a DNC system. These three factors -- least burden on commerce, consumer choice, and timing -- make the DNC approach the most attractive of all the mechanisms proposed to protect telephone subscriber privacy rights.

## **B. IMPLEMENTATION AND COMPLIANCE WITH A DNC SYSTEM**

### **1. The Olan Mill's DNC System**

While the comments submitted in this proceeding overwhelmingly favor a company-specific DNC mechanism, some of the parties did not discuss the specifics of the system or how it could be successfully implemented by the Commission. One attractive feature of the DNC approach is that it can be individually tailored to meet the needs of each specific company, thereby relieving the Commission from having to enact overly strict, technical requirements. Olan Mills

believes that the Commission should have an understanding of the details of such a system in order to be assured that this approach can successfully protect residential telephone subscribers' rights to privacy.

Olan Mills has utilized a DNC system for 16 years. The system was established as a response to some consumers' desires to be free from unwanted solicitations by the company. While Olan Mills' believes that many consumers want to hear information regarding its products, it is good business etiquette to refrain from contacting consumers who are not interested in making purchases from the company. Olan Mills believes that the DNC mechanism best fulfills these goals.

Olan Mills currently utilizes two systems to conduct its telemarketing campaigns. The larger studios utilize a computerized system, while operators in the smaller studios are provided hard-copy lists of names and telephone numbers. The computer printouts have various categories of call results which are coded by the Olan Mills' employee. One of the call result categories is placement on the Olan Mills DNC list. In order for a consumer to be added to the DNC list, he must express a desire not to be called again in the future. There are no "magic words" that are required by the consumer, any specific request from the consumer that the company should not call again in the future is sufficient.

Periodically, the computerized sheets are returned to Olan Mills' main computer facility in Chattanooga, Tennessee, where the names on these sheets are aggregated on a master computer list. When the company purchases a new marketing list,<sup>9</sup> the computer will run the list against Olan Mill's DNC list, and suppress the names which appear on the DNC. Thus, the operators in Olan Mills' studios will never see the names of the consumers who asked not to be called again, because their names will be deleted from the marketing list sent to the studio.

In smaller studios that are not "on line" with the main computer facility the process is even simpler. Consumers who ask not to be called again are coded and this code remains on the hard copy in order to prevent future calls. Because each studio has an exclusive area to serve, each individual office need only consult its own in-studio Do Not Call list. Gradually, Olan Mills will convert these studios to computers as well.

Olan Mills' solicitations are conducted by company employees. These employees are trained by Olan Mills, including how the DNC mechanism works. While Olan Mills often uses computers for its DNC system, computers are not

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<sup>9</sup> As discussed in its comments, Olan Mills' marketing lists are compiled from public records and do not include non-published phone numbers.



necessary to implement this approach. Small telemarketers can simply generate hand-written lists or keep file cards.

The experience of Olan Mills is that the company-specific do not call system is relatively inexpensive to maintain and operate. The company's total annual costs for updating and maintaining this system is estimated to be \$41,000. This works out to a cost of 11 cents for each DNC record per year.<sup>10</sup>

## **2. Compliance with Commission Rules**

Should the Commission adopt regulations to effectuate a company-specific DNC mechanism, it would need to specify minimal requirements for such a system and adopt procedures to ensure that companies adequately comply with the Commission's mandate. The Commission should also write the regulations in a manner such that compliance with the Commission's rules will constitute "reasonable practices and procedures" in accordance with Section 228 c(5) of the TCPA. This will ensure that telemarketers who comply with the Commission's rules will be accorded an affirmative good-faith defense to any actions brought against them.

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<sup>10</sup> This cost figure was calculated by first determining the total cost to the company of maintaining and updating all its phone records. Second, the percentage of all such phone records attributable to the Do Not Call system was determined. Finally, this percentage was applied to the total cost to the company of maintaining and updating all its phone records.

Olan Mills suggests that the Commission require telemarketers to file annually with the Commission a letter of certification that the company is in full compliance with the regulations. In addition, telemarketers should file with the Commission a copy of their written corporate guidelines on establishment of the DNC, which would include a policy of keeping DNC numbers for two years. Of course, the Commission retains authority under the TCPA to conduct audits and investigations of companies subject to the Act.

### **III. THE COMMENTS DEMONSTRATE THE UNDESIRABILITY OF THE OTHER COMMISSION PROPOSALS**

#### **A. A National Database Would Not Promote the Public Interest**

Only a handful of parties asked the Commission to consider the adoption of a national database. Unfortunately, none of these parties seem to present a cohesive and detailed description of how such a database might be established or operated. Furthermore, while at least one of the commenters would be interested in implementing the system, its comments lack specific cost estimates for its creation, or how these costs would be apportioned among the various types and sizes of telemarketers. Indeed, some of the commenters expressed

doubt as to whether they could even comply with such a system.<sup>11</sup>

The comments indicate that the costs of establishing a national database would be exorbitant. AT&T estimates that the database could cost between \$24 and \$80 million, depending on the complexity of system.<sup>12</sup> Household International believes that the costs "would be at least \$50 million, and may reach up to \$100 million."<sup>13</sup> Even the Commission estimated that a national database could cost up to \$6 million to implement.<sup>14</sup> The Commission would need to devise a mechanism to ensure that these costs are recovered in a way that does not unfairly burden small companies engaged in limited amounts of telemarketing.

Many companies and individuals engaged in telemarketing will also be required to make additional investments in both equipment and human resources for individual compliance. These costs will inevitably be passed on to consumers in the form of higher prices for goods and services.

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<sup>11</sup> See Comments of Avon; Comments of Amway Corporation at 3.

<sup>12</sup> Comments of AT&T at 12.

<sup>13</sup> Comments of Household International at 12.

<sup>14</sup> See Telephone Advertising Consumer Rights Acts, Rpt. No. 102-317, 102d Cong., 1st Sess. (1991) at 22.

**B. The Proposals Submitted in Favor of the National Database Lack Sufficient Details**

The comments in favor of a national database do not provide sufficient information to adequately assess this proposal. For example, InterVoice suggests that the Commission implement a licensing scheme "whereby all telemarketing organizations must petition to the FCC for a license to conduct their telemarketing operations," making monthly subscription to the database a condition of maintaining the license.<sup>15</sup> InterVoice recognizes, however, that implementation of the database "might be an onerous task and an expensive proposition if not properly implemented," but fails to provide any cost estimates for creating and establishing a national database.<sup>16</sup>

InterVoice's comments, however contain significant areas of concern for the Commission and for telemarketers. To begin with, the TCPA does not give the Commission the jurisdiction to license companies engaged in telemarketing. Furthermore, the Commission's authority to regulate common carriers under Title II of the Communications Act does not extend to telemarketers and the millions of other business and residential telephone customers who merely use the telephone services that common carriers provide. While the

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<sup>15</sup> Comments of InterVoice, Inc. at 9.

<sup>16</sup> Id. at 8.

Commission has power under Title I to regulate forms of "interstate and foreign communications by wire or radio" not expressly addressed elsewhere in the Act, such authority extends solely to matters "reasonably ancillary" to effectuating the Commission's expressly delegated responsibilities.<sup>17</sup> No such nexus exists here. The activities of telemarketers affect neither the availability of telephone services nor the terms and prices upon which such access is provided.

Even if one were to assume that, in theory, a licensing scheme might be devised that falls within the Commission's Title I authority, the actual implementation of such a scheme in an area wholly unaddressed by the Communications Act would necessarily lead to resource-consuming delay. Protracted legal challenges could be expected, similar to what invariably arises from major regulatory initiatives based solely on ambiguous statutory language.<sup>18</sup>

Moreover, the Commission's current financial and administrative limitations would preclude it from undertaking the daunting task of implementing from scratch an effective

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<sup>17</sup> See United States v. Southwestern Cable Co., 392 U.S. 157, 172 - 78 (construing 47 U.S.C. § 152(a)); see also FCC v. Midwest Video Corp., 440 U.S. 689, 706 (1979) (Commission "not delegated unrestrained authority;" authority recognized in Southwestern Cable was only that "necessary to ensure the achievement of the Commission's statutory responsibilities").

<sup>18</sup> See, e.g., Midwest Video.

nationwide licensing scheme for telemarketers. In sum, given the current limitations on the Commission, both legally and financially, it is doubtful that, as a practical matter, a comprehensive, nationwide licensing scheme of the sort that InterVoice apparently envisions could effectively be implemented.

LeJeune Associates also advocates adoption of a national database, asserting that based upon the Florida experience, "a database system can achieve virtually all of the goals of the TCPA . . . and can be funded through modest charges to telemarketers. . . ." <sup>19</sup> The proposal advocates Commission selection of a database administrator through a request for proposal ("RFP") process. Consumers could be notified of the database on the LEC billing statements, through press releases, and by other publicity efforts undertaken by the database administrator. <sup>20</sup> LeJeune also states its interest in administering the database system. <sup>21</sup>

Unfortunately, LeJeune fails to provide any cost estimate for the creation and establishment of a national database. While it projects revenues of \$2.5 million for sale of the lists to telemarketers, it does not predict the annual expenditures necessary to maintain the system. In

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<sup>19</sup> Comments of LeJeune Associates of Florida at iv.

<sup>20</sup> Id. at 22.

<sup>21</sup> Id. at 20.

addition, Olan Mills is unsure whether LECs could modify their billing systems to include additional messages on local subscriber bills, and how the costs for such modifications would be recovered. Finally, the issuance of an RFP seems inconsistent with the Commission's finding that the database should not be a government-sponsored institution.<sup>22</sup>

Several consumer groups also believe that a national database would best protect consumer's privacy rights. The Center for the Study of Commercialism suggests that the Commission establish a national database of consumers who want to receive telephone solicitations -- a do call list. The burden of "signing up on the list would fall only on those consumers who do wish to receive sales calls."<sup>23</sup>

Olan Mills submits that such an approach would not conform to the requirements of the TCPA. The statute directs the Commission to initiate a proceeding and prescribe regulations "concerning the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object." Under the proposal, consumers would not have an opportunity to object, rather they would have to decide which calls to accede to without knowing what the calls are. Privacy Times also advocates a national database system, although its comments

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<sup>22</sup> See NPRM at 13.

<sup>23</sup> Center at 11.

are wholly devoid of any factual analysis on implementation of such a system or its associated costs.

The National Consumers League ("NCL") recommends that the change of address information collected by the U.S. Postal Service can be used by consumers to indicate their desire to discontinue telephone solicitations. NCL advocates that the U.S. Postal Service add to the form information regarding the database and then allow consumers to indicate on the card their desire to be included in such a system.

Olan Mills has significant concerns about NCL's proposal. NCL does not provide details on how this system would be implemented. Would the change of address cards be forwarded to the database administrator for inclusion in the system, or would the Post Office be responsible for compiling a list of address holders who want to be in the telephone database? Furthermore, the U.S. Postal Service allows its change of address forms to be sold to commercial entities for marketing purposes. The TCPA, however, prohibits the use of a national database for commercial purposes.<sup>24</sup> Therefore, use of the U.S. Postal Service change of address system may result in inappropriate use of this information.

Consumer Action suggests that the FCC authorize creation of a National Telemarketing Center ("NTC") which would be governed by industry and consumer representatives. The NTC

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<sup>24</sup> TCPA at C(3)(k).



would be responsible for creating and implementing a national database. Companies would then be required to submit all of their telemarketing lists for comparison against the Center's database of consumers objecting to telephone solicitations. The cost of the searches would be borne by the telemarketer.

While this proposal is creative, Olan Mills does not believe that it represents a workable option for the Commission. First, substantial Commission involvement is a prerequisite to authorizing and creating the NTC. The Commission, however, has already indicated its desire to adopt procedures that would be the least burdensome on the Federal Government. Next, the telemarketing industry is comprised of an extremely diverse range of companies. It would be difficult to appoint individuals to manage the NTC who accurately represent the industry. Finally, a requirement that every company or individual engaged in telemarketing submit their marketing lists to the Center for prior clearance would be overly burdensome and will result in companies experiencing significant delays in conducting their marketing campaigns.

Very few parties support Commission adoption of a national database mechanism. And, the comments advocating this approach fail to provide a detailed discussion of the significant costs that such a system will place on telemarketers and the inherent complications associated with

its development. Indeed, the absence of detail in the proposals evidences the difficulty in developing answers to key questions, such as how the administrator would be chosen or how the costs would be apportioned among the various types and sizes of companies that engage in telemarketing. The database option is fraught with unreasonable costs and burdens and should not be implemented by the Commission.

**C. Other Alternatives Proposed by the Commission Are Not Feasible**

**1. The Comments Demonstrate that Special Directory Markings Would Prove Unworkable**

Another of the Commission's proposals involve the development of special markings in the local telephone directories to indicate a consumer's desire to refrain from telephone solicitations. The comments demonstrate, however, that this mechanism would prove unworkable for telemarketers conducting businesses on a nationwide basis and that the costs associated with such a system would be significant. Finally, this mechanism would most likely prove disappointing to many consumers because of the time lag inherent with a system that will only be updated on an annual basis.<sup>25</sup>

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<sup>25</sup> See Comments of Pacific Bell and Nevada Bell at 13; Comments of GTE Service Corporation at 16.

As noted by GTE, a directory markings system was "tried in Florida and proved ineffective."<sup>26</sup> Telemarketers use a variety of sources to develop their marketing lists and frequently do not consult local telephone directories. In addition, telephone directories "cover a finite geographic area that may not match the geographical area of the telemarketing campaign."<sup>27</sup> Thus, even primarily local telemarketers may be forced to check their marketing lists against several directories.

Based on the comments, the costs and administrative burdens associated with development of a special directory marking system would be substantial. NYNEX, for example, indicates that a special directory marking requirement would be "problematic,"<sup>28</sup> and would force the LECs to engage in detailed and costly procedures such as reprogramming service order systems and developing procedures to update, revise and store the lists.<sup>29</sup> Bell Atlantic estimates that the costs to develop a directory marking option could amount to \$70 million during the first year.<sup>30</sup> These costs would most

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<sup>26</sup> Comments of GTE at 16.

<sup>27</sup> Id.

<sup>28</sup> Comments of NYNEX Telephone Companies at 10.

<sup>29</sup> Id. at 10-14.

<sup>30</sup> Comments of Bell Atlantic Telephone Companies at 6.

likely fall on the LECs, since they are primarily responsible for publishing the directories.<sup>31</sup>

## **2. Network Technologies Cannot Currently Support Telemarketer Specific Blocking**

The comments also indicate that network technologies, which may allow the Commission to successfully protect consumers from unwanted telephone solicitations, do not yet exist. Indeed, it is significant that all of the local and interexchange carriers submitting comments in this proceeding indicated their belief that the network does not have the capacity to implement subscriber blocking.

For example, GTE stated that "it is not clear that the North American Numbering Plan has sufficient resources" to allow for a telemarketing specific prefix.<sup>32</sup> PacTel discusses the inability of the current network to allow selective call blocking on a prefix basis, as well the lack of ubiquitous CLASS type features in the telephone network.<sup>33</sup> AT&T states that the network technology proposal "is not technically viable at this time and is overly restrictive."<sup>34</sup>

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<sup>31</sup> See Comments of Pacific Bell and Nevada Bell at 14.

<sup>32</sup> Comments of GTE Service Corporation at 15.

<sup>33</sup> Comments of Pacific Bell and Nevada Bell at 13.

<sup>34</sup> Comments of AT&T at 15.

Olan Mills Studios does not profess to be an expert on the capabilities of the telephone network. However, the very carriers who design and operate the network seem to believe that the Commission's proposal cannot be implemented at this time without significant difficulties and costs. Olan Mills urges the Commission to carefully consider the comments of the carriers and refrain from enacting regulations which would place costly and burdensome requirements on the LECs and their ratepayers.

**3. Time-of-Day Restrictions Do Not Add Any  
Significant Protections for Consumers**

Finally, as discussed in its comments, Olan Mills does not believe that time-of-day restrictions would allow the Commission to fulfill its statutory mandate under the Act. The Act directs the Commission to enact procedures to protect residential telephone subscribers' privacy rights. Simply limiting telemarketing calls to certain hours of the day does not provide consumers with a mechanism to discontinue unwanted solicitations. Most of the parties commenting in this proceeding seem to take a similar view. Further, there has been no showing that the proposed 9 a.m. to 9 p.m. limitation would have any significant effect on the current patterns of telemarketing calls. And as the Commission points out, more restrictive limitations would impose an unacceptable burden on commerce.

**IV. THE COMMISSION SHOULD NOT ADOPT FURTHER EXEMPTIONS FROM THE ACT**

**A. De Minimis Exemptions**

Some companies suggest that the Commission adopt a "de minimis" exemption from whatever rules are eventually adopted by the Commission for certain telephone marketing operations.<sup>35</sup> These companies argue that "small, direct sellers be given protection in the FCC rules and differentiated from the national telemarketers."<sup>36</sup> Interestingly, a similar proposal is made by two large companies conducting business nationwide.<sup>37</sup> The basis for their proposed exemption appears to be that they call locally, and infrequently. The Commission, however, has no authority under the statute totally to exempt these categories of telemarketers from the rules. Therefore, Olan Mills urges the Commission to refrain from adopting any improper exceptions.

While Olan Mills is sympathetic to the difficulties associated with employing thousands of telemarketers nationwide, Congress clearly did not intend for these types of companies to be completely exempted from the Commission's

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<sup>35</sup> See Comments of JC Penney at 18.

<sup>36</sup> Comments of Amway at 3.

<sup>37</sup> See Comments of JC Penney at 18; Comments of Sears at 6.

rules. Rather, the language contained in Section 228 c(1)(D) of the statute carefully states that the Commission may consider "whether different methods and procedures may apply for local telephone solicitations".<sup>38</sup> It does not provide the Commission with the authority to exempt completely a certain category of telemarketers from its rules. The legislative history indicates that this provision was included to ensure that if the Commission adopted regulations which it believed would be particularly burdensome on localized telemarketers, that it would be free to implement different procedures for these companies in light of the self-policing pressures that exist on telemarketers operating solely within a community.<sup>39</sup> Nowhere in the legislative history, however, or the statute itself does Congress grant the Commission the authority to totally exempt these categories of telemarketers from the Commission's rules.

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<sup>38</sup> TCPA at § c(1)(D).

<sup>39</sup> See Additional Comments of Senator Pressler, the bill's sponsor, "this provision does not give any group a blanket exemption from the FCC regulations." Indeed, Olan Mills was one of the parties primarily responsible for this Section's inclusion in the statute. See Cong. Record (daily ed. November 18, 1991) H10344 (specifically mentioning Olan Mills as an example of companies doing businesses in a local setting).

**B. The Commission Should Not Adopt Additional Exemptions From Its Automated Calling Rules**

The NPRM suggests several exemptions to the automatic dialing system requirements. Specifically, the Commission proposes to exempt noncommercial calls, commercial calls that do not transmit an advertisement, calls by tax exempt nonprofit organizations and calls to former or existing clientele. Several of these exemptions are provided for in the statute for live operator solicitations, but not included for calls made by automated dialing systems with prerecorded or computer generated voices. However, Olan Mills is concerned about enacting further exemptions to the legislation which might allow callers to continue to receive calls to which they object.

Olan Mills would note that the TCPA imposes very stringent conditions on the ability of the Commission to exempt telemarketers from the restrictions on the use of automated telephone equipment as described in Section 228(b)(1)(B). While exemptions may be granted under the statute for noncommercial calls, the Commission may only grant an exemption for commercial calls if they "will not adversely affect the privacy rights that this section is intended to protect."<sup>40</sup> Therefore, Olan Mills questions the

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<sup>40</sup> TCPA at § b(2)(B).



basis for the Commission proposing to exempt commercial calls.

The legislative history of the TCPA reflects Congress' belief that calls made using ADRMs are more intrusive to the privacy concerns of telephone subscribers than calls made by live operators.<sup>41</sup> The Commission also has found that solicitations made by ADRMs are more intrusive and bothersome for telephone subscribers in that these calls "generate the bulk of consumer telemarketing complaints . . . ." <sup>42</sup>

Olan Mills urges the Commission not to expand on the exemptions already contained in the statute. Both Congress and the Commission have found that ADRMs solicitations are more bothersome to consumers, and represent the bulk of consumer frustration. Thus, there seems to be no reason to allow further exemptions than necessary. Olan Mills urges the Commission to refrain from adopting exemptions from its ADRM rules.

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<sup>41</sup> The Senate found that "automated telephone calls that deliver an artificial and prerecorded voice message are more of a nuisance and a greater invasion of privacy than calls placed by 'live' persons." See Automated Telephone Consumer Protection Act S. Rpt. No. 102-178 102d Cong., 1st Sess. (1991).

<sup>42</sup> NPRM at 11.

**V. CONCLUSION**

Based on the foregoing, Olan Mills urges the Commission to adopt flexible regulations that would require companies to develop a company-specific DNC mechanism.

Respectfully submitted,

**OLAN MILLS, INC.**

By 

Thomas W. Kirby  
James T. Bruce, III  
Paul C. Smith  
Rachel J. Rothstein

of

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

Its Attorneys

June 25, 1992

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D. C.

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

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

CONSOLIDATED REPLY COMMENTS OF HOUSEHOLD INTERNATIONAL

HOUSEHOLD INTERNATIONAL (hereinafter "Household"), by its attorneys, hereby submits its consolidated reply to certain comments filed in response to the Commission's Notice of Proposed Rulemaking (hereinafter "NPRM") initiating this proceeding.<sup>1</sup> For its consolidated reply, Household states as follows:

PROCEDURAL STATUS

1. The Commission initiated this proceeding for the purpose of adopting rules implementing the Telephone Consumer Protection Act of 1991 ("TCPA").<sup>2</sup> The NPRM set May 26, 1992 as the cut-off date for the filing of comments in this proceeding. By that date, the Commission had received over 200 comments in response to the NPRM.<sup>3</sup> Household was among the parties whose initial comments were timely filed. The NPRM also specified this date, June 25, 1992,

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<sup>1</sup> Notice of Proposed Rulemaking in the Matter of the Telephone Consumer Protection Act of 1991, FCC 92-176, released April 17, 1992.

<sup>2</sup> 47 U.S.C. § 227.

<sup>3</sup> Additional comments were received after the cut-off date.

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for the filing of reply comments. Accordingly, this consolidated reply is timely filed.

2. Given the multiplicity of comments, this consolidated reply will address only those comments which Household believes best exemplify the arguments regarding the critical issues in this proceeding. Therefore, any failure to directly rebut or support a specific argument by a particular commenter should not be construed as an acquiescence in, or opposition to, that argument by Household.

#### **PREDICTIVE DIALERS DISTINGUISHED**

3. Household believes that the Commission cannot fairly address the issues in this proceeding without further refining the terms "automatic telephone dialing systems" and "auto dialers." Certain of the initial comments filed in this proceeding provide substantial guidance as to the distinction between "predictive dialers" and "automatic dialer and recorded message players" ("ADRMPS").<sup>4</sup> Household utilizes only predictive dialers in its telecommunications activities. Accordingly, Household's comments may be construed only as support for certain uses of predictive dialers, and not as support for any use of ADRPMs.

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<sup>4</sup> Comments of Digital Systems International, Inc. ("Digital Systems"); D. F. King & Co., Inc. (King TeleServices); and Teknekron Infoswitch Corporation.

## DEBT COLLECTION CALLS

### Exemption of Debt Collection Calls

4. In its initial comments, Household supported the Commission's decision to include debt collection calls within the "business relationship" exemption of proposed rule Section 64.1100(c)(3). In addition, Household urged the Commission to strengthen the protection for debt collection calls by declaring them to also fall within the scope of the "prior express consent" exceptions set forth throughout proposed rule Section 64.1100. Upon reviewing certain comments, however, Household is constrained to urge the adoption of a specific, stand-alone, exemption for debt collection calls, which exemption should not be based upon any presently proposed exemption.

5. The plethora of comments the Commission received regarding debt collection calls demonstrates the sensitivity and importance of this issue to both consumers and businesses. One commenter went so far as to challenge the Commission's proposed inclusion of debt collection calls within the business relationship exemption by asserting that "a debtor who has failed to pay a debt is, in most cases, a person who no longer wishes to have a relationship with the creditor."<sup>5</sup> That commenter presumably would also take the position that any prior consent involved in a debtor-creditor relationship can be revoked by a debtor "who no longer wishes to have a relationship" with a creditor to whom that debtor still has a legal obligation.

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<sup>5</sup> Comments of Consumer Action, p. 8.

6. This situation, and various other comments, demonstrate the appropriateness of the recommendation of the Utilities Telecommunications Council ("Council") that the Commission create a specific exemption from the operation of Section 64.1100 for debt collection calls.<sup>6</sup> It would appear that, absent the creation of exemption such as proposed by the Council, the Commission and the courts will be called upon repeatedly to settle the inevitable arguments between debtors and creditors as to whether a "relationship" continues to exist or whether a "prior consent" remains in effect. It is imperative, therefore, that the Commission articulate and adopt a clear and specific exemption from the operation of Section 64.1100 for debt collection calls.

#### **Conformity With Fair Debt Collection Practices Act**

7. Household's initial comments alerted the Commission to the fact that it could not ignore the inherent conflict between the identification requirements of TCPA and the provisions of the Fair Debt Collection Practices Act ("FDCPA"). The various comments on this issue clearly justify Household's concerns in this regard.

8. The Commission must recognize that even the most legitimate, diligent and conservative utilization of predictive dialers for loan collection calls will inevitably result in the connection of an occasional call before a live operator is available to handle it. In such an instance, the creditor

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<sup>6</sup> Comments of Utilities Telecommunications Council, pp. 5-6.

initiating the call is prohibited by FDCPA from announcing its identity until it has identified the answering party as the debtor to whom the call is directed. Household, and other commenters who utilize predictive dialers to initiate debt collection calls, presently use an innocuous recorded message to request that the answering party hold the line pending intervention by a live operator.<sup>7</sup> <sup>8</sup> Once the live operator takes over the call and determines the identity of the answering party, the live operator is able to provide responses, including identification, which comply with FDCPA.

9. The NPRM expressed the Commission's belief that "debt collectors should be able to draft identification messages that comply with both" TCPA and FDCPA.<sup>9</sup> However, many commenters recognized that language conforming to both statutes may not be possible.<sup>10</sup> While most commenters, including Household, supported a limited exemption to allow debt collectors to identify an answering party before providing caller identification, one commenter suggested "that where a message cannot be fashioned to

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<sup>7</sup> Digital Systems refers to such messages as "momentary hold cues."

<sup>8</sup> If an answering party does not wish to comply with Household's request to hold, it may immediately terminate the call in question by simply hanging up the receiver.

<sup>9</sup> NPRM, at fn. 23.

<sup>10</sup> See, e.g., Comments of the Public Utility Commission of Texas.

meet the requirements of both laws, use of an auto-dialer should not be permitted."<sup>11</sup>

10. Household urges the Commission to apply its particular expertise and experience regarding telecommunications practices to this problem, and to exercise its discretion to fashion an appropriate administrative remedy. To this end, Household again suggests a limited exemption from identification requirements for debt collection calls, which exemption should be coupled with requirements that predictive dialer debt collection calls utilizing momentary hold cues provide both for the immediate termination of such calls by the called parties, and for appropriate caller identification upon intervention by a live operator.

#### **BUSINESS RELATIONSHIP EXEMPTION**

11. Both TCPA and the rules proposed by the NPRM provide certain exemptions for calls initiated by the caller in reliance upon its "business relationship" with the called party. The Commission, however, seeks guidance as to "whether this exemption should encompass prior, current or both prior and current customers of a business."<sup>12</sup>

12. Certain commenters seek to limit the application of the business relationship exemption to parties with whom a caller has

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<sup>11</sup> Id., at p. 6.

<sup>12</sup> NPRM, at para. 14.



had a transaction within a specified period of time.<sup>13</sup> While Household agrees that there must be some chronological relationship between the exempting transaction and the initiation of a call, it does not believe it is reasonable to apply a single, inflexible time limit to all exempting transactions. Instead, Household suggests that callers should be allowed to make a reasonable determination as to the appropriate limit on the elapsed time by taking into account the nature of the previous transaction upon which it relies in initiating a call under the business relationship exemption.

#### **TELEPHONE SOLICITATION TO RESIDENTIAL SUBSCRIBERS**

13. In response to the TCPA's mandate, the NPRM sought comments concerning the possible need to adopt further procedures to protect residential telephone subscribers' privacy rights from intrusion by telephone solicitations to which they object. The NPRM specifically sought comments on the usefulness and desirability of the following five regulatory alternatives for restriction of such solicitations: (a) databases (national or regional); (b) network technologies; (c) special directory markings; (d) do not call lists (industry-based or company specific); and (e) time of day restrictions.

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<sup>13</sup> See, e.g., Comments of the Public Utilities Commission of Ohio, pp. 3-4, which comments recommend that the exempting transaction between the parties be required to have taken place within the previous twelve months.

14. The comments of various telephone companies make it abundantly clear that the use of network technologies is precluded by both the limitations of the North American Numbering Plan and the exorbitant costs which would be associated with the implementation of such technologies.<sup>14</sup> Special directory markings were almost universally rejected both by consumers (who view such markings as themselves constituting invasions of privacy) and by businesses (which find the utilizations of such markings to be both difficult to maintain on a current basis and overly cumbersome to utilize). Household's review of the initial comments was unable to discern any significant support for time of day restrictions. In the end, the debate among the commenters seem to focus on the use of either databases or do-not-call or "suppression" lists.<sup>15</sup>

15. The main proponents of a national database were Consumer Action and LeJeune Associates of Florida. While Consumer Action volunteered to coordinate the initiation and operation of such a database, it cavalierly avoided the cost issue associated therewith by contending the cost would be borne by shifting the economic

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<sup>14</sup> See, e.g., Comments of the United States Telephone Association.

<sup>15</sup> The Attorney General of Washington also proposed that the Commission consider adopting rules similar to various telemarketing prohibitions in effect in the State of Washington. One of those prohibitions, for example, prohibits any dialing of unlisted telephone numbers. Household believes these prohibitions are overly restrictive and fail to recognize marketplace realities. For example, a subscriber to an unlisted number consents to the dialing of that number when he provides it to another person or entity with whom he has a social or business relationship. That consent should take precedence over any presumption created by a prior decision to maintain an unlisted number.

burden to business users of the database. LeJeune, which proposes the use of its own services for establishment of a national database, also avoids any valid economic analysis of the costs associated with such a database. By contrast, King TeleServices sets forth specific costs estimates for a national database, which estimates are fully consistent with estimates previously developed by Household's in-house telecommunications staff. It is clear that any mandated use of a national database is effectively foreclosed by the enormous capital outlays required for its implementation and operation.

16. After reviewing all of the comments, and considering all of the arguments therein, Household remains convinced that the only practical means by which the Commission can provide additional protection to residential telephone subscribers is the utilization of company-specific suppression lists. If the Commission feels such additional protections are required, Household urges it to restrict its remedies to such suppression lists.

17. Most, if not all, of the comments addressed one or more of the alternatives put forth by the Commission.

#### **CONCLUSION**

Household respectfully submits that the Commission should adopt 47 C.F.R. § 64.1100, as proposed in the NPRM, but, in its order adopting that rule, should clarify, in a manner consistent with Household's above suggestions, the basis for, and the extent of, the exemptions set forth in the rule. Household also submits

that the Commission either should determine that there is no need for further restrictions on telephone solicitations of residential subscribers, or, in the event the Commission makes a contrary determination, that the privacy of residential telephone subscribers can be best protected through the use of company specific do-not-call lists.

**Respectfully submitted,**

**HOUSEHOLD INTERNATIONAL**

By: *Toni A. Bellissimo*  
Toni A. Bellissimo, Manager  
Federal Government Relations  
HOUSEHOLD INTERNATIONAL  
1000 Connecticut Avenue, N.W.  
Suite 507  
Washington, D.C. 20036  
202/466-3561

By: *A. Thomas Carroccio*  
A. Thomas Carroccio  
Edward J. Smith, Jr.  
SANTARELLI, SMITH & CARROCCIO  
1155 Connecticut Avenue, N.W.  
Suite 900  
Washington, D.C. 20036  
202/466-6800

June 25, 1992

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of June, 1992, I mailed a copy of the foregoing "Consolidated Reply Comments of Household Internation" via first-class United States mail, postage prepaid, to the following:

Ken McEldowney  
Executive Director  
Consumer Action  
116 New Montgomery Street  
Suite 223  
San Francisco, CA 94105

William Bradford Weller, Esquire  
Digital Systems International, Inc.  
6464 185th Avenue, N.E.  
Redmond, WA 98052-5032

John J. Gavin, President  
King TeleServices  
77 Water Street  
New York, NY 10005

Peter A. Rohrbach, Esquire  
Hogan & Hartson  
555 13th Street, N.W.  
Washington, D.C. 20004  
Attorneys for LeJeune Associates of Florida

Ohio Public Utilities  
Ann E. Henkener, Esquire  
Assistant Attorney General  
Public Utilities Section  
180 East Broad Street  
Columbus, OH 43266-0573

Cynthia S. Anthony, Esquire  
Teknekron Infoswitch Corporation  
4425 Cambridge Road  
Fort Worth, TX 76155

Linda L. Kent, Esquire  
U.S. Telephone Association  
900 - 19th Street, N.W.  
Suite 800  
Washington, D.C. 20006-2105

Jeffrey L. Sheldon, Esquire  
Utilities Telecommunications Council  
1140 Connecticut Avenue, N.W.  
Suite 1140  
Washington, D.C. 20036

Jeffrey D. Goltz, Esquire  
Washington State Attorney General  
1400 S. Evergreen Park Drive SW  
P.O. Box 40128  
Olympia, WA 98504-0128

  
Michele A. Depasse

ORIGINAL  
FILE

RECEIVED

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

JUN 25 1992

Federal Communications Commission  
Office of the Secretary

In the Matter of )

CC Docket No. 92-90

The Telephone Consumer Protection )  
Act of 1991 )

REPLY COMMENTS  
OF THE  
BANC ONE CORPORATION  
CALIFORNIA BANKERS CLEARING HOUSE ASSOCIATION  
FIRST USA BANK  
NEW YORK CLEARING HOUSE ASSOCIATION  
QVC NETWORK, INC.  
VISA U.S.A., INC.

The Banc One Corporation, California Bankers  
Clearing House Association, First Bank USA, New York  
Clearing House Association, QVC Network, Inc., and VISA  
U.S.A., Inc. (collectively the "Coalition")<sup>1</sup> submit these  
reply comments addressing the Commission's proposed  
regulations implementing the Telephone Consumer Protection  
Act of 1991, Pub. L. No. 102-243 (to be codified at 47  
U.S.C. § 227) (the "Act").

No. of Copies rec'd 0+5  
List A B C D E

<sup>1</sup> A description of each of the Coalition's members is  
attached as Appendix A.

**I. THE COMMISSION'S PROPOSED EXEMPTIONS  
CORRECTLY REFLECT CONGRESS' INTENT TO  
PRESERVE LEGITIMATE BUSINESS ACTIVITIES  
WHILE PROTECTING CONSUMER PRIVACY.**

Certain commenters inaccurately contend that the Commission has overstepped its bounds or misconstrued Congressional intent in proposing certain exemptions to the autodial restrictions of the Act.<sup>2</sup> In fact, Congress expressly authorized the Commission to exempt categories of automatically dialed prerecorded voice messages that

(1) do not adversely affect consumer privacy rights, and

(2) do not include the transmission of any unsolicited advertisement.<sup>3</sup>

At the heart of this exemptive authority is Congress' desire to preserve legitimate telemarketing business activities<sup>4</sup> while proscribing unwarranted automated or prerecorded voice message calls.<sup>5</sup> This intent was echoed by the President

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<sup>2</sup> See, e.g., Comments of the Center for the Study of Commercialism, filed May 26, 1992, at 1; Consumer Action's Opening Comments, filed May 22, 1992, at 1; Comments of The National Consumers League, filed May 26, 1992, at 6-8.

<sup>3</sup> 47 U.S.C. § 227(b)(2)(B)(1991).

<sup>4</sup> See 137 Cong. Rec. H11312 (daily ed. Nov. 26, 1991) (comments of Rep. Cooper) (Supporting the bill because it addresses privacy concerns "in a balanced way that permits telemarketing to continue its important function of promoting commerce.") and 137 Cong. Rec. H11310 (daily ed. Nov. 26, 1991) (comments of Rep. Markey) ("[T]he aim of this legislation is not to eliminate the brave new world of telemarketing...").

<sup>5</sup> See S. Rep. No. 178, 102nd Cong., 1st Sess. 1 (1991), reprinted in 1991 U.S.C.C.A.N. 1968 ("The purposes of the bill are to protect the privacy interests of residential (Footnote 5 Continued)



when he signed the bill into law.<sup>6</sup> Thus, the National Consumers League's claim that "the Notice of Proposed Rulemaking issued by the Commission does not fulfill the intent of Congress" is simply not correct.<sup>7</sup>

As we noted in our initial comments,<sup>8</sup> the Commission in the Notice of Proposed Rulemaking ("NPRM") appropriately balanced consumer privacy rights and the legitimate needs of the business community in exempting calls to former and existing clientele and non-solicitation commercial calls.<sup>9</sup>

In particular, the Coalition agrees with many other commenters that there is a critical need for exemptions to

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(Footnote 5 Continued)  
telephone subscribers by placing restrictions on unsolicited, automated telephone calls to the home.").

6 Statement by President George Bush Upon Signing S.1462, 27 WEEKLY COMP. PRES. DOC. 1877 (Dec. 20, 1991) reprinted in 1991 U.S.C.C.A.N. 1979.

7 Comments of The National Consumers League at 7.

8 Comments of the Banc One Corporation, California Bankers Clearing House Association, First USA Bank, New York Clearing House Association, QVC Network, Inc., and VISA U.S.A., Inc., filed May 26, 1991, ("Coalition Comments") at 2.

9 Beneficial non-solicitation calls include fraud detection calls made by credit card companies to check that new and replacement credit cards reached customers. See Comment of Digital Systems International, Inc., filed May 26, 1992, at 4; Fraud Prevention Meets Customer Service at Chase, Bank Technology News, May 1992, at 27. Attached as Appendix B.

protect debt collection calls.<sup>10</sup> Indeed, Congress clearly envisioned an exemption for such calls. Commenting on the exemptions section of the Act, Rep. Markey stressed that it was designed to protect less intrusive uses of telemarketing such as "leav[ing] messages with consumers to call a debt collection agency to discuss their student loan."<sup>11</sup> The House Committee report notes that: "[t]he definition of a 'telephone solicitation' is in no way intended to include calls to collect debts or to follow up on billing a subscriber for some service, purchase or other transaction."<sup>12</sup> It also states that the Committee did not intend to restrict "normal, expected or desired communications between businesses and their customers" and included a creditor advising a customer of an unpaid bill as an example of a desirable call.<sup>13</sup>

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10 See, e.g. Comments of The Consumer Bankers Association, filed May 26, 1992, at 2-3; Comments of Teknekron Infoswitch Corporation, filed May 22, 1991, at 2-3; Comments of Household International, filed May 26, 1992, at 5-7; Comments of Gannett Co., Inc., filed May 26, 1992, at 3-4; Comments of American Financial Services Association, filed May 26, 1992, at 5-6; Comments of Wells Fargo Bank, filed May 26, 1992, at 1; Comments of American Bankers Association, filed May 26, 1992, at 3; Comments of National Retail Federation, filed May 26, 1992, at 5-6; Comments of Citicorp, filed May 26, 1992, at 2-3.

11 137 Cong. Rec. H11310 (daily ed. Nov. 26, 1991).

12 H.R. Rep. No. 317, 102nd Cong., 1st Sess. 16 (1991).

13 H.R. Rep. No. 317 at 17 (1991).

Debt collection calls have enormous value to consumers and the business community. Such calls can help resolve debt issues quickly, thereby protecting consumers from repossession or the loss of credit or future services. The Coalition urges the Commission to insure that these normal, expected and desirable debt collection calls are exempted as proposed in the NPRM. Moreover, should the Commission decide against the more general exemptions that currently encompass debt collection activities, it should create an explicit exemption for debt collection calls.

**II. AUTODIALED, PRERECORDED DEBT COLLECTION  
MESSAGES ARE AMONG THE LEAST INTRUSIVE  
MEANS OF COLLECTING UNPAID BILLS.**

One of the commenters opposing an exemption for debt collection calls wrongly contends that debtors who receive prerecorded calls are suffering a terrible intrusion or that "allowing auto dialers to be used for debt collection purposes will increase the potential for harassment."<sup>14</sup> In truth, automatically dialed prerecorded debt collection telephone calls are already among the least intrusive, most amicable means of notifying debtors of unpaid bills.<sup>15</sup> Telephone debt collection reminders not

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14 See Consumer Action's Opening Comments, at 1 and 7-8.

15 As discussed in the initial comments of the Coalition, the vast majority of debt collection calls are switched to a live operator once the party has picked up the phone. Prerecorded messages may be used to advise the party to hold for a live operator or to leave a message when the called party is not home. See Coalition Comments at 9.

only save creditors time and money, but also save consumers needless embarrassment or loss of credit.

As numerous commenters noted, automatically dialed prerecorded telephone calling has become an efficient mainstay in the debt collection industry.<sup>16</sup> Absent this cost-saving tool, many companies might have to reconsider their lending policies or increase prices to cover the higher transaction costs associated with collections efforts. They might also be forced to foreclose or take other formal legal action against the debtor sooner than they do now. The slight imposition of a telephone call reminding a customer of an overdue bill is a far more attractive alternative from the customer's perspective than, for example, trying to make a purchase at a store and learning then that a credit card has been cancelled or credit curtailed.

In addition, debtors already are protected against unscrupulous debt collection practices under existing federal and state consumer protection laws. The Federal Fair Debt Collection Act, 15 U.S.C. § 1692 (1988), contains such consumer protections. Several states also have similar provisions.<sup>17</sup> Given the broad scope of these consumer

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16 See, e.g., Comments of The Consumer Bankers Association at 2; Comment of Digital Systems International, Inc., at 2; and Comments of National Retail Federation, at 6.

17 The Robbins-Rosenthal Fair Debt Collection Practices Act, CAL CIV. CODE § § 1788-1788.32 (West 1985 and Supp. (Footnote 17 Continued)

protection laws, the Commission need not further restrict debt collection calls under the Act.

III. COMMENTERS OVERWHELMINGLY SUPPORT COMPANY SPECIFIC "DO NOT CALL" LISTS FOR SOLICITATION PURPOSES.

If the Commission chooses to regulate live telephone solicitations, the Coalition agrees with the overwhelming majority of commenters that company specific "do not call" lists are the most efficient and practical approach, providing consumers with the freedom to select among potentially desirable solicitations.<sup>18</sup> Several commenters suggested realistic ways the Commission can police the company specific "do not call" lists.<sup>19</sup> The Coalition agrees with their proposals to require telemarketers to have written "do not call" list policies

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(Footnote 17 Continued)

1992); The Consumer Collection Practices Act, FLA. STAT. ANN. § § 559.55-559.78 (West 1988); and The Debt Collection Act, TEX. REV. CIV. STAT. ANN. article 5069-11.01-11.11 (West 1987 and Supp. 1992).

18 See, e.g., Comments of Electronic Information Systems, Inc., filed May 18, 1992, at 3; Comments of MBNA America Bank, N.A., filed May 26, 1992, at 3-4; Comments of Teknekron Infoswitch Corporation at 4; Comments of Household International at 14-15; Comments of Bell Atlantic, filed May 26, 1992, at 4-5; Comments of Citicorp at 23-27; Comments of National Retail Federation at 10-11; Comments of JCPenney Company, filed May 26, 1992, at 15-20; Comments of Gannett Co., Inc. at 5-7; AT&T Comments, filed May 26, 1992, at 6-10.

19 See, e.g., Initial Comments of American Express Company, filed May 26, 1992, at 9-10; Comments of Citicorp at 25-28; Comments of National Retail Federation at 10-11; AT&T Comments at 9-10.

and to notify customers and train personnel in the details of such policies. The Coalition also agrees that names should be placed on the "do-not-call" list within a reasonable period of time after the request. Finally, we agree that proof that these rules were followed should be prima facie evidence of compliance with the Commission's regulations.

Certain commenters inaccurately contend that enforcement needs "require[] that the FCC respect Congress' intent and create a National "Do Not Call" Database."<sup>20</sup> As noted above, a company specific system can be enforceable. Moreover, Congress did not require the Commission to adopt a national database. Several legislators in fact voiced opposition to the national database plan. Rep. Cooper stated: "I think the company-specific do-not-call approach offers consumers greater choice."<sup>21</sup> And Rep. Richardson added: "It is my personal opinion that the creation of a giant national database containing the names of people who do not wish to receive telemarketing calls is not the best way to go. This proposal is extremely problematic and may cause more harm than good."<sup>22</sup>

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20 Comments of Privacy Times, filed May 26, 1992, at 1. Also argued in Comments of The National Consumers League at 17.

21 137 Cong. Rec. H11312 (daily ed. Nov. 26, 1991).

22 137 Cong. Rec. H1131415 (daily ed. Nov. 26, 1991).

The Coalition agrees with commenters that the national database would be "operationally difficult and costly to implement,"<sup>23</sup> and "unrealistic [in its] ability to deter unwanted calls."<sup>24</sup> Further, it "would prevent telemarketers from reaching willing recipients and thereby would restrict consumer choice."<sup>25</sup> In short, the national database favored by a few commenters<sup>26</sup> would not be in the public interest and, indeed, may well be dissatisfying to many of the very consumers on whose behalf the national database supporters purport to speak.

#### CONCLUSION

For the reasons set forth herein and in the Coalition's initial comments, the Coalition supports the Commission's proposed regulations, which provide exemptions for calls to existing and former clientele and commercial non-solicitation calls, including most particularly calls for debt collection purposes. The Coalition urges the Commission to refrain from regulating live solicitations.

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23 Comments of Citicorp at 28.

24 Comments of Gannett Co., Inc. at 6.

25 AT&T Comments at 11-12.

26 See, e.g., Consumer Action's Opening Comments at 2; Comments of Privacy Times at 1-3; Comments of The National Consumers League at 15-17. Note that in its comments, The National Consumers League states at 13-14 that most consumer groups do not have the resources to do a rigorous technical analysis of the live calling regulation alternatives.

If the Commission determines to regulate such solicitations, then the Coalition recommends adoption of company specific "do not call" lists as the best of the alternatives set forth in the NPRM.

Respectfully submitted,



Debra L. Lagapa  
Robert G. Ballen  
Mary K. O'Connell  
MORRISON & FOERSTER  
2000 Pennsylvania Avenue, N.W.  
Washington, D.C. 20006  
(202) 887-1500

Attorneys for the Banc One  
Corporation, California Bankers  
Clearing House Association,  
First USA Bank, New York  
Clearing House Association, QVC  
Network, Inc., and VISA U.S.A.,  
Inc.

Date: June 25, 1992



## APPENDIX A

### DESCRIPTION OF COALITION MEMBERS

BANC ONE CORPORATION is a bank holding company headquartered in Columbus, Ohio, with assets of \$48.7 billion. BANC ONE CORPORATION currently operates 57 banking institutions with 869 offices in Indiana, Illinois, Kentucky, Michigan, Ohio, Texas and Wisconsin. BANC ONE CORPORATION also operates over 100 other corporations, which engage primarily in data processing, venture capital, investment and merchant banking, trust, brokerage, equipment leasing, mortgage banking, consumer finance and insurance.

The CBCHA and the NYCHA are associations of major banks. They serve primarily as clearinghouses through which members settle accounts and present checks and other payment instruments, and as representatives of their members on issues of common concern.<sup>1/</sup> The CBCHA's members include seven of the largest banks in California,<sup>2/</sup> and the NYCHA's members include eleven of the leading banks in New York.<sup>3/</sup> Together, the members of CBCHA and the NYCHA include nine of the largest banks in the United States. Their combined

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<sup>1/</sup> The NYCHA operates two electronic payment systems, the New York Automated Clearing House ("NYACH") and the Clearing House Interbank Payments System ("CHIPS"). The NYACH handles substantial volumes of preauthorized debits and credits, e.g., Social Security checks, insurance premium payments, and direct payroll deposits and serves depository institutions in the Second Federal Reserve District (i.e., New York State and Northern New Jersey). CHIPS provides the means for about 125 foreign and American banks to exchange dollar payments electronically.

<sup>2/</sup> The Bank of American National Trust and Savings Association, Wells Fargo Bank, N.A., First Interstate Bank of California, Union Bank, Sanwa Bank California, Bank of California, N.A., and City National Bank.

<sup>3/</sup> The Bank of New York, The Chase Manhattan Bank, N.A., Citibank, N.A., Chemical Bank, Morgan Guaranty Trust Company of New York, Bankers Trust Company, Marine Midland Bank, N.A., United States Trust Company of New York, National Westminster Bank USA, European American Bank and Republic National Bank of New York.

assets exceed \$600 billion, and their annual communications bills approach \$1 billion.

VISA is an association of over 17,500 member financial institutions throughout the United States that are licensed to use VISA's service marks in connection with payment systems (including debit and credit card), check authorizations, and automated teller machine ("ATM") services. VISA is affiliated with VISA International, an association of over 19,000 financial institutions in over 160 countries. VISA member institutions have issued 135.6 million cards in the United States. VISA cards are accepted at over nine million merchant outlets worldwide, including 83% of the retail establishments in the United States. Its cards are used over 3.5 billion times each year.

First USA is a credit card bank located in Wilmington, Delaware, which issues VISA and MasterCard products to customers nationwide. First USA currently has approximately \$2.2 billion in loans outstanding and has issued about 3 million credit cards. As a credit card bank, a large proportion of First USA's operations are devoted to telemarketing or collection related activities.

QVC Network, Inc. is a retailing organization that markets a wide variety of consumer products directly to the public through its nationally televised shopping network. The QVC program is produced live and broadcasts continuously to more than 42 million homes by cable and more than 3 million homes by satellite.

## APPENDIX B

## BANK TECHNOLOGY NEWS

**Fraud Prevention Meets Customer Service At Chase**

Most credit card operations use predictive dialing for collection purposes, and Chase Manhattan Bank is no exception. But when the bank also turned to the systems for fraud prevention, it found an added bonus in customer service.

**Combating bogus bills**

Chase's anti-fraud effort targets the interception and use of new or reissued cards by unauthorized users. Cards are sent out but never received by the authorized card holder. Instead, the cards fall into the hands of people who run up large bills. Ordinarily, the bank doesn't discover the fraudulent use until after the first statement is sent and the authorized user disputes the charges. "Never-received fraud is one of the biggest problems we have," says Ben Hernandez, assistant treasurer at Chase's Garden City, NY, credit card processing center.

In December 1990, Chase initiated a new program to combat this type of fraud. Using a predictive dialing system, the bank calls card holders the first time their new or reissued card is used. "Within 24-hours of their first charge, we give them a call. If they didn't make the charge, we put an immediate hold on the card," explains Hernandez.

In the first month of operation, the program identified 56 cases of fraud and avoided about \$80,000 in potential losses. In 1991, the bank avoided over \$1 million in never-received fraud, Hernandez reports.

**Daily downloads**

Here's how the system works: The calling group downloads from the bank's host computer the list of first charges to new or reissued cards daily into the predictive dialing system from Digital Systems. There are, however, too many names for the group to call, so the managers select which names to call first and set up the day's calling job using the list management facilities of the predictive dialing system.

The selection of who to call is based on several criteria, Hernandez explains. Factors which combine to trigger a call include whether the first charge is made in a state different from where the card holder lives, if the charge comes from areas and merchants the bank has identified as high risk, and if there is a large credit line at risk.

"We use a scorecard to prioritize the information in the file. Everyone doesn't get a call, although that is our goal," says Hernandez.

The call itself sounds like a customer service call. Operators tell the card holders they are calling to confirm receipt of the card and verify charges. They offer to assist if the card holder has any service problems or questions. "The response to the calls is very positive. People tell us they have never received calls like this before," Hernandez reports.

**Slow pacing**

The group uses 15 operators at peak times and the system supports 48 outbound lines. The call pacing has been deliberately set slow, resulting in operators waiting 20 to 30 seconds between calls to insure that no card holder is put on hold.

The Digital System predictive dialer gives the operators enough information on the screen to handle most questions that are asked. If more information is needed, the operators can hit a key and be connected with the host. If the operators for some reason can't resolve a card holder's problem, they then transfer the card holder to a priority queue in the particular department.

Prior to the arrival of the predictive dialer, the never-received fraud group attempted to do the job manually. "We had stacks of reports. It was very difficult to decide who to call. We had no effect on fraud," Hernandez recalls. The predictive dialing system, however, allows the bank to effectively manage and prioritize the calling lists and improves the productivity of the operators 300 to 400 percent, he reports. The result: "We can put a big dent in fraud," he says. □

CERTIFICATE OF SERVICE

I, Mary O'Connell, do hereby certify that true and correct copies of the foregoing documents were served this 25th day of June, 1992 by hand delivery to the persons below:

Chairman Alfred C. Sikes  
Federal Communications  
Commission  
1919 M Street, N.W., Room 814  
Washington, D.C. 20554

Commissioner James H. Quello  
Federal Communications  
Commission  
1919 M Street, N.W., Room 802  
Washington, D.C. 20554

Commissioner Sherri P. Marshall  
Federal Communications  
Commission  
1919 M Street, N.W., Room 826  
Washington, D.C. 20554

Commissioner Andrew C. Barrett  
Federal Communications  
Commission  
1919 M Street, N.W., Room 844  
Washington, D.C. 20554

Commissioner Ervin S. Duggan  
Federal Communications  
Commission  
1919 M Street, N.W., Room 832  
Washington, D.C. 20554

Robert L. Pettit  
General Counsel  
Federal Communications  
Commission  
1919 M Street, N.W., Room 614  
Washington, D.C. 20554

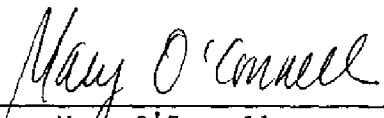
Cheryl A. Tritt  
Chief of Common Carrier Bureau  
Federal Communications  
Commission  
1919 M Street, N.W., Room 500  
Washington, D.C. 20554

Olga Madruga-Forti  
Domestic Services Branch  
Federal Communications  
Commission  
2025 M Street, N.W., Room 6008  
Washington, D.C. 20554

Abraham A. Leib  
Chief of Domestic Services  
Branch  
Federal Communications  
Commission  
2025 M Street, N.W., Room 6008  
Washington, D.C. 20554

Downtown Copy Center  
1919 M Street, N.W.  
Room 246  
Washington, D.C. 20554

Office of the Secretary  
Federal Communications  
Commission  
1919 M Street, N.W.  
Room 239  
Washington, D.C. 20554

  
\_\_\_\_\_  
Mary O'Connell



Domestic  
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Jul 14 '92

FEDERAL COMMUNICATIONS  
COMMISSION  
OFFICE OF THE  
SECRETARY

ORIGINAL  
FILE

June 22, 1992

Office of the Secretary  
Federal Communications Commission  
1919 M St. N.W.  
Washington, D.C. 20554

Re: Reply comments concerning The TCPA

Dear Sir or Madam:

We filed comments on this matter in May and are now filing reply comments. Enclosed is an original along with nine copies so that each commissioner may receive a personal copy.

Sincerely,

A handwritten signature in cursive script, reading "Rodney H. Thomas".

Rodney H. Thomas  
President



June 22, 1992

Office of the Secretary  
Federal Communications Commission  
1919 M St. N.W.  
Washington, D.C. 20554

Re: Reply comments concerning The TCPA

Dear Sir or Madam:

These brief comments are a follow-up to our comments of May 21, 1992.

**INTERNAL "DO NOT CALL" DATA BASE**

In the original comments we mentioned that our firm does extensive telephone advertising and that we maintain an internal "Do Not Call" list. We have found this system to be effective in honoring the requests of consumers who have informed us that they do not wish to receive telemarketing calls from our company.

When we receive such a request, the consumer's name, address and phone number are entered into a data base. Any list that we purchase is run against this "Do Not Call" data base, deleting all matches.

This system has been almost 100% effective in eliminating calls to those who have requested that we not call them. This procedure is inexpensive, yet very accurate, which makes it preferable to an unwieldy national or regional data base. -

We strongly advocate private "Do Not Call" lists maintained by individual businesses.

**PREDICTIVE DIALERS VS. OTHER AUTOMATED DIALING TECHNOLOGY**

Predictive dialing systems use computers to dial on multiple telephone lines, passing answered calls to live telemarketers. This method of phone dialing avoids the problems inherent to automatic dialing and announcing devices. Predictive dialing is beneficial to consumers because it eliminates accidental duplicate calls which sometimes happen with manually dialed phones.

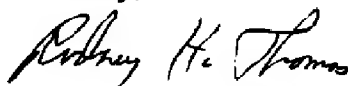
Predictive dialing is a positive development in phone technology which benefits consumers and should not be classified with sequentially dialing devices using a pre-recorded message.

**DEFINITION OF "ESTABLISHED BUSINESS RELATIONSHIP"**

There are so many different types of business relationships in this country that only a broad definition can avoid unintentionally harming many businesses. It is important that no law cripples the ability of businesses to communicate with individuals with whom the businesses have had any kind of past contact. An example is individuals who have requested information from a company by phone or mail.

Thank you very much for your time in reviewing this and please let us know if we can provide any further comments or testimony.

Sincerely,

A handwritten signature in cursive script that reads "Rodney H. Thomas".

Rodney H. Thomas  
President  
(314) 291-0200

EX PARTE OR LATE FILED

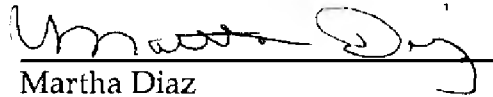
92-90  
FCC MAIL BRANCH

CERTIFICATE OF SERVICE

JUL 13 1992

I, Martha Diaz, do hereby certify that a true copy of the foregoing Reply Comments of Digital Systems International, Inc., was served this 7th day of July 1992, by United States Mail, first class, postage prepaid, upon the parties listed on the attached service list.

FILE

  
Martha Diaz

July 7, 1992

RECEIVED

JUL 13 1992

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

12 cc Copies 0



Philip S. Corwin  
American Bankers Association  
1120 Connecticut Ave., NW  
Washington DC 20036

Basil J. Mezines  
General Counsel  
American Collectors Assoc.  
Stein, Mitchell & Mezines  
1100 Connecticut Ave., NW  
Suite 1100  
Washington, D.C. 20036

James S. Blaszak  
Kevin S. DiLallo  
American Express Company  
Gardner, Carton & Douglas  
1301 K Street, NW  
Suite 900  
Washington, DC 20005

Jeffrey W. Plaut  
General Manager  
Amer. Service Telemarketing, Inc.  
425-B Coliseum Blvd.  
Montgomery, AL 36109

Floyd S. Keene  
Pamela J. Andrews  
Attorneys for the  
Ameritech Operating Companies  
2000 West Ameritech Ctr. Dr.  
Room 4H94  
Hoffman Estates, IL 60196-1025

David A. Brune  
General Counsel  
Baltimore Gas & Electric  
Charles Center  
P. O. Box 1475  
Baltimore, MD 21203

Debra L. Lagapa  
Robert G. Ballen  
Mary K. O'Connell  
Banc One Corp., et al.  
Morrison & Foerster  
2000 Pennsylvania Ave., NW  
Washington, DC 20006

Charles F. Wright  
VP Corporate Development  
Centel Corporation  
8725 Higgins Road  
Chicago, IL 60631

P. Michael Nugent  
Patrick D. Hadley  
Attorneys for  
Citicorp  
425 Park Avenue  
2nd Floor/Zone 6  
New York, NY 10043

Joe Belew, President  
Consumer Bankers Association  
1000 Wilson Blvd., Suite 3012  
Arlington, VA 22209

Amy N. Lipton  
Senior Vice President/General  
Counsel  
CUC International, Inc.  
707 Summer Street  
Stamford, CT 06904-2049

Jodi Meryl Wallace  
Electronic Information Systems, Inc.  
1351 Washington Blvd.  
Stamford, CT 06902

Danial L. Bart  
GTE Service Corporation  
Suite 1200  
1850 M Street, NW  
Washington, DC 20036

Mallory B. Duncan  
JC Penney Company, Inc.  
14841 N. Dallas Parkway  
Dallas, TX 75240

Bruce E. Thompson, Jr.  
Merrill Lynch, Pierce, Fenner, &  
Smith, Inc.  
Merrill Lynch & Co. Inc.  
300 K Street, NW  
Suite 620  
Washington DC 20007

Michael J. Altier  
Vice President, General Counsel  
National Retail Federation  
701 Pennsylvania Avenue, NW  
Suite 710  
Washington, DC 20004

Albert H. Kramer  
Robert F. Aldrich  
North American  
Telecommunications Assoc.  
Keck, Mahin & Cate  
1201 New York Avenue, NW  
Penthouse Suite  
Washington, DC 20005

James P. Tuthill  
Nancy C. Wolf  
Attorneys for  
Pacific Bell/Nevada Bell  
140 New Montgomery Street  
Room 1523  
San Francisco, CA 94105

Sears, Roebuck and Co.  
Sears Tower  
Chicago, IL 60684

Durward D. Dupre  
Richard C. Hartgrove  
Michael J. Zpevak  
Robert J. Gryzmala  
Attorneys for  
Southwestern Bell Telephone Co.  
1010 Pine Street, Room 2114  
St. Louis, MO 63101

Jay C. Keithley  
Attorney for  
Sprint Corporation  
1850 M Street, NW  
Suite 1100  
Washington, DC 20036

W. Richard Morris  
Attorney for  
Sprint Corporation  
P. O. Box 11315  
Kansas City, MO 64112

Leon Kestenbaum  
Phyllis Whitten  
Attorneys for  
Sprint Corporation  
1850 M Street, NW  
Suite 1100  
Washington, DC 20036

Ann Marie Czulowski  
Lucy Weymouth  
Student Loan Marketing Assoc.  
1025 Thomas Jefferson St., NW  
Washington, DC 20007

Peter A. Rohrback  
Attorney for  
Student Loan Marketing Association  
Hogan & Hartson  
555 13th Street  
Washington, DC 20004

Aaron I. Fleischman  
Charles S. Walsh  
Matthew D. Emmer  
Attorneys for  
Time Warner, Inc.  
1400 16th Street, NW  
Washington, DC 20036

Richard C. Rowleson  
Sr. VP and General Counsel  
Vanguard Cellular Systems, Inc.  
2002 Pisgah Church Road  
Suite 300  
Greensboro, NC 27408

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C.

In the Matter of )  
 )  
The Telephone Consumer )  
Protection Act of 1991 )  
\_\_\_\_\_ )

CC Docket No. 92-90

SECOND COMMENT OF  
DIGITAL SYSTEMS INTERNATIONAL, INC.,  
TO  
FCC NOTICE OF PROPOSED RULEMAKING  
(Adopted April 10, 1992; Released April 17, 1992)

Wm. Bradford Weller  
Laura McMCher  
Digital Systems International, Inc.  
6464 185th Ave NE  
Redmond, WA 98052-5032  
206-869-4582

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BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C.

JUL 13 1992

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
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SECOND COMMENT OF  
DIGITAL SYSTEMS INTERNATIONAL, INC.,  
TO  
FCC NOTICE OF PROPOSED RULEMAKING  
(Adopted April 10, 1992; Released April 17, 1992)

Digital Systems International, Inc. ("Digital Systems"), again expresses its appreciation for the opportunity to comment on the work accomplished by the FCC in its Notice of Proposed Rulemaking (the "NPR") mandated by the Telephone Consumer Protection Act of 1991 (the "TCPA"). As stated in its first comment submitted May 26, 1992, Digital Systems supports the views voiced by Congress and the American people regarding the improper use of automated telephone dialing equipment. Digital Systems has reviewed the comments submitted by scores of business entities in the FCC's designated first comment round, and continues to believe, along with the majority of the entities who have commented on the proposed regulations, that reasonable controls can and should be placed on this technology so the American consumer is protected.

The purpose of this second comment, however, is to point out that a significant number of parties submitted comments remarkably similar to the comment of Digital Systems. Each of these parties is a user or vendor of predictive dialing systems, and each expressed concern that the proposed

regulations promulgated by the FCC are unnecessarily restrictive in connection with use of predictive dialer systems.

Common themes running through these comments include:

- The fact that, because predictive dialers are used to connect live operators with the called parties, predictive dialers are completely different from the kinds ADRMPs and ADADs that Congress intended to regulate with enactment of the TCPA.
- Many point out that telephone numbers are not randomly or sequentially generated by predictive dialers, and consequently predictive dialers are not or should not be subject to the TCPA at all. These parties ask the FCC to reflect this interpretation more clearly in its regulations.
- Similarly, many comment on the ambiguity of the regulations concerning the definition of auto dialers, and seek clarification of the kinds of systems and the types of use thereof that will trigger the restrictions imposed by §§227(b) and (d) of the TCPA. Several of these comments focus on the fact that predictive dialers are used to connect live operators to the called parties, are therefore more akin to live operator calls, and should be treated differently from auto dialers.
- Others focus specifically on issues addressed in Digital Systems' first comment – that predictive dialers only deliver "messages" when playing a brief request to "hold the line" for an operator.

Attached as Exhibit A is a matrix of the various comments submitted by others that amplify or echo the comments submitted by Digital Systems. A review of these comments proves the importance of this issue to mainstream and responsible American businesses. This issue should be given an equal amount of attention to that which will be accorded the national do-no-call list issues, which was the focus of so many of the comments submitted.

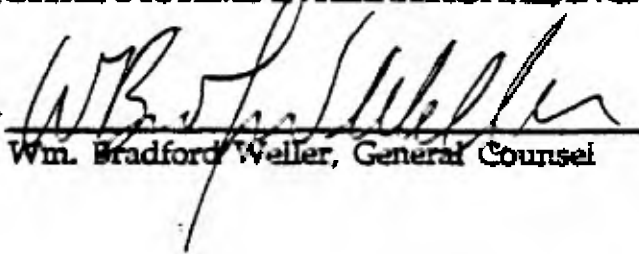
Digital Systems again urges the FCC to adopt a definition of the term "message" so that predictive dialer use of hold-queues is not restricted, or to

otherwise clarify or amend its regulations as suggested by others to alleviate the impact of the TCPA on responsible use of predictive dialers.<sup>1</sup>

Respectfully Submitted this 24th day of June, 1992.

DIGITAL SYSTEMS INTERNATIONAL, INC.

By

  
Wm. Bradford Weller, General Counsel

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<sup>1</sup> Digital Systems suggested in its first comment that the term "message" be defined to exclude requests to hold the line for a live operator, or some similar request, where:

- a. the calling party intends to connect the called party with a live operator as soon as an operator is available;
- b. the duration of time the called party is placed on hold does not exceed sixty seconds;
- c. no solicitation or other request is made by the calling party in the recorded request; and
- d. where the system automatically releases the called party's line within 5 seconds of the time notification is transmitted to the system that the called party has hung up.

**EXHIBIT A**

**SUMMARY OF COMMENTS RE PREDICTIVE DIALERS**

<b>COMMENTING ENTITY</b>	<b>SUMMARY OF COMMENTS</b>
<b>SEARS</b>	<p>Final rule should draw a clear distinction between the ordinary use of automatic dialing equipment and the automated delivery of a recorded message.</p> <p>Calls merely utilizing a labor saving device to make live operator calls should not be subject to any of the ADRMP related rules since they pose no threat to privacy rights.</p> <p>Disconnection requirement: notification must be the signaling protocol that is transmitted from the called party back to the originating equipment. Also, any standards set should be consistent with technical capabilities.</p>

<p><b>NATIONAL RETAIL FEDERATION</b></p>	<p>Comment focused on debt collection exemption.</p> <p>Automatic dialing equipment greatly increases the efficiency of the collector and thereby reduces the cost of collection, alleviating unnecessary burdens on the American economy and the American public.</p> <p>Requirement for self identification in "message:" In the case of calls made using sophisticated dialers, the delivery of a complete preamble may not always be possible. A prerecorded message may be interrupted, before completion, when the live operator comes on the line. The literal requirement of the FCC's proposed rule could be satisfied by excluding use of a please hold request as a triggering issue. Either result is illogical, costly and unnecessary with respect to TCPA.</p> <p>The NRP believes the ideal solution is simply exempt collection calls.</p>
<p><b>SPRINT</b></p>	<p>Sprint uses autodialers to initially dial the potential customer, and the customer may occasionally be asked by a pre-recorded request to wait momentarily for a live operator during occasional overflow situations.</p> <p>The autodialer is used as a productivity tool that lowers the cost of providing services. In neither case (collections and telemarketing applications) is an unsolicited pre-recorded advertisement delivered to the customer.</p> <p>The potentially objectionable intrusion to the privacy of the customer is minimized through the use of live personnel that actually deliver the real content of the call.</p> <p>In light of the use of live personnel to deliver real content of any communication with the called party, and the cost savings inherent in the use of predictive dialers, the rules should clearly allow auto dialers to use pre-recorded "wait momentarily" for live cust. svc. reps. announcements.</p>



## JC PENNEY

It is critical to distinguish, between auto dialers generally and the sub class of dialers known as ADRMPs. Auto dialers are a 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 auto dialer call is indistinguishable to the recipient from an manual call. An ADRMP essentially substitutes a pre-recorded message for the live operator. 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 op. In the case of sophisticated dialers, delivering a complete hold msg. may not always be possible.

When all operators are busy, a brief request to "please stand by for an important message might be delivered. Since the equipment is programmed to connect a called party to a live operator at the earliest opportunity means that the recorded msg. sometimes will be interrupted in order to deliver a live operator more quickly. Thus, even though the equipment might be programmed to deliver the self ID message required by the TCPA, there is no guarantee that a live operator will become available before message is complete.

Since this interruption occurs as a result of the equipment's programmed desire to facilitate the communications between the called party and the live operator, to require that consumers 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 the purposes of the act.

JC Penny recommends that in those cases where a live operator is delivered to the called party, the FCC should clarify that the phrase "beginning of the message" to state that it is satisfied when a live operator is offered for questioning as to the identity of the entity initiating the call.

<b>VANGUARD CELLULAR</b>	A predictive dialer is not an auto dialer because it does not and can not <u>generate</u> numbers. The numbers must be loaded into it.
<b>NORTH AMERICAN TELECOMMUNICATIONS ASSOCIATIONS</b>	<p>In addressing consumer issues posed by certain uses of technology, it is important to preserve the ability of businesses to use new technology flexibly and efficiently in marketing activities which the FCC recognizes are generally beneficial to consumers.</p> <p>In the TCPA's statements, the term "auto dialer call" is apparently being used as a shorthand for "transmission of a pre-recorded message." It is important to distinguish predictive dialing, which does not involve pre-recorded messages and does not lead to the specific problems targeted by the TCPA, from the abusive transmission of prerecorded advertisements to randomly dialed number's--the primary abuse at which the legislation's prohibitions are aimed.</p> <p>NATA urges the FCC to avoid using the term autodialer in such a way that predictive dialers are regulated.</p>

**AMERICAN COLLECTORS  
ASSOCIATION**

Even with the most advanced predictive dialing systems, the situation arises in which a call is connected before an operator is available. If the system were to simply hang up because no operator is available, then the answering party is left with the annoyance or possible disturbing uncertainty of an unidentified call.

If the system leaves the party on the line with no message or indication of any kind for more than a few seconds, the answering party is likely to hang up.

To avoid delay-related problems, most predictive dialing systems used by collectors deliver a recorded message to the called party which asks the party to hold for a moment. As an adjunct to predictive dialing, the automated recorded message functions solely for the purpose of alerting the answering party that operator will be coming on the line. The message conveys no other information.

ACA believes that this kind of recorded message, which functions solely as a functional adjunct of predictive dialing, is distinct from prerecorded messages with informational or solicitation content. Sales solicitations or other uses in which delivery of the contents of the recorded message is itself the purpose of the call are not the equivalent of "please hold" or "all operators are busy" or "one moment please".

ACA believes the TCPA was clearly directed at the use of "artificial or pre-recorded voice systems" as distinct from the requirements applicable to automated predictive dialing.

<p><b>GTE SERVICE CORPORATION</b></p>	<p>The FCC needs to clearly characterize what types of equipment or systems are intended to be included within the scope of the TCPA and FCC's rules. The definitions are ambiguous. In any instance where the FCC will allow a live operator call, GTE urges the FCC to allow predictive dialers or similar automation to make such operations efficient. Use of a more efficient method of calling with live operators should not raise any TCPA privacy concerns.</p>
<p><b>AMERICAN EXPRESS COMPANY</b></p>	<p>Live telephone solicitations require less regulatory attention than artificial or pre-recorded voice solicitations. The use of automatic dialing devices not coupled with artificial or prerecorded voice solicitations need not be restricted.</p> <p>The language of the TCPA, its legislative history and the NPRM contain inconsistent terms regarding "automatic dialing devices" and "artificial or prerecorded voice machine."</p> <p>It seems clear from the text of the TCPA that Congress recognized that automatic dialing devices (i.e., those which are not coupled with artificial or prerecorded voice machines) pose virtually no threat to residential privacy interests. It is important that a distinction be made, as Congress intended, between autodialers and artificial or prerecorded voice machines. The former merely accomplish a function--dialing--which all callers must do, and therefore pose no added threat to privacy.</p>
<p><b>CUC INTERNATIONAL</b></p>	<p>Whether a live operator call is placed by use of an autodialer or an operator's fingers should be irrelevant to the FCC's analysis. The only relevant factor from the customer's perspective is whether a live operator or a prerecorded message is on the other end of the line.</p>

<b>TIME WARNER, INC.</b>	Time Warner submits that the FCC should take precaution not to view as interchangeable terms "automatic dialing systems," "autodialer," "artificial or prerecorded voice" and "automated call."
<b>BANK ONE CORP ET AL.,</b>	<p>Calls that use an auto dialing device, but do not leave a prerecorded or artificial voice solicitation message, use a mechanism that is often referred to as a "predictive dialer".</p> <p>In certain circumstances, a predictive dialer may leave a brief, non-solicitation message for the called party, either requesting that the party hold for a live operator, or if the called party is not home, requesting that the party call a specified number.</p> <p>The FCC should state that such calls that leave a brief message fall within the exemption for commercial, non-solicitation calls. The FCC's draft regulations recognize the difference between autodialer calls leaving a prerecorded or artificial voice message and calls that switch to a human operator once the connection is made.</p> <p>In the NPRM however, the FCC treats these categories as interchangeable and certain language in the NPRM could mistakenly be interpreted to suggest that the use of a predictive dialer to make calls to residential subscribers, where the dialer switches to a human operator, is prohibited unless it falls within one of the exemptions defined in the regulations.</p> <p>This was clearly not the intent of the TCPA, and the FCC should clarify that its regulations concerning automatically dialed calls to residential subscribers apply only to auto dialing systems that leave a prerecorded or artificial message (more than a please hold request).</p>
<b>BALTIMORE GAS &amp; ELECTRIC</b>	Predictive dialers should not regulated because telephone numbers are not generated, either randomly or sequentially.

<b>CITICORP</b>	<p>Exclude live operator calls (using predictive dialers) from the prerecorded messaging delivery impacts of the TCPA.</p> <p>Predictive dialers should be treated differently from the types of machines Act intended to regulate. No number generation.</p>
<b>AMERICAN SERVICE TELEMARKETING</b>	Treat predictive dialers differently. Live operator calls should not be regulated as message devices.
<b>MERRILL LYNCH PIERCE</b>	Live operator calls should be permitted. Brokers make 1.5 billion calls per year, without significant complaints. Favors company specific do not call lists.
<b>CENTEL CORP</b>	<p>TCPA does not prohibit calls by predictive dialers: No random or sequential number generation.</p> <p>Requests clarification and confirmation from the FCC.</p>
<b>AMERITECH OPERATING CO. (ILLINOIS BELL; INDIANA BELL; MICHIGAN BELL; OHIO BELL; AND WISCONSIN BELL)</b>	<p>Statute and regulations are ambiguous regarding restrictions on use of auto dialers and messaging systems.</p> <p>FCC should distinguish between live operator calls (using predictive dialing systems) and the types of calls TCPA intended to regulate. 2% of calls put into their hold queues at even slowest calling setting. Need to use the please hold requests.</p> <p>Live operator calls less offensive to consumers.</p>
<b>SOUTHWESTERN BELL</b>	Predictive dialer calls, using hold-queue "please hold" requests, should be excepted from regulation of autodialer calls.

<b>STUDENT LOAN MARKETING ASSOCIATION</b>	<p>Raise issues re use of predictive dialer hold queue "please hold" requests:</p> <ul style="list-style-type: none"> <li>• calls transferred to operator before any ID message completed.</li> <li>• Rarely receive complaints.</li> </ul>
<b>CONSUMER BANKERS ASSOCIATION</b>	FCC should create an exception for predictive dialer use. The please hold request is not a message; regulations should be clarified to make sure predictive dialing is not subject to rules and standards.
<b>AMERICAN BANKERS ASSOCIATION</b>	<p>Requests clarification that predictive dialers not regulated since they just store and do not generate numbers to be called.</p> <p>Requests clarification over use of self ID rules and Fair Debt Collection Practice restrictions.</p>
<b>PACIFIC BELL &amp; NEVADA BELL</b>	Distinguish between predictive dialers and regulated auto dialers. No numbers generated.
<b>ELECTRONIC INFORMATION SYSTEMS</b>	<p>ADRMPS do not facilitate communication between caller and callee.</p> <p>There is no perceptual difference between predictive dialing and manual dialing. The fact that the process is automated is irrelevant from the standpoint of the telephone consumer. It is clear that there are several distinguishing factors between autodialers and predictive dialers.</p> <p>The laws regulating autodialers should reflect the different automated dialing systems, and the FCC needs to clarify the definition and use consistent industry terminology.</p>

**EXHIBIT B**

**INDUSTRY STATISTICS**

COMMENTING ENTITY	SUMMARY OF COMMENTS
Business Marketing, June 1992	The 100 top business to business marketers anticipate to increase spending in telemarketing by 49% during the next few years.
CITICORP	<p>\$5 Million per year spent on predictive dialing equipment credit card operations.</p> <p>\$5:\$1 return (they recover \$5 for every \$1 spent).</p> <p>\$26 Million per year in revenue resulting from use of predictive dialing equipment.</p>
AT&T	<p>Telemarketing industry supports 3.4 million jobs nationwide.</p> <p>Over 300,000 bus. actively telemarket to business &amp; residential consumers.</p> <p>Businesses make more than 300,000 tmktg. calls to more than 18 million Americans each day.</p> <p>One out of every 14 people called by a telemarketer makes a purchase.</p>
JC PENNEY	Penneys has invested more than \$13 million in auto dialer equipment for debt collection.



AMERICAN COLLECTORS ASSOC.	U.S. collection agencies handled betw. \$70 and \$80 billion in placements in 1991.
CUC INTERNATIONAL	More than 2 million of the potential customers called purchase one or more of CUC's services, generating approx. \$250 million revenues a year. Once potential customers become members, they purchase trips & merchandise worth over \$400 million per year.
AMERICAN SERVICE TELEMARKETING	300 Employees engaged in calling activities. Invested more than \$800,000 in predictive dialing equipment.
AMERICAN COUNCIL OF LIFE INSURANCE COMPANIES	Statistics of complaints generated by live operator calls by various members: <ul style="list-style-type: none"> <li>• 26 complaints in 3.4 million calls in 1991.</li> <li>• .53 complaints per 100,000 calls in 1991.</li> <li>• 125 complaints out of 22.1 million calls in 1991.</li> <li>• .0004% complaints in 1991</li> </ul>
TIME WARNER, INC.	More than 3.7 million people order Time Warner products annually via tmktg.

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FEDERAL COMMUNICATIONS COMMISSION  
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The Revised, Corrected and Amplified Comments

of

Private Citizen, Inc.

Originally Submitted May 26, 1992

In a Matter presently before  
the Federal Communications Commission

CC Docket No. 92-90

Telephone Consumer Privacy Act  
of 1991

July 10, 1992

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

COMMENTS ON THE FEDERAL COMMUNICATIONS COMMISSION'S (FCC) PROPOSED  
IMPLEMENTATION OF REGULATIONS AND TENTATIVE DEFINITION OF EXEMPTIONS TO  
PROHIBITIONS OF THE TELEPHONE CONSUMER PROTECTION ACT. (TCPA or The Act).

INTRODUCTION AND SUMMARY OF COMMENTS REGARDING THE ABOVE

**IT STINKS !**

Due to public outcry, the TCPA was created (presumably) to protect consumers from the intrusions of telesolicitors. But its net effect will be to protect solicitors while it strips citizens of their basic right to be left alone.

In order to get Congress to pass, and President Bush to sign the TCPA, gaping loopholes (large enough to drive a "boiler-room" through) were added to it. Not satisfied with this, the FCC seems ready to take every advantage to further weaken The Act with proposals of wholesale exemptions, and avoidance of efficient, effective means by which a citizen could be protected from *junk* callers.

The carcass of this law should be buried. Effective legislation should be forged. Failing this, the FCC should eagerly help America's majority who seek to effectively control intrusive, unwanted telesolicitations of either a sales, or non-commercial nature. Since the FCC's current TCPA proposal more closely reflects the interests of businesses (such as AT&T and Ameritech) than those promoted by citizens, it should be remembered that our's is supposed to be "The best government by the People",... not "The best government that people can buy" [\*]

AN OVERVIEW

Private Citizen, Inc. (PCI) was formed in May 1988 to protect private citizens from unwanted fund-raising, political, survey, and business-related telephone solicitations. PCI effectuates our fundamental right to be left alone, free of such unwanted tele-intrusions, through written notifications sent on behalf of our members, to over 1000 telephone marketing related organizations. These include list compilers, telephone solicitation service agencies, firms that make such calls on their own behalf, and others. They are put on notice of our members' unwillingness to be freely disturbed by such calls, and that such calls will be received only on a *for hire* basis from such notified firms. [1] Currently, PCI has approximately 3000 subscribers nationwide.

Since 1985, PCI's president, Robert Bulmash has studied the "out-bound telesolicitation" industry; its effect on our rights, and our reaction to all incoming phone calls. Today, this Industry operates freely within a virtual legislative vacuum. Such telesolicitors (a.k.a., *junk* callers, telemarketers, phone-to-phone solicitors, telenuisance callers) barge into our homes at their convenience, for their own self-interest, in order to take advantage of our conditioned reaction to the ring of a telephone, as if we were Pavlovian dogs.

This *telenuisance* industry has effectively diminished our sense of sanctuary at home, an essential component of our residence, where we may retreat after a day's labor to spend time

[\*] From 1/89 to 6/91, the following was given to each of two Illinois state senatorial campaigns.

from an Illinois Bell Telephone related PAC	- \$10,300 to Democratic - \$10,000 to Republican
from an AT&T related PAC	- \$ 6,500 to Democratic - \$10,000 to Republican
from the vast majority of citizens	- \$ 0 to Democratic - \$ 0 to Republican

[1] See PCI Authorization Form

as we see fit. [2] Perhaps Dante Cirilli of Grolier Communications (a telesolicitation firm) illustrated the problem best when he said, "[The public has] been conditioned to sit up and listen when the phone rings in our home. How natural is it for us to turn the TV down, or even to move into another room to give the caller our undivided attention. And when the caller is a telemarketer, the result is a concentrated commercial message to which we have no other choice but to respond." [3] (writer's emphasis)

Before, and since Mr. Cirilli's insight, we have abhorred live unsolicited sales calls:

68% very annoyed - The Roper Organization Am. Demographic Mag. 3/91

83% preferred not to be called - Public Pulse / Roper Inc. Mag. 1/89

78% find it unacceptable - Ebasco Consult. commissioned by Washington State Utility Comm. 1985

86% consider it annoying - Field Re'srch. commissioned by Pacific Telephone & Telegraph 1978

66% hang-up on, or cut off the pitchmen.- Public Pulse / Roper Inc. Mag. 1/89

70% see it as an invasion of privacy - Walker Research Telemarketing Mag. 3/91

69% consider such calls an offensive way to sell - Walker Research Telemarketing Mag. 3/91

The vast majority of Americans are fed up with this intrusive industry's concentrated messages to which we have no other choice but to respond! How has the American family come to deserve such insult?

PCI's efforts are driven by our fundamental, therefore Constitutionally recognized (though unenumerated) right to be left alone; a right that Supreme Court Justice Louis Brandeis referred to as "*the most comprehensive of rights, and the one most valued by civilized man*" [4]. Furthermore, the U.S. Constitution's Preamble tells us that, "*We the People of the United States, in Order to form a more perfect Union, establish Justice, insure Domestic Tranquility...*" created our system of government.

If our right to enjoy peace and quite is to exist at all, it must at least exist in our domicile, our home. To effectuate that right, we may notify a telesoliciting entity of our unwillingness to be disturbed. And once notified, they have a duty to respect our request to be left alone. To do otherwise would be to violate a fundamental right, the spirit of the 9th Amendment [5], as well as the right to peacefully enjoy our own property.

Unwanted door-to-door, and phone-to-phone solicitation are strikingly similar.  
Both summon us while disguised as the familiar ring or knock of a family or friend.  
Both are intrusive strangers who know more about us than we of them.  
Both pull us from our private, family activity at home.  
Both demand a physical act in response to their summons.  
Both are personally upon us at their convenience.  
Both present themselves in "real-time", thus forcing us to deal with them.  
Both may defraud us, and disappear without a trace.  
Both know beforehand, that their act will likely serve only to disturb us.  
Both can do all this without gaining physical entrance to the home...

The phone-to-phone soliciting industry is spreading, with growth estimates ranging from 30

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[2] "Our decision reflects... the right... to be let alone in the privacy of the home. Sometimes the last citadel of the tired, the weary and the sick." Carey v Brown 447 US 455, 471 (1980)

[3] The Washington Monthly, December 1986 - Article titled "Dialing for Dollars".

In Telemarketing Magazine of April 1991, "Grolier" was listed as one of the largest U.S. telesolicitators

[4] Harvard Law Review, 1890

[5] Constitution of the United States Ninth Amendment "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."

to 50% annually, while door-to-door soliciting fades into a memory. To date, our legal system has recognized only a means to effectively ward off the later. And our power in this regard is absolute, based solely on our discretion, not the nature of the solicitation. Now our government seems ready to formulate rules for the former, based not on the protection we need, but instead on the minimum protection that can be given.

In Martin v. Struthers 63 S.Ct 982 (1943), the court stated, "*For centuries, it has been a common practice... for persons not specifically invited to go from home to home and ring doorbells... Whether such visiting shall be permitted has in general been deemed to depend upon the will of the individual master of each household...*" While in Pennsylvania Public Interest Coalition v. York Township 569 F.Supp. 1398 (1983) the court held, "*A city can punish those who call at a home in defiance of the previously expressed will of the occupant.*", and "*The township has the means at its disposal to protect those individual residents who indicate they do not wish to be disturbed.*"

As a proper base from which to regulate, Congress and the FCC should view phone-to-phone solicitation as the more intrusive electronic counterpart of door-to-door solicitations, with the added power to gain immediate electronic entrance to a home at the push of a button thousands of miles away. Sadly, the NO SOLICITATION sign our government is readying for us, will probably read more like OPEN HOUSE to the myriad of *junk* callers excluded from The Act.

The Telephone Consumer Privacy Act (TCPA) is supposed to help protect our right to be left alone, free from the intrusions of those we are unwilling to hear from. However, in light of the rainbow of exemptions allowed by the TCPA, and those tentatively proposed by the FCC, The Act seems to be shaping up as the antithesis of citizen protection. Private Citizen's fear is that once the FCC fulfills its seeming intention to bleed this already very weak legislation, the TCPA will be seen by the *telenuisance* industry as a license to disturb us. Worse yet, courts may wrongly view any civil action brought against unwanted tele-intruders as meritless unless brought pursuant to the TCPA (in the absence of "telephone solicitation" legislation on a state level).

Thus the TCPA, which was touted as a *citizen's privacy protector*, may actually become a *junk caller's legislative crowbar* for entering any home, while holding it up to shield themselves from repercussions which would otherwise result from their wrongful intrusions. Indeed, leaders of the Telephone Solicitation Industry are already talking about how the TCPA will legitimize the Industry [6].

Even if the TCPA is implemented in its most formidable version, with *live* calls included;

- † It will still let every *telenuisance* firm call every citizen annually without consequences,
  - Their are "*hundreds of thousands of local businesses that account for most of the calls...*" [7]. Thus it is reasonable to assume the majority of residences are each within the "telesolicitation firing range" of thousands of such firms.
- † If a *junker* repeatedly televiolates the law, and is sued as a result, the TCPA allows the intruder an "**affirmative defense**".
  - Essentially, under the TCPA, all the *junker* has to say in court is, "Your Honor, we tried not to call him!" Since *telenuisance* firms are commonly megalithic-like enterprises with financial and legal assets far beyond an average citizen's, once such a firm testifies, "it was a mistake", the televictim will have to prove otherwise.

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[6] TeleProfessional Magazine, March 1992: **Legislation Aimed at Telemarketing Has Positive Twist**, "*Legislation will have a legitimizing effect for telemarketing.*" Steve Idelman, Chrmn, ITI Mrktg. Srvc.

[7] DM News Richard Barton's May 27, 1991 column, **Inside the Beltway, Why the No-Call Bill Is Dangerous**

- Many telesoliciting firms have software enabling "No Call" requests to be effectuated. Yet employees of such firms commonly report that people, logged *on screen* as a "No Call", continue to be called. The seeming anomalous behavior of a firm over-riding "No Call" requests can be understood in light of the Industry's willful nature of calling those who don't want to be called. (Indeed, if all those who preferred not to receive tele-sales-solicitations [83%] were not *junk* called, the industry would be quickly crippled from a lack of available targets.)

Unless the plaintiff and judge know of the common practice to over-ride "No Call" software, a judge will likely, (and wrongly) view the defendant's mere possession of the software as evidence of the caller's intent to heed a "No Call" request. Thus such decisions will often favor the plaintiff, based on misleading evidence.

♦ The citizen may also file a complaint with the FCC based on violations of 47 USC § 227.

- **RUBBISH!** Unless complaints are against phone companies, the FCC will effectively do less than nothing about them. Example: When this writer made complaint (with extensive documentation) to the FCC alleging violations of a Communications Act criminal statute (47 USC § 223, [\$50,000 / 6 month penalty]), involving the WATS line of a *Wall Street* based investment firm (**McLAUGHLIN, PIVEN, VOGEL Securities**), the FCC wasted 8+ months, and untold tax dollars to find it was not the proper entity to enforce the law against *non-phone company* violators. Such a finding can be made in 8 minutes... not 8 months. The result was an absolute, total waste of time and energy for all involved... and your taxes. (see copy of subject complaint & Illinois Bell trap report)

As it is with any powerful industry lobby, those profiting from telephone solicitations try to minimize the implementation of effective government regulation. In that regard, the Direct Marketing Association (DMA) tells lawmakers that its *self-regulatory policy* benefits the public. The DMA has even created a No Junk list they obliquely term the *Telephone Preference Service* ([TPS]. The DMA tells law-makers, citizens, and the media that those who are unwilling to be *junked* can put themselves on the TPS, which is "made available" (read "sold") to the Industry. At the same time, the DMA tells everyone that *junk* callers do not want to call anyone unwilling to be called... as such calls would not be productive.

On the surface this seems to make perfect sense. But what the DMA fails to effectively address is that the vast majority of phone sales solicitations are made to people who prefer not to be bothered with such calls. The *junk* call industry's first priority is finding a compliant *callee*. Since the odds of failure are so great for any one call attempt, they try to insure success by increasing the number of calls. This strategy results in a citizen's right of privacy to suffer an outrageous increase of insult. At the same time, they often view a family as *just another number*, something they can handle wastefully as they please. [8] And why should the Industry do otherwise, when the injured are given no recourse by government?

There is no other societal circumstance which tolerates an unauthorized "real-time" entry into another's home based solely on the intruder's right of "free speech", or commerce. The fact that our home's front door faces the public way, does not constitute an invitation for others to enter in the exercise of their rights. Nor does our open window authorize others outside to gawk at the private activity within. Likewise, our residential telephone's

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[8] Encyclopedia of Telemarketing edited by Bencin & Jonovic, Published by Prentice Hall, **Handling Rejection**  
"*Humans are just not conditioned... to continually withstand the perceived head-bashing that is associated with the inevitable 'no's' telesales reps hear, day in, day out.*" "*Yet those who continue to prosper in telephone selling have found ways to insulate themselves from the seeming endless barrage of 'no's'.*" "*Accept the fact that you will get 'no's'. Many of them. And then more.*" "***Don't be afraid to waste a few calls. So what if you got a 'no'? You have an effectively infinite number of calls available to you.***" (this writer's emphasis - their writer's candor)

connection to the public network, does not constitute authorization for others to enter our home, and demand our physical involvement for their own self-interest, when they know (or should know) society's general displeasure with such behavior.

Indeed, in the world of telephone solicitations, where most are unwilling to be called, the only socially responsible method for the conduct of their business would be to solicit only those who have given their *prior, fully informed, affirmative consent* to that soliciting entity: a concept rejected out of hand by the Industry. [9]

Tellingly, in the face of clear evidence of our annoyance (and its own TPS list of 400,000+ citizens), last year the DMA's Senior Vice President of Governmental Affairs, and registered lobbyist, Richard Barton told Congress that the DMA has, "*no empirical data demonstrating that American consumers are generally opposed to current 'live operator' telemarketing practices...*". Yet, this same DMA lobbyist seemed to recognize how the public could be opposed to such practices 10 weeks later, when he was quoted in a trade publication insisting that, "*...telemarketers must continually remind themselves that theirs is the most obtrusive of advertising media.*"[10]

While the public clamors against phone-to-phone soliciting, the Direct Marketing Association's members allow the DMA to puff itself as the "the foremost advocate of direct marketers". Many major U.S. firms now filing TCPA comments are DMA members. To gain insight into the comments by these Industry / DMA members, let's examine how they view some of the basic problems collateral to the Industry's operation.

- ♦ In responding to the need for a national No Call database;
  - The DMA tells the FCC, "*a regulatory approach based upon third party administration of [such a] 'do not call' database simply will not work*". Yet when the DMA touts its own national *Do Not Call* database to the public, the TPS (infra), we hear how effective it is. Perhaps the FCC can determine why the DMA seems to have two different opinions about a national 'No Call List'... depending on who its trying to persuade.
- ♦ Recently, Mr. Barton, the DMA lobbyist, chaired a *telemarketing* convention's, legislative panel discussion, at which the FCC Chairman's Chief of Staff delivered the Legislative Keynote on the TCPA. The convention, panel, and conference were sponsored by Telemarketing Magazine. When the panel was asked to relate the Industry's anthem, "*we don't want to call those who don't want to be called*", to the Industry's behavior of calling a population that (surveys consistently find) generally don't want to be telesolicited at home, Mr. Barton responded as follows;
  - 1) **The Industry doesn't have statistical evidence that most don't want telesolicitation.**
    - Yet the statistical evidence above is available to anyone... who is concerned.
  - 2) **Surveys can be "torqued" in almost any way [to gain the statistical data desired].**
    - Yet two of the surveys mentioned above were generated by one of the industry's own telesoliciting firms, and published in Telemarketing Magazine, the conference's sponsor. This becomes more *peculiar* in light of Telemarketing Magazine's common, prominent reference, that it is regarded as the "Bible" of the industry, and considered "The only credible source of information in the industry." (What was that about being *torqued*?)
  - 3) **Telemarketing generated \$400 billion. Thus he doubts only a minority was involved.**
    - Yet the annual dollar figure cited by this Industry lobbyist is one that is inflated 25

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[9] DM News May 18, 1992, **AmEx Hit on Data Usage; NY Sets Privacy Hearing**; quote of Jonah Gitlitz, DMA president - "*Perhaps the most draconian legislative threat that could severely impact the direct marketing business, as we know it now, is the increased threat of positive consent - that consumers should not receive solicitations unless they specifically request them.*"

[10] DM News - Sept. 30, 1991 Richard Barton's column, **Inside the Beltway; Tone it Down, Telemarketers**

times (see infra re: *paragraph 24*). In fact, on average a very small percentage of those telesolicited actually comply. Mr. Barton may now cast his doubts aside!

**4) Most shoppers don't want sales clerks approaching them in stores either.**

- This one takes the cake! Aside from an implied abandonment of the mendacious argument that "most folks don't mind *junk* calls", the Industry's Mr. Barton indicates that our right to be left alone at home is somehow comparable to our right of privacy at a used car dealership, clothing boutique, or the like. Perhaps, in its frenzy to generate revenue, the telesoliciting industry has lost its sense of what a home is. It would do well for the Industry to clearly realize that the ancient concept of our home as our castle is still alive today. Phone-to-phone solicitors should not even begin to fantasize our home as their convenience store.

Their novel view of the world, and peculiar response to those who question it, seems to characterize a blindly defensive posture. Sadly, the success of this defense strategy speaks as much about our government, as it does about their intrusive industry.

The Industry (through lobbying entities like the DMA) has successfully thwarted government regulation. It has virtually cut the legs from under most state legislation that it couldn't stop. And it is now evidently doing the same federally. Their argument, "*We don't want to call those who don't want to be called*", has worked so well, that now when a telephone soliciting firm continues to bother a person who has repeatedly told that firm to stop, the solicitor will bark, "We will abide by the law... and only the law", leaving the televictim with no perceived recourse.

If the TCPA, is effectuated with the proposed exemptions, our homes will surely become their retail outlets. Indeed, the very best aspect of the TCPA is that would allow the FCC to ask Congress for the sweeping powers necessary to actually protect private citizens from the telenuisance industry. An action that is deserving, but not foreseen from the Federal Communications Commission under President Bush's leadership.

**ADRMPS (AutoDialing, Recorded Message Playing device)**

**AUTODIALERS** - The proposed TCPA bans AutoDialers from calling "911", hospital, police, and fire emergency numbers, as well as physician and poison control offices. For the purposes of this aspect of the TCPA, it should also ban calls to the homes of medical professionals who are "on emergency call". The proposed TCPA bans AutoDialers from calling the "rooms" of a hotel, hospital, health and elderly care home. For the purposes of this aspect of the TCPA, it should also ban calls to the private homes of elderly citizens.

Generally, the argument for allowing use of ADRMP's for non-commercial or fund-raising activity can be favorably compared to allowing assault weapons in the name of hunting. Use should be strictly regulated, with stiff penalties. All types of solicitations should be included in the TCPA, without exception.

It seems absurd that autodialers would be banned from calling hotel rooms, but not homes. The very nature of the legislation at this point is to protect the property rights of commercial concerns, and the privacy rights of those who pay an innkeeper. Yet nowhere else in the TCPA is this absolute blanket of protection given to citizens in their homes. (On the topic of hotels, at least one Hilton Hotel is soliciting collateral business by "*live telesoliciting*". In doing so, Hilton managed to repeat such calls to this writer, after my vigorous instruction to Hilton's pitchmen to stop. [If it happened here, it evidently must happen elsewhere.]

"Predictive" autodialers commonly call numbers before staffers are available to pitch those called. Thus *junk* calling firms avoid tedious dialing and waiting while we run to the phone.



These predictive dialers pass answered calls to solicitors (*busy's*, and disconnected numbers are dropped). When more people answer than the machine predicted, it will either play a "Please hold" message, (hoping we'll wait for the *next available pitchman*), or just hang up on us. Unless autodialers are prohibited, the TCPA will impliedly license the annoying use of such equipment. If the TCPA allows recordings, we will be dragged to the phone at a machine's convenience, only to wait for them. If the TCPA bans recordings, these machines will hang up on us instead. The industry term for these hang ups is "abandonment". One Industry leader whose firm (AT&T) makes 5 million telesolicitations a month, recently noted that the industry considers abandoning 3% of predictive dialed calls to be responsible (3% of 5 million = 6,000).

Since the TCPA will not prohibit machines from hanging up on us, I urge the prohibition of all autodialer calls to homes.

#### ADRMP's TO BUSINESSES

Small businesses may commonly get 10 phone solicitations a day. From bakers to book keepers, a businessman must stop profit making activity to answer a solicitor's summons, as he can't afford to miss the call of a potential customer. As a result, the added *telenuisance* cost of doing business are countless and useless interruptions of productive time. Once a business asks a telesoliciting entity to stop intruding, the solicitor should stop until instructed otherwise. Simple as that! And that's what the law should enable!

I strongly urge the FCC to prohibit ADRMP calls to all businesses.

#### COMMENTS ON THE TELEPHONE SALES PHILOSOPHY OF THE INVESTMENT INDUSTRY

The one industry singled out in the text of the FCC's NOTICE OF PROPOSED RULEMAKING, is the "stockbroker" industry. In that regard, it mentions 75,000 brokers making 1.5 billion calls per year. Possibly, this aspect of *junk* calling is the largest contributor to the nation's telenuisance problem. As such, it is appropriate to point out specific incidents indicating that particular industry's view of a telephone subscriber's rights.

MERRILL LYNCH - In Massachusetts, after an attorney was repeatedly telesolicited by this firm's representatives he asked that Merrill Lynch stop bothering him in his office. [11]

When the calls continued, the attorney put his request in writing.

When the calls continued, the attorney threatened legal action.

When the calls continued, he asked for, and got a court order enjoining Merrill Lynch to stop.

Merrill Lynch appealed the ruling, claiming (in part) that:

Merrill Lynch "... has no practical ability to ensure that any person will not be called..."

the attorney "... does not have to take any calls at his office, unless he chooses to do so."

(I am compelled to note my view of their argument here; that since they cannot effectively control who they solicit, citizens bear some responsibility for these intrusions by answering the phone.)

Remarkably, the State's Supreme Court took the appeal prior to its Appellate Court hearing, and found that the words of the state law on which the attorney based his original action, did not accurately reflect the state's intent. The court rejected the interpretation of the word "or" in the law's phrase requiring that the calls be an "unreasonable, substantial or serious interference", and ruled that the word "or" was used to really mean "and". Therefore, since the Merrill Lynch calls were not also serious and/or substantial, the standard was not met, and the injunction was overturned.

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[11] Commonwealth of Massachusetts Appeals Court - No. 89-P-1117 Middlesex County

DEAN WITTER - According to a telesolicitation trade publication [12], describing this firm's broker sales training practices, they test telemarketers in the following way; *"Bring them in on Saturday at 8 AM. Make them do 50 calls before lunch. For those who complete the calls tell them 'we do it again on Sunday morning.' Those who show no hesitation get the job."*

PAINEWEBBER - Their Senior VP and General Counsel (in response to issues raised due to the repeated solicitation of a person who had told them to stop) told this writer; *"At this time, however, there are only a few jurisdictions with current prohibitions against the use of telephone lines for legitimate purposes. To my knowledge [the subject televictim] does not reside in such a jurisdiction."* PaineWebber's general counsel then advised me to send him any future Private Citizen correspondence, with the oblique warning that, *"... some organizations may feel it incumbent upon themselves to charge you for their time. Please bear that in mind."* A copy of this letter is enclosed for review. It illuminates a screaming need for effective regulation of what seems to be a common telesoliciting philosophy in The Investment Industry. *When PaineWebber talks, people must listen...* until we get them off our phones. I strongly urge the FCC to remedy this situation.

Concerning oblique warnings from major investment firms; they too should *bear in mind* that a bully (even a subtle one) does his best work in a schoolyard... against children!

A popular *investment* industry practice is to hire "pre-callers", whose job it is to dial phone numbers to get us to the phone. Once we are on-line, they try to transfer those who don't hang up, and who may have an interest, to licensed stockbrokers for pitching. In this way stock-brokers don't have to waste their valuable time while wasting ours. Pre-callers to do it for them.

Commonly, investment industry telesolicitors will make 300 calls a day. The result will be 280 that will not allow the caller to complete the pitch (by hanging-up or vigorously describing their displeasure). Of the 20 others, one will become a "client".

The above items provide only a glimpse of one corner of the telephone solicitation industry. We the People, need effective help in protecting ourselves from an industry driven by attitudes such as these! The FCC's anticipated neglect to include TCPA protection for businesses that have asked specific *live* soliciting firms to stop tele-annoying them, will **help to accelerate the frenzied sales practices of an industry whose leaders admit to its being out of control.**

#### GENERAL EXEMPTIONS PROPOSED FOR CALLS TO RESIDENCES

By excluding non-commercial solicitation, the TCPA regulates the content of speech. This may well be the TCPA's fatal flaw. The TCPA declares, *"The Congress finds that: (#8) The Constitution does not prohibit restrictions on commercial telemarketing solicitations."* Indeed, the Constitution does not prohibit restrictions on any specific type of solicitation by telephone, while it commonly does prohibit restriction of speech based on its content. However, the Constitution does allow: Time, Place, and Manner restrictions on speech. *Grayned v. Rockford*, 408 U.S. 104 (1972). Certainly, solicitors have ample alternatives to the use of our telephone, which interrupts our meals, wakes us from our sleep, or drags us from our bathroom, in the exercise of thier free speech.

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[12] INBOUND OUTBOUND MAGAZINE, July 1989, **Patches & Fixes**

IT IS PROPOSED THAT ADRMP's WILL BE ALLOWED TO SOLICIT RESIDENTS FOR:

**Non-commercial purposes -**

Such as tax-exempt entities like Police and Fireman's Benevolent Assns. whose incessant solicitors commonly keep +25%, while turning over less than 15% of the donated gross to a union picnic beer account (often the undisclosed beneficiary of such fund-raising drives).

**Former and/or existing customers -**

The FCC should clarify if a *call for product information* to an 800 number will qualify as an existing relationship. And, what if a caller refuses to give a phone number upon request? (Note: residents who call 800 lines commonly have their originating [home] phone number supplied to the called entity by the phone company supplying the "800" service.)

Notable here, AT&T staff has described (to this writer) its criteria for judging who are AT&T customers; saying that such criteria includes those who have accepted collect calls from AT&T phone lines. (... honest!)

The FCC should insist on a telesolicitor's duty to respect the rights of residents who ask to be left alone, regardless of whether that person is, or was a customer. A firm may ask if they may intrude in to the homes of new customers during their initial business transaction.

**Debt collection -**

Although the FCC mentions that a predictive dialer "immediately delivers answered calls" to a telephone rep, manufacturer's sales staff of such equipment commonly say that it is appropriate to set the speed of the predictive dialer so high that it will "abandon" (hang up) on 30% of those called... for lack of a representative to talk to those answering. (Note: with today's predictive dialer technology, abandonment is not a function of the dialer, but rather of the calling firm's discretion.) Instances of high abandonment in debt collection is a means of applying pressure to those unable or unwilling to pay bills in a timely manner.

Consent for ADRMP debt collection calls may be obtained when credit is first extended.

If consent is refused, so too may be the credit. Exclusion from the TCPA is unnecessary.

**Emergency purposes**

The FCC interprets this to include health or safety information, even if not of an emergency nature. As a result, phone scams that commonly use ADRMP's to pitch vitamin & water softeners will be allowed to continue. These scams first suggest that one of five "awards" will be given to the called party... if they purchase. Today, this popular telefraud scam preys predominantly on older citizens. I suggest that the FCC take this opportunity to act to protect older citizens in this regard.

I strongly urge that (if all ADRMP's are not banned, as they should be), all ADRMP's users should be required to have prior affirmative, fully informed authorization of the called parties.

**ADRMP TECHNICAL STANDARDS**

The FCC asks for comment on the following rules:

The name of the calling entity is to be stated at the beginning of the message.

Whose name?... the principal or the soliciting agency that may have made the call under contract? Televictims will likely not recognize the name of any firm that would use an ADRMP in any case.

The address or phone number of the caller can be given at the end of the solicitation.

This will force us to listen an entire pitch, waiting for sufficient information to enable identification of the caller, in order to proceed with a complaint, in or out of court.

I urge that name, phone number and address be given within the first 10 seconds of the solicitation. The phone number shall not be the ADRMP's, and shall be answered during ADRMP operation. The identifying information shall be given at a rate allowing it to be easily hand written as given.

The ADRMP shall release the line within 5 seconds of receiving "notification" of a hang up.

Note that some local telephone companies take 25 seconds to transmit that signal. [13]  
A dead line for 30 seconds, due to an ADRMP can result in a dead person forever.  
I urge that ADRMP's be required to "immediately release" the line.  
- if not, then ADRMP's should not be allowed on that local exchange switch!  
- that is, unless the law is meant to protect ADRMPs instead of people.

Generally, these rules seem to miss the point: **Most of us don't want junk phone callers to disturb us.** Instead of taking this opportunity to protect us, the FCC proposes to incorporate rules to:

Require ADRMP users to give their name - a minimal requirement at best.

Allow ADRMP users to force victims to listen to an entire pitch before giving their address.

Allow ADRMP's to tie up our telephone lines for up to 30 seconds AFTER WE HANG UP.

The FCC's proposals actually do more to protect the *junk* call industry, rather than its victims.

Whether a tele-solicitation is made to home or business, by machine or personally, to generate sales, donations, or data, the FCC should be clear in its rulemaking (or lack thereof) that the

TCPA is not to be construed as a license to abuse the rights of others via the nation's telephone network. I strongly suggest that the FCC express its sense that an entity, once a soliciting entity is told to bothering another firm or person, the solicitor is under a duty to stop making such calls; regardless of their nature, be they for sales, non-profit, survey or political purposes.

#### TELEPHONE SOLICITATION TO RESIDENTIAL SUBSCRIBERS

The FCC's rulemaking procedure mandated by Congress is supposed to result in the protection of citizen privacy rights from violations by *junk* callers. Yet President Bush stated that the FCC should implement the TCPA in a pro-business fashion, saying;

*"... I fully expect that the [FCC] will... ensure that the requirements of the [TCPA] will be met with the least possible cost to the economy."*

Thus the FCC's primary Presidential directive is to protect business. Though the TCPA was created to protect our right of privacy from *junk* call intrusions, the President seems to see the TCPA as a problem that citizen's created for business.

The FCC may either help unwilling victims of, *"the most obtrusive of advertising media"* (see Barton, cited above), or limit the protection of these victims by implementing the wholesale exemptions that it, and the business community have proposed or applauded.

This writer often hears from residential telephone subscribers who describe repeated solicitations from specific firms after a resident's request that they stop. Commonly, these callers are so brazen that they will inform the televictims that their is NOTHING (short of removing their phone, or not answering it) that will stop their tele-intrusions. Yet these callers know their next solicitation will likely result only in disturbing someone.

If our right to be left alone at home is to exist, we need protection from these intruders. *Junk* callers demand their right to disturb us, in disregard of our privacy. At the same time (as Mr. Barton demonstrated) the industry turns a blind eye to the vast majority of us who consider even *proper phone sales solicitation calls* to be an outright offensive way to sell, and a violation of privacy (as noted in their own "Bible", Telemarketing Magazine)

And by the way; repeat calls are not necessarily the specialty of "boiler-rooms". Indeed such boiler-room operations are often scams, and as such are short lived. Repeat *telemisance* calls commonly involve the "board-rooms" of America's largest, and most respected firms.

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[13] see FCC document # 63203: ICB-FS-UNSOL-1 April 1990 UNSOLICITED CALLS

Examples of the above include:

**CitiBank** - has insisted on a policy of continuing to solicit citizens after being asked to stop. And to effectively block attempts of those who would try to stop Citi-*junk* calls independently. In one incident they even refused to identify the firms they hired to carry out these tele-intrusions. To wit: CitiBank gave the phone numbers of its credit-card applicants to various *junk* calling service agencies. One of these was a "wrong number" which happened to be mine. As a result, I began getting *junk* called by a variety of firms looking for someone that did not live at my residence. When I asked CitiBank to correct this, they told me it may take up to six months for the solicitations to stop. As this did not constitute appropriate co-operation, I asked CitiBank to identify the firms that they gave my "wrong number" to, so I could personally contact them with instructions not to bother me. CitiBank refused!... saying, **since I was not a CitiBank Card Holder, they had no duty to tell me who they gave my phone number to.** (The Citi-*junk* calls continued for well over 6 months!)

**Encyclopedia Britannica's** Britcom (telemarketing) division has insisted it will telesolicit any person that it is hired to solicit by its clients. This will be the case, even in defiance of a citizen's previously expressed request that Britcom not call again. The rationale Britcom gave me for this behavior was that they work for the firms that hire them, not for the citizens they annoy. Thus, we have no right to ask them to stop bothering us.

**Ameritech**, and its local exchange carrier Illinois Bell Telephone, continues to multi-telesolicit residents that have repeatedly asked these firms, both orally and in writing, not to bother them with their *junk* calls. In more than one case, when Ameritech's televictims asked Ameritech to identify the firms they hired, so the televictim could contact such firms directly to advise them not to *junk* call them, Ameritech refused. Thus these residents were forced to remain defenseless against firms that Ameritech / Illinois Bell kept hidden, until they barged into our homes. Only after an Ameritech hired tele-gun bothers a resident, will Ameritech / Illinois Bell acknowledge that they contracted with that particular firm, and only to the the resident intruded upon. The net effect... Ameritech / Illinois Bell will act as a barrier to citizens who wish to protect themselves from Ameritech / Illinois Bell *junk* calls. **We need effective protection from "reputable" firms like Ameritech.** (Note: Ameritech / Illinois Bell was soliciting their own customer in this situation. It is evident that an exclusion for existing business relationships will only serve to promote abuse such as noted here.)

**MCI** once telesolicited an elderly woman the afternoon she returned from the hospital being diagnosed as having a malignancy. When the woman said "no" and hung up, the MCI solicitor quickly called back asking for the woman's husband (she had never been married). The solicitor readily admitted her earlier call, but insisted that she called back to *talk to someone who could understand common sense.*

As horrific as this situation was, it got worse when this matter was brought to the attention of MCI's Washington Headquarters. Despite the *junk* caller's admission to the earlier intrusion, MCI's investigation concluded that their solicitor inadvertently marked the woman's card as a "busy", thus generating a second call. In my view, as ill-timed as MCI's first intrusion, and as awful as their second, the lowest aspect of the entire episode flowed directly from MCI's headquarters when they reported their "busy" finding. Thus MCI's self-investigation freed it from accountability by finding a non-event. Thus comforted by their own special reality, no corrective action was taken because none was needed. As a result, similar MCI non-events likely continue today. (Whether run from a boiler-room or a board-room, the obtrusive nature of the *junk* call industry, and its effect, remains the same.)

In October of 1990, it was reported to a Congressional Subcommittee; *Fraudulent Customer Acquisition Practices in the Long Distance Telephone Industry*, that MCI may place as many as 7 million phone solicitations a month. Since that time, trade magazines indicate that MCI's own available capacity to make such

calls has grown by approximately 50%. [14]

**AT&T** - reportedly makes over 5 million telephone solicitations monthly [15]. I often hear from folks about such AT&T calls. Last month, a Georgia resident described four such calls she received year during the past year. Each time she told the AT&T caller she was not to be disturbed again, and each time the caller quickly and wordlessly hung up on her. When she (and I) called AT&T, she learned of their policy requiring her to call an AT&T "customer" service number (although she was not a customer) if she wanted to stop AT&T's pestering. Since AT&T selected, and supervised its solicitors in a fashion which allowed them to consistently hang up on the Georgia resident rather than help her stop their intrusive behavior, it is easy to see AT&T's methods are obstructive to privacy. To view it as indicative of a responsible industry, may force citizens; to find the proper phone number of every firm that *junk* calls them, call those firms back, and ask them not to call again. Worse yet, will be a requirement I fear the FCC may implement; forcing folks to wait for a "first call" before they can instruct a caller not to call.

**Olan Mills** - Chairman submitted his written statement for inclusion in the hearing record of the US Senate's Subcommittee on Communications (July '91) which was looking into regulation of *telemarketing* industry. His closing remarks included, "*We think the FCC should have some other options besides the national electronic data list. The option that we favor is the 'Do Not Call System' that we use now.*" In describing this 'Do Not Call System' to Congress, Olan Mills wrote, "*When someone indicates clearly that they do not want to be called again, we put their number on a list and don't call them again for 2 years.*"

Olan Mills has a peculiar sense of its right to barge into my home. When I say "Don't Ever Bother Me Again!", Olan effectively hears, "Call me again in a couple years!" A plea for privacy is met by Olan with some patience, and then more calls. Tellingly, Olan sees this policy as so responsible that it crows about it to Congress. To me, Olan's policy seems both socially absurd, and indicative of the business philosophy necessary to support an obtrusive sales process that effectively treats our right to be left alone in our own homes, free of annoying intrusions, as but a quaint historical anomaly. Note that the TCPA will enable Olan to double its existing "Do Not Call" callback rate without legal burden. All their assurances aside, this writer was solicited 3 times within a six month period by Olan Mills, Inc., twice after I told them to stop. Indeed, of all the complaints received here, regarding repeat calls after requests to stop... Olan Mills, Inc. is easily among the "Top Ten".

The FCC should require that once:

- a telesolicitor is told not to call a citizen, the firm is considered to have been put on notice,
- a firm, once *notified* not to disturb a citizen, may not do so even once without burden,
- a citizen, business, or agent of either may effectively give such notice prior to any telesolicitations from the notified firm.

In 1980, the FCC found regulation was not warranted. Now the FCC asks if additional authority is needed to protect consumers, The answer is YES, for:

- 
- [14] see: HEARING before the Government Information, Justice, and Agriculture Subcommittee of the (US House of Representatives) Committee on Government Operations. October 17, 1990, page 184  
see: Telemarketing Magazine April 1991, **Top 50 Service Agencies...** Page 43; #1 is Pioneer Teletechnologies, a firm doing + 50% of its business with MCI, with a total of 4,698 "Outbound lines"  
see: Telemarketing Magazine May 1992, **Top 50 Service Agencies...** page 51, #1 is MCI Services Marketing (name changed from Pioneer Teletechnologies). Total "Outbound lines" = 6,694
- [15] see: HEARING before the Government Information, Justice, and Agriculture Subcommittee of the (US House of Representatives) Committee on Government Operations. October 17, 1990, page 185

Prior relationships, when a potential *callee* indicates unwillingness to be called.  
Non-profit/tax exempt, when a potential *callee* indicates unwillingness to be called.  
Survey-research, when a potential *callee* indicates unwillingness to be called.  
Political, when a potential *callee* indicates unwillingness to be called.

The TCPA must enable citizens to advise *junk* calling firms not to bother them before their first intrusion. The FCC is a body of the People of this nation. The People need your help.

It is well recognized that solicitors have a duty to respect "No Solicitation" signs on doors.

Martin v. Struthers 63 S.Ct. 682 (1943) - "...homes are sanctuaries from intrusions upon privacy, and of opportunities for leading lives of health and safety. Door-knocking and bell-ringing by professed peddlers of things or ideas may therefore be... circumscribed so as not to sanctify the rights of these peddlers in disregard of the rights of those within doors."

Carey v. Brown 447 US 471 (1980) - "The state's interest in protecting the well being, tranquility & privacy of the home is of the highest order in a civilized society." "Our decision reflects the right to be let alone in the privacy of the home. Sometimes the last citadel of the tired, the weary and the sick."

Rowan v. US Post Office 397 US 728 (1977) - "A mailer's right to communicate must stop at the mailbox of an unreceptive addressee. To hold less would be to license a form of trespass." "That we are often captives outside the home to objectionable speech doesn't mean we must be captives everywhere."

Reasonable time, place, and manner restrictions may be placed on otherwise free speech.

See: In the Matter of Unsolicited Telephone Calls (FCC Docket No. 78-100)  
Memorandum Opinion and Order of the FCC, 5/22/80, Page 16, Par. 35

See: Grayned v. Rockford, 408 U.S. 104 (1972)

Therefore, soliciting restrictions may consist of: Any time, To place of residence, By phone.  
This would still leave a myriad of alternative forms of speech (advertising) for business to use.

The FCC asks if it should address the inherent difference between ADRMP, and *live* calls.

At the center of the entire matter is **our right to be left alone** free from annoyances that drag us from our activity in response to another's unwanted summons. The harm is our loss of privacy to those who know, or should know, not to bother us. Whether calls are from people who dial phones, or program phone dialers, **IT IS THE SAME RESULT!**

Relating to paragraph #24 - NOTICE OF PROPOSED RULEMAKING, the FCC states:

- 1) "...unsolicited sales calls generated \$435,000,000,000 in sales in 1990".
- 2) "Thus many consumers find such contacts beneficial..."
- 3) "The [FCC] tentatively concludes that it is not in the public interest to eliminate this option for consumers."

**My comments on the FCC's view of unsolicited sales calls to consumers:**

- 1) The FCC wrongly relates the \$435 billion to consumer telephone sales solicitations.  
The FCC cites the TCPA as the figure's source - The TCPA, refers to 'total telemarketing sales'.
  - Total *telemarketing* sales include: industrial and commercial telesolicitations, and calls *made by citizens, at our convenience*, to order products or service.The \$435 billion figure is not historical fact (as indicated), and its use is misleading.
  - The figure appeared in 1985 as a prediction of Industry growth by 1990 [16].

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[16] The \$435 billion figure is cited through-out the TCPA legislative process. Its source has been attributed alternatively to a 1985 prediction of Technology Marketing Corp., publisher of Telemarketing Magazine (as reported in The Encyclopedia of Telemarketing), or the 1985 prediction of a consortium of the Direct Marketing Assoc., the U.S. Bureau of Economic Analysis, Forecasts Associates, and Telemarketing Magazine

- The FCC uses this \$435 billion figure to wildly overstate the TCPA's legislative effect.
- Only 4% (1/25th) of all *telemarketing* is attributable to unsolicited calls to homes [17]. It is unreasonable for the FCC to relate \$435 billion to *junk* "unsolicited sales calls".
  - The 1991 U.S. deficit was \$400 billion. By comparison, the FCC believes \$435 billion is generated by calling "consumers" from their bathrooms, bedrooms, and meals.
- 2) The word "**many**" is a relative term: 1000 is "many", but against 1 million, it's a scintilla. Simply put, and in fact, **the vast majority of us** find unsolicited sales calls an annoyance.
- Adhering to the logic used by the FCC in its conclusion; we should all regularly undergo liposuction since it benefits many of us.
- 3) The FCC indicates its concern that regulation of telephone sales solicitations to residents, may "eliminate this '**option**' for consumers".
- The TCPA should (in theory) protect only those residents that seek protection.
- The strong enactment of the TCPA will result in creation (not elimination) of options for consumers.

The FCC also notes it received 757 complaints on auto-dialers, and 74 about *live junk* calls. [18] This relatively small number of complaints may be attributed to DMA diversionary tactics. The DMA created the Telephone Preference Service (TPS), the Industry's euphemism for a "No Junk Call" list. The TPS's purpose... In their own words, "*TPS will give consumers an alternative to running to their legislators for protection.*" "*We must develop a strong self-regulatory posture [?] if we are to prevent legislation.*" [19]

The DMA is a trade group of many of the U.S.'s largest "for profit" firms who benefit from telesoliciting. "*The goal of the DMA is to discover and to thwart possible government regulation...*" [20]. The FCC assists the DMA in thwarting government regulation by promoting the TPS to consumers [21]:

- without suggesting that unwilling citizens tell *junk* calling firms to stop bothering them.
- or suggesting that citizens write their legislators to demand effective regulation.
- or informing citizens that adherence to the TPS is voluntary on the part of the Industry.

DMA members who claim to use the TPS, continue to tele-annoy folks listed on the TPS. This commonly occurs well after the *junk* calling firm had ample opportunity to purge those who have asked the DMA to be placed on its TPS. Excuses for the intrusions range from:

- "Your not on the TPS." (In one case of this excuse, the DMA got the citizen's listing request by certified mail far enough in advance of the call for the TPS to have been effective.)
- "We have no right to purge another's call list." (a telemarketing *service agency* favorite)
- "We will solicit our own customers as we please." (local phone companies use this a lot)

At least one list compiler used the TPS to *flag* those on it... and still sold their numbers.

#### Relating to paragraph #25 - NOTICE OF PROPOSED RULEMAKING, the FCC states:

The FCC cites Chairman Markey's comments to indicate that ADRMP calls do more harm to

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[17] see Houston Chronicle: 9/16/91, **Working the Phones** quotes the 1990 Annual Guide to Telemarketing.

[18] As the FCC is now *involved in telemarketing*, Private Citizen, Inc. (PCI) is registering (under separate cover), the complaints of approximately 3000 citizens and businesses concerning "live telephone solicitation practices". In doing so, PCI is acting within the scope of its agency agreement with and on behalf of its subscribers.

[19] see Advertising Age: 5/20/85, R.Borders, chair-elect of DMA Telephone Mktg. Council, speaking during the first year of the TPS's operation.

[20] see DM News: 10/22/90, interview with Jonah Gitlitz, DMA President "*The goal of the DMA is to discover and to thwart possible government regulation, and we have done it!*"

[21] see FCC document # 63203: ICB-FS-UNSOL-1 April 1990 UNSOLICITED CALLS



privacy than *live* calls. Yet the quotes cited by the FCC show that both types of calls do very similar privacy damage.

To wit: *Live* solicitors call "more than 19 million" citizens per day.

ADRMP's "have the capacity to call 20 million" citizens per day.

Chairman Markey's comments also correctly noted that ADRMP calls are placed randomly, thus calling unlisted numbers. But all too often, *live* callers call unlisted numbers when dialing sequentially. Sequential dialing is very popular with newspaper sales efforts. (What's the difference if a person, or a prohibited machine sequential dials a hospital coronary room?)

Perhaps most complaints target ADRMP's because no one is on the line to yell at when they come in. Regardless, our right of privacy at home in the area of phone solicitation consists of our right to be left alone. How *junk* callers summon us from our family activities at home, our final sanctuary, is of less concern than the summons itself. Since people are annoyed with both types, the FCC should enable citizens to protect themselves from both.

#### REGULATORY ALTERNATIVES TO RESTRICT LIVE OPERATOR SOLICITATIONS

Simply put, and in light of the overwhelming common disdain held by citizens for *junk* calls; the list that should be created by the FCC is a national OK to Call list. The rationale for it is self-manifesting. It would be cheap, short, contain only those who do not mind having their numbers distributed, and be very valuable to the telephone solicitation industry. Remember the telemarketer's cliché of, "*We don't want to call anyone who doesn't want to be called*"? Pursuant to Industry's own words, such a list should be more than they could ever hope for. Same goes for the vast majority of the people of the United States. As for the Constitutionality of such a "prior ban", other types of annoying exercise of free speech are commonly banned... such as blaring sound trucks on residential streets.

Failing the implementation of an OK to Call list, a Do Not Call list should be instituted... without the exemptions. A Do Not Call list which exempts large segments of this intrusive industry, will be interpreted by the industry as their license to disturb us in defiance of our requests that such callers stop calling. As for anyone who wanted to be called by an otherwise *call limited* entity, that citizen may contact the firm and authorize their calls to continue. Such a database can be easily maintained with "number only" information being supplied to the telesolicitors. Lejeune Associates of Florida already has a system it offers to the Industry that will serve a No Call Database quite nicely. The FCC is aware of Lejeune's capability. Indeed, Private Citizen, Inc. has been sending its Private Citizen [No Call] Directory to those involved in the *junk* call industry since 1988. It is not an exceedingly difficult technological feat.

#### CONCLUSION

Trade publications already report that the FCC is well on its way to effectively gutting the TCPA. The May 4th, 1992 issue of the DM News, wrote its preliminary epitaph:

*"The [FCC], in giving surprising support to outbound telemarketing, has also taken a softer-than-expected stand on automatic dialers and recorded messages."*

*"Though tentative, it is clear the FCC favors 'as little regulation as possible,' said Richard Barton, senior vice president for government affairs with the [DMA], which has quietly pushed for many of these positions."*

The FCC has an opportunity to choose between success, failure, and calamity in the TCPA's implementation. Regardless of what is evident today, I hope it will protect the rights of residents who want to be left alone! Nevertheless, I fear that pursuant to President Bush's instructions, the FCC will accomplish the exact opposite by turning the TCPA into the Telesoliciting Caller's Protection Act.

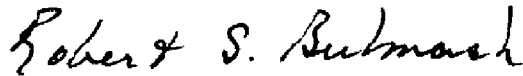
As a baseline, and unless otherwise advised by the FCC, I will assume the FCC's agreement with the following premise;

- That any telephone soliciting entity - be it commercial, tax exempt, research or political,
- having been advised by a telephone subscriber directly, or by his[er] agent, or by an immediate family member, or via a database,
- that the subscriber is unwilling to freely accept telephone solicitations from the notified calling entity,
- shall have a duty to respect the decision and collateral rights of that subscriber, and the subscriber's exercise thereof.

I urge the FCC to clearly state its sense of this important matter concerning our basic right to be left alone by those we are unwilling to associate with.

PRIVATE CITIZEN, INC.

By its President,



Robert S. Bulmash  
c/o Private Citizen, Inc.  
P.O. Box 233  
Naperville, IL 60566  
(708) 393-1555

encl: Private Citizen, Inc. authorization form  
Letter from PaineWebber Sr. VP and General Counsel re: telephone solicitation  
Complaint to FCC re: Harassment via McLaughlin, Piven, Vogel Securities WATS line

Copyright Private Citizen, Inc. 1992  
All Rights Reserved

Exception is hereby granted for purposes directly related the Federal  
Communication Commission's Notice of Proposed Rule Making (CC Docket No.  
92-90), and appropriate distribution of above comments collateral thereto.

# Private Citizen, Inc.

P.O. Box 233 - Naperville, IL 60566 - 708/393-1555

## AUTHORIZATION FORM

*Yes, I'm fed up with junk phone calls. List me in the Private Citizen Directory for a year, and send it to telemarketers across America at least twice a year. Then send me a list of firms to whom it was sent. My **\$20** check is enclosed.\**

I/we \_\_\_\_\_

clearly print your full name (e.g. for spouses, John R. & Jane C. Doe) Note: Only one "Last" name or Firm name may appear on this line.

located at \_\_\_\_\_

print your street address, city, state, zip \* You can list one additional address for an added \$5

hereby adopt as my own, the NOTIFICATION & OFFER and DEFINITIONS on the back of this form, and appoint Private Citizen, Inc. (PCI), to be my agent to communicate this to firms involved in telemarketing, and advise them of my wish not to be junk called, and that such a call will be taken as acceptance of my offer, and their obligation to pay me for their use of my time and telephone. Accordingly, PCI will also advise such firms of my name, city, state, zip, and

phone number (\_\_\_\_) \_\_\_\_ - \_\_\_\_

To further protect your privacy, the Directory lists phone numbers in a separate table, apart from subscriber names, city, state & zip

(\_\_\_\_) \_\_\_\_ - \_\_\_\_ (\_\_\_\_) \_\_\_\_

\* You can list additional phone numbers for an added \$5 each.

RECEIVED

DEC 18 1992

FCC MAIL BRANCH

X

SIGN HERE \_\_\_\_\_

DATE \_\_\_\_\_

Are particular junk calling firms annoying you? Tell us about them below.

If they are not already on our list, we can add them.

Firm name

Address

City - State - Zip

Phone #

To: Those involved in the *direct marketing / telenuisance / telemarketing / junk call* industry,  
From: See my listing in the Private Citizen Directory, or see the reverse of this document,  
Subject: The following is transmitted to you by my agent, Private Citizen, Inc., on my behalf:

## NOTIFICATION & OFFER

- I consider junk calls (as defined below), to be an annoying invasion of my privacy, and an interference with my ability to peacefully enjoy my property. You are now instructed to carefully respect my rights in this regard!
- I am unwilling to allow your free use of my time and telephone for such calls and offer you such use on the following terms:
- I will accept junk calls, placed by or on your behalf, for a \$100 fee, due within 30 days of such use.
- Each such call will be a separate acceptance of this offer, and upon its answer-ratification, all involved entities in receipt of this document will be bound by the resulting agreement and all terms contained herein.
- Your junk call to me will constitute your agreement to the reasonableness of my fee, my appropriate recording of such call, and your payment of all reasonable legal fees and/or collection costs as may be required.
- This offer extends for one (1), year from the date of its latest receipt by you, or until I may expressly modify it.
- Note that non-payment of charges billed as a result of your telemarketing activity, may be construed to indicate; your defiance of my request that you leave me alone and rejection of duty to respect my privacy, and/or your intent to unjustly enrich yourself at my expense, and/or your maintenance of a nuisance, and noisome trade at my expense.
- I may deem such wrongful, and/or tortious behavior as a cause of action based on, but not limited to implied, constructive, or quasi contractual obligation, and in which case I may endeavor to collect punitive, and/or exemplary damages as well.
- I consider the sale or rental of my name and any other identifying information to be a conversion of my property (name). A \$100 fee will be due within 30 days of each such conversion, payable to me by involved and notified entities.
- I hereby certify that I subscribe to PCI's NOTIFICATION & OFFER (below), and incorporate it with mine wherever possible.

Private Citizen, Inc. (PCI), for itself and its subscribers, hereby Notifies and Offers your organization as follows;

- The Private Citizen Directory is the property of PCI. It is not to be sold. A transfer of it must include this document.
- You may verify the intent and authenticity of those listed in PCI's Directory (details from PCI), by:
  - mailed inquiry to those listed in PCI's Directory (PCI can forward your request to those for whom you have no address),
  - inspection of original Authorization Forms at a location agreed upon by both PCI and the inspecting entity,
  - inspection of copies of Authorization Forms mailed to a location of your choice,
- Responding to a telephoned verification request is a service offered by those listed in PCI's Directory and obligates such callers to compensate called subscribers \$100 per call. The terms and conditions described above apply here as well.

## DEFINITION OF TERMS

PCI, and those listed in the Private Citizen Directory define the terms Telemarketing / Telenuisance / Junk call as:

- A telephone call to the premises of a PCI subscriber, delivered live or prerecorded, by voice or facsimile,
- by or on behalf of an organization, including but not limited to its agent, dealer, franchisee, contractor or subsidiary,
- without both an existing direct relationship with, and fully informed, affirmative authorization of the party called,
- whether such calling organization be of a commercial, non-profit, survey-research, or political nature and,
- dialed either randomly, sequentially, automatically, manually or intentionally targeted,
- intended to sell, rent, survey/poll, solicit information about, encourage donations to, generate/qualify sales leads for, create interest in or renew subscriptions for anything (tangible or intangible), of concern to the calling entity.

Junk calls include those by a firm having an established relationship with the called party, if the call is not related to the business established between them (ex. a city bank junk calling its credit card holders to peddle a city travel package).

Junk calls do not include calls made to collect debts if payment is not made per agreement, nor do they include calls made when both the calling and called individuals involved are personally acquainted with each other.

PaineWebber Incorporated  
1200 Harbor Blvd.  
Weehawken, NJ 07087  
201 902-6630

Robert M. Berson, Esq.  
Senior Vice President and General Counsel

July 10, 1991

PaineWebber

Robert Bulmash  
Private Citizen, Inc.  
Box 233  
Naperville, IL 60566

Dear Mr. Bulmash:

Gail Wickes has referred this matter to me for further response. As I know you are aware, various consumer groups are working at the state and federal level to enact legislation governing the practice of "cold calling." At this time, however, there are only a few jurisdictions with current prohibitions against the use of telephone lines for legitimate purposes. To my knowledge, your "client" does not reside in such a jurisdiction.

Listing one's telephone number in an available public document such as a directory may invite desired as well as undesired contact. You and your clients know that. Persons desiring unwanted telephone calls from strangers can avail themselves of unlisted, hence unpublished, telephone numbers. Moreover, if one receives an undesired call, there is always the option of hanging up. A recent article in The Wall Street Journal respecting your organization makes it clear that there are a variety of equally effective defense tactics which can be employed.

RECEIVED

JUL 18 1991

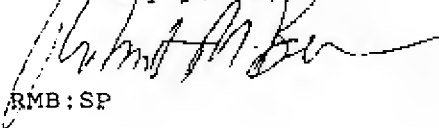
FCC MAIL BRANCH

Whatever response a caller from PaineWebber may receive, our approach is to be polite, inquiring, and informative. It is not our intent to annoy or to inconvenience anyone, but we currently have the same right to the telephone lines as do the members of Private Citizens, Inc. have to take steps to limit access, and indeed, to deny it by having unlisted numbers.

We regret that we cannot assure you that those who subscribe to your service for a small fee will, in fact, be assured of the privacy they believe you can afford them by your efforts.

You are requested to direct any future correspondence or inquiries to me. As The Wall Street Journal also reported, some organizations may feel it incumbent upon themselves to charge you for their time. Please bear that in mind.

Sincerely yours,



RMB:SP

0168e

Robert Bulmash  
c/o Private Citizen, Inc.  
P.O. Box 233  
Naperville, IL 60566  
Phone (688)393-1555

Federal Communications Commission  
Common Carrier Bureau  
Enforcement Division  
2025 M Street N.W. - Rm. #6202  
Washington, DC 20554

RECEIVED  
SEP 18 1991  
FCC MAIL BRANCH

Greetings,

The following is my complaint. I ask you to investigate, and take action as you deem appropriate. Please call to discuss the matter further and apprise me of your progress.

**COMPLAINT:** Telephone harassment, attempted extortion, tampering with U S Mail, and all collateral violations of applicable local, state, and federal laws, statutes, tariffs, etc.

**SYNOPSIS:** I was tele-harassed over a four week period by a number of people acting in concert, evidently intent on (among other things), disrupting my business, denying me free use of my phone lines, and conducting a campaign of intimidation, extortion, and veiled threats of physical harm.

**HISTORY:** The June 24, 1991 issue of the *Wall Street Journal* ran an story written by Mike Miller, titled; *When the 'Junker' Calls, This Man is Ready for Revenge* \* \* \* *Mr. Bulmash Leads the Charge Against Telemarketers; and They Often Pay Up.*

I am the president and founder of Private Citizen, Inc. (PCI). The story was about PCI, and my its effort to limit telephoned sales solicitations made to those who subscribe to PCI's service. PCI notifies firms across America, involved in telemarketing that PCI subscribers are unwilling to be freely solicited by phone.

**CIRCUMSTANCES:** At 4:08 p.m., June 24th I received the first of many harassing telephone calls on my business line (708)393-1555. They were generally made under the guise of a call to solicit business or collect a bill, and continued through 2:56 p.m., July 19th. During the interim, I was tele-harassed up to 5 times a day with (among other things), bogus sales pitches, extortion attempts, intimidation of physical harm, and calls made so early so as to disturb my sleep.

All subject incidents involved one or more of the same three individuals, with whose voices I became familiar. They often called themselves Don, Chuck, and Frank.

The harassment program began with a call from someone who falsely said he was Tom Mendel, an executive of D.H. Blair & Co., a Wall St. investment firm. Ostensibly, the call pitched an IPO in a firm making rotary dial / cellular telemarketing equipment. (It seems "IPO" is a securities industry term for Initial Public Offering.)

After a few annoyances using the above ploy, the harassers changed their premise. Presenting themselves as "The Egg Basket", a fictitious Chicago area firm, they repeatedly harassed me with pitches to sell a non-existent breakfast service.

After weeks of repeated harassments of this nature, the calls evolved into demands for payment of charges for breakfasts that were never ordered or delivered.

page 2 of 3

The harassers' program continued despite my clearly expressed and detailed plea that they stop. Constantly pulling me from my duties in running my one man firm, they added stress to a pressured period of PCI's operation, and my effort to earn a living. Some of the relevant matters that I noticed during this period of harassment were that:

- 1) THE CALLS SEEMED TO ORIGINATE FROM A SECURITIES FIRM. During many harassments, particularly during business hours, I heard a background sound environment which I sensed was the busy sales room of a securities firm. This indication included words and phrases that others were speaking, peculiar to the investment industry.
- 2) OTHERS IN THE SAME ROOM AS THE PERPETRATORS KNEW SOMEONE WAS BEING HARASSED. The harassers commonly spoke with such vigor that associates (yards away), reasonably heard the demands for payment of "breakfast" charges, threats, and extortion attempts. Surely, if the harassers were "at work", their supervisors and/or managers knew, or should have known the nature of their undertaking.
- 3) A SECURITIES FIRM WAS IDENTIFIED AS THE HOLDER OF THE PHONE LINE USED TO HARASS ME. Illinois Bell Telephone, my local utility placed a trap on my business telephone service. The trap was successful. The perpetrators were found to be using 212-108-3007, a WATS line of McLaughlin, Piven & Vogle, a securities firm located at 30 Wall St., New York, NY. McLaughlin also has an office in nearby Chicago.
- 4) THE HARASSERS' PROGRAM WAS DUE TO MY NOTORIETY IN HELPING CONSUMERS PROTECT THEMSELVES FROM TELEMARKETING INTRUSIONS, AND/OR MY DISTASTE FOR SAME. They once offered to stop calling if I put another "ad" in the *Wall Street Journal*. At least twice they taunted me with remarks concerning my efforts to help others avoid junk calls, and my inability to stop them from tele-annoying me. See attached copy.
- 5) OCCASIONALLY, THE SAME HARASSERS WOULD IDENTIFY THEMSELVES AS VARIOUS FIRMS. Although *The Egg Basket* was their preferred ruse, they also claimed to be D.H. Blair, Inc., my local phone company, or the American Association of Telemarketers.
- 6) THEY SLANDERED MY REPUTATION TO THE PRESS. At one point, while begging them to let me alone, I was called by a news reporter. In desperation I put the harassers on line with him, hoping to frighten them with exposure. but the harassers took the opportunity to falsely tell the reporter that I would not pay a legitimate bill.
- 7) THEY ATTEMPTED TO (AND LIKELY DID), ACCESS, AND MISUSE MY PRIVATE INFORMATION. I occasionally noticed that my answering machine was being addressed with a series of touch tones. Once, upon my answering during the "tone series" the person inducing the tones began another "Egg Basket" pitch. (Incoming messages stored by my answering machine are remotely accessible via a series of touch tones.)
- 8) THEY ARE LIKELY RESPONSIBLE FOR A FALSE COMPLAINT AGAINST MY FIRM TO BELL ATLANTIC. During the harassment period, New Jersey Bell called me to investigate a complaint (filed by a Mr. Risso or Rizzuto), charging that my firm relentlessly telemarketed him despite his plea to the caller that it stop. See attached documentation.
- 9) THEY THREATENED TO SUE ME TO COLLECT A NON-EXISTENT BILL.
- 10) THEY THREATENED TO SEND AN 'ANGRY COLLECTION MAN' TO MY HOME.
- 11) THEY ATTEMPTED TO EXTORT MONEY FROM ME, offering to stop harassing me for \$100.
- 12) THEY INSTRUCTED ME TO USE A U S POSTAL FACILITY IN CONJUNCTION WITH THE EXTORTION. On July 17th at 5:15 I was told to put \$100 in my Post Office Box. Note: they knew my P.O. Box number as it was printed in the *WSJ*, but did not know my address.
- 13) CONTEMPORANEOUS TO THE EXTORTION ATTEMPT, MY SUBJECT POST OFFICE BOX WAS OPENED WITHOUT MY AUTHORIZATION, AND THE MAIL WITHIN IT WAS RIFLED; PERHAPS STOLEN. I suspect the harassers are ultimately responsible for this violation in light of the above circumstances. See attached documents.

On or about July 19th at 2:56 p.m., during one of their basic harassment calls, I told them I knew they were with McLaughlin, Piven, and Vogle. The speaker suddenly became evidently nervous and hung up. The harassers never called again.

An Illinois Bell Annoyance Bureau specialist was "on line" during the "McLaughlin, Piven, and Vogle harassment call", and listened as this incident unfolded.

CASE NUMBER: 0503

07/19/91 - 12:54 - PAGE 3

TIME EDITED BY  
MARYANN

07/19/91  
MARIANVILLE PD  
1070153Z  
DECR SCYMAWSKY  
708-393-2181  
07/19/91  
MARIAN

TIME:  
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TIME:  
14:55Z

CO-RETURNED:  
FIELD-RETURNED:  
CLOSED DATE: 07/19/93  
ARREST DATE:  
CONVICTION DATE:

encl: New Jersey Bell letter Re: harassment report, 6/24/91 Wall Street Journal,  
Illinois Bell Security report Re: McLaughlin, 7/20/91 USPS Mail Vandalism Complaint and staffer note  
Warrenville Police Rpt. #91-10269 of 7/2/91, 7/19/91 Warrenville Police Supplementary report and  
Illinois Bell 7/19/91 letter "We have been successful in identifying the origin of the annoying calls..."

EX PARTE OR LATE FILED  
SANTARELLI, SMITH & CARROCCIO  
A PARTNERSHIP INCLUDING A PROFESSIONAL CORPORATION

ORIGINAL  
FILE

A. THOMAS CARROCCIO  
DONALD E. SANTARELLI, P.C.  
EDWARD J. SMITH, JR.  
STEPHEN V. WEHNER  
RICHARD O. WOLF

1155 CONNECTICUT AVENUE, N.W.  
WASHINGTON, D.C. 20036-4308

TELEPHONE  
(202) 466-6800

TELECOPY  
(202) 463-0969

OF COUNSEL  
LANGHORNE M. BOND  
RICHARD E. HILL

September 9, 1992

Donna R. Searcy, Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Room 222  
Washington, D.C. 20554

Re: Notice of Ex Parte Presentations  
CC Docket No. 92-90

RECEIVED  
SEP - 9 1992  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Dear Ms. Searcy:

Pursuant to the requirements of Section 1.1206 of the Commission's Rules, we are submitting the original and one copy of this disclosure of an oral ex parte presentation on behalf of Household International regarding the Telephone Consumer Protection Act of 1991 (CC Docket No. 92-90). That presentation was made to the Office of Commissioner James H. Quello on September 2, 1992.

The issues addressed by the presentation are reflected in the attached pre-meeting letter from the undersigned to Commissioner Quello's office. This disclosure and the attachment should be included in the public record of CC Docket No. 92-90.

Should any questions arise regarding this matter, please communicate with the undersigned member of this firm.

Sincerely,

SANTARELLI, SMITH & CARROCCIO

By:   
A. Thomas Carroccio

Counsel for  
Household International

cc: Mr. Brian F. Fontes  
Office of Commissioner Quello



# SANTARELLI, SMITH & CARROCCIO

A PARTNERSHIP INCLUDING A PROFESSIONAL CORPORATION

A. THOMAS CARROCCIO  
DONALD E. SANTARELLI, P.C.  
EDWARD J. SMITH, JR.  
STEPHEN V. WEHNER  
RICHARD O. WOLF

1155 CONNECTICUT AVENUE, N.W.  
WASHINGTON, D.C. 20036-4306

TELEPHONE  
(202) 466-6800

TELECOPY  
(202) 463-0669

September 1, 1992

## HAND DELIVERED

OF COUNSEL  
LANGHORNE M. BOND  
RICHARD E. HILL

Mr. Brian F. Fontes  
Advisor to Commissioner James H. Quello  
Federal Communications Commission  
1919 M Street, N.W.  
Room 802  
Washington, D.C. 20554

Dear Mr. Fontes:

Household International ("Household") appreciates your providing the opportunity to discuss the issues in Common Carrier Docket No. 92-90, the Commission's pending proceeding which seeks to implement the Telephone Consumer Protection Act of 1991 ("TCPA"). Household's representatives look forward to meeting with you at 2:30 p.m. on September 2, 1992.

Household will be represented at tomorrow's meeting by the following individuals:

Anne G. Walters, Director of Research and Development for Household Financial Network, and Chairperson of Household International's Telemarketing Task Force.

J. Denis O'Toole, Vice President of Household International.

Toni A. Bellissimo, Federal Government Relations Manager for Household International.

A. Thomas Carroccio, Santarelli, Smith & Carroccio.

Donald E. Santarelli, Santarelli, Smith & Carroccio.

While Household's representatives will be prepared to discuss all aspects of the TCPA proceeding, there are certain issues to which we will seek to direct the Commission's particular attention. Those issues are as follows:

1. Use of Predictive Dialers. Although the TCPA fails to distinguish between calls randomly originated by "auto dialers" and calls directed to specific, pre-screened parties by "predictive dialers", the Commission has recognized such differences.

SANTARELLI, SMITH & CARROCCIO

Mr. Brian F. Fontes  
September 1, 1992  
Page 2

Household urges the Commission to maintain the distinction between these call origination methods when promulgating the rules mandated by TCPA.

2. Debt Collection Calls.

(a) It is necessary for the Commission to accommodate the requirements of the Fair Debt Collection Practices Act (15 U.S.C. §1692c) when promulgating telemarketing identification requirements.

(b) It is necessary for the Commission to articulate a clear, specific exemption allowing the utilization of predictive dialers for debt collection calls. This exemption should not be dependent upon the presently proposed "business relationship" exemption.

3. Affiliated Companies and Products. Household, through its several subsidiaries, offers American consumers and businesses a broad range of financial products. The Commission should interpret the "prior business relationship" exemption so as to allow each of Household's various subsidiaries to initiate calls to parties with whom another subsidiary has a prior or existing business relationship.

4. Methods for Protecting the Privacy of Residential Telephone Subscribers. Of the five regulatory alternatives for protecting telephone subscriber privacy addressed in the NPRM, Household has determined that only company-specific suppression lists can provide effective privacy protection without undue burden or prohibitive expense.

If, prior to our scheduled meeting, you have any questions regarding Household's position on the various issues addressed in the TCPA proceeding, please do not hesitate to direct them to the undersigned member of this firm.

Sincerely,

SANTARELLI, SMITH & CARROCCIO

By: 

A. Thomas Carroccio

Counsel for  
Household International

EX PARTE OR LATE FILED

ORIGINAL  
FILE

SANTARELLI, SMITH & CARROCCIO  
A PARTNERSHIP INCLUDING A PROFESSIONAL CORPORATION

A. THOMAS CARROCCIO  
DONALD E. SANTARELLI, P.C.  
EDWARD J. SMITH, JR.  
STEPHEN V. WEHNER  
RICHARD O. WOLF

1155 CONNECTICUT AVENUE, N.W.  
WASHINGTON, D.C. 20036-4306

TELEPHONE  
(202) 466-6800

TELECOPY  
(202) 463-0969

OF COUNSEL  
LANGHORNE M. BOND  
RICHARD E. HILL

September 9, 1992

Donna R. Searcy, Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Room 222  
Washington, D.C. 20554

RECEIVED

SEP - 9 1992

Re: Notice of Ex Parte Presentations  
CC Docket No. 92-90

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Dear Ms. Searcy:

Pursuant to the requirements of Section 1.1206 of the Commission's Rules, we are submitting the original and one copy of this disclosure of a written ex parte presentation on behalf of Household International regarding the Telephone Consumer Protection Act of 1991 (CC Docket No. 92-90). That presentation was submitted to Commissioner Sherrie P. Marshall this day.

A copy of the written presentation submitted to Commissioner Marshall is attached hereto. This disclosure and the attachment should be included in the public record of CC Docket No. 92-90.

Should any questions arise regarding this matter, please communicate with the undersigned member of this firm.

Sincerely,

SANTARELLI, SMITH & CARROCCIO

By: 

A. Thomas Carroccio

Counsel for  
Household International

cc: The Honorable Sherrie P. Marshall

**SANTARELLI, SMITH & CARROCCIO**

A PARTNERSHIP INCLUDING A PROFESSIONAL CORPORATION

A. THOMAS CARROCCIO  
DONALD E. SANTARELLI, P.C.  
EDWARD J. SMITH, JR.  
STEPHEN V. WEHNER  
RICHARD O. WOLF

1155 CONNECTICUT AVENUE, N.W.  
WASHINGTON, D.C. 20036-4306

TELEPHONE  
(202) 466-6800

TELECOPY  
(202) 463-0969

OF COUNSEL  
LANGHORNE M. BOND  
RICHARD E. HILL

September 9, 1992

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SEP - 9 1992

The Honorable Sherrie P. Marshall  
Federal Communications Commission  
1919 M Street, N.W.  
Room 826  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Re: Telephone Consumer Protection Act of 1991  
CC Docket No. 92-90

Dear Commissioner Marshall:

Household International ("Household") appreciates the time and attention you and your staff devoted to Household's recent presentation on CC Docket No. 92-90, the Commission proceeding regarding the Telephone Consumer Protection Act of 1991 ("TCPA").

As was discussed in the course of the presentation, Household believes that the Commission should articulate an express exemption for debt collection calls when addressing the exceptions to any prohibited uses of "auto dialers". To this end, Household is submitting herewith suggested language for inclusion in the order adopting the rules implementing TCPA.

Should you or any member of your staff have any questions regarding this matter, please do not hesitate to contact the undersigned member of this firm.

Sincerely,

SANTARELLI, SMITH & CARROCCIO

By: 

A. Thomas Carroccio

Counsel for  
Household International

## SUGGESTED LANGUAGE

The NPRM tentatively concluded that "a separate express exemption for debt collection calls is not necessary."<sup>1/</sup> That conclusion was based on several factors. First, the NPRM recognized that while businesses utilize auto dialers in their debt collection activities, TCPA did not intend to prohibit such use. The NPRM also found that otherwise lawful debt collection calls do not adversely affect the privacy of the contacted debtor. In addition, the NPRM stated the belief that debt collection calls fall within the scope of our proposed exemption for commercial calls "that do not offer a product or service and do not affect privacy concerns." Finally, debt collection calls also were determined by the NPRM to fall within the "business relationship" exemption.

Several commenters addressed the use of "auto dialers" in debt collection activities. One of the commenters opposing our proposed inclusion of debt collection calls within the existing or proposed exemptions contended that "a debtor who has failed to pay a debt is, in most cases, a person who no longer wishes to have a relationship with the creditor." That commenter went on to assert that it was an invasion of a debtor's privacy to be subject to calls from a creditor with whom the debtor no longer wishes to do business.<sup>2/</sup> By contrast, commenters supporting the adoption of a separate express exemption for debt collection calls contended that such an exemption is necessitated by potential uncertainty as to whether a "business relationship" can be unilaterally terminated by a debtor.<sup>3/</sup>

We conclude that lawful debt collection calls do not adversely affect the privacy concerns of telephone subscribers. We also conclude that debt collection calls fall within both the "business relationship" exemption and the exemption for commercial calls which do not include any unsolicited advertisement. While not adopting a separate exemption for debt collection calls, we expressly find that such calls are exempt from the prohibitions on "auto dialer" calls, despite any unilateral attempt by a debtor to terminate its relationship with a creditor during such time as the debtor's account with the creditor remains unsatisfied.

---

<sup>1/</sup> NPRM at para. 16.

<sup>2/</sup> Comments of Consumer Action.

<sup>3/</sup> Comments of Utilities Telecommunications Council; Comments and Reply Comments of Household International.

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D. C.

ORIGINAL  
FILE

In the Matter of

Rules and Regulations Implementing )  
the Telephone Consumer Protection )  
Act of 1991 )

CC Docket No. 92-90

RECEIVED

NOV 23 1992

To: The Commission

PETITION FOR RECONSIDERATION AND CLARIFICATION

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Household International ("Household"), by its attorneys and pursuant to Section 1.429 of the Commission's Rules, hereby petitions the Commission to reconsider and clarify, in part, the Report and Order in the captioned proceeding.<sup>1</sup> For its petition, Household states as follows:

PROCEDURAL MATTERS

Certain of Household's business activities will be affected by the rules and policies promulgated in the R&O. Household previously attempted to protect its interests in the subject proceeding through the timely filing of both comments and reply comments in response to the Notice of Proposed Rulemaking initiating this proceeding.<sup>2</sup> Household, therefore, has standing to seek reconsideration and clarification of the R&O.

<sup>1</sup> Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CC Docket No. 92-90, FCC 92-443, 57 Fed. Reg. 48333 (1992) ("R&O").

<sup>2</sup> Notice of Proposed Rulemaking, 7 FCC Rcd 2736 (1992) ("NPRM").

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The R&Q was released October 16, 1992, and a summary thereof was published in the Federal Register on October 23, 1992. Accordingly, this petition is timely filed pursuant to the provisions of Section 1.4 of the Commission's Rules.

#### DEBT COLLECTION CALLS

##### Established Business Relationship

In its comments and reply comments, Household urged the Commission to adopt a specific exemption from the prohibitions of the Telephone Consumer Protection Act of 1991 ("TCPA")<sup>3</sup> for debt collection calls. In the R&Q, however, the Commission concluded that such an express exemption was unnecessary because debt collection calls were "adequately covered" by other exemptions adopted by the R&Q.<sup>4</sup> Specifically, the Commission found debt collection calls to be exempt as: "(1) calls from a party with whom the consumer has an established business relationship, and (2) commercial calls which do not adversely affect privacy rights and which do not transmit an unsolicited advertisement."<sup>5</sup>

While concurring in the Commission's determination that debt collection calls are covered by both of the above-cited exemptions, Household finds that certain other statements set forth in the R&Q require clarification so as to prevent the inequitable termination of the established business relationship

---

<sup>3</sup> 47 U.S.C. Section 227.

<sup>4</sup> R&Q, at para. 39.

<sup>5</sup> Id.

exemption, at least as applicable to debt collection activities. Specifically, Household's concern in this regard arises from repeated statements in the R&O, and the rules promulgated by the R&O, indicating telephone subscribers are allowed to unilaterally "terminate" or "sever" business relationships.<sup>6</sup>

---

<sup>6</sup> The language of the R&O and the Rules which concerns Household includes:

The term "established business relationship" means a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party (emphasis added).

Section 64.1200(f)(4), as promulgated by the R&O;

The definition of "telephone solicitation" in Section 227(a)(3) [of the TCPA] also excludes calls made to parties with whom the caller has an established business relationship and calls for which the calling party has received the called party's prior express invitation or permission. We emphasize, however, that subscribers may sever any business relationship, i.e., revoke consent to any future solicitations, by requesting that they not receive further calls from a telemarketer, thus subjecting that telemarketer to the requirements of Section 64.1200(e) (emphasis added).

R&O, at n. 47; and

We emphasize, however, that a business may not make telephone solicitations to an existing or former customer who has asked to be placed on that company's do-not-call-list. A customer's request to be placed on the company's do-not-call-list terminates the business relationship between the company and that customer for the purpose of any future solicitation (emphasis added).

R&O, at n. 63.



Household does not believe the Commission intended to impair the ability of creditors to utilize debt collection calls by subjecting debtor-creditor relationships to unilateral termination prior to complete payment of the debts giving rise to such relationships. Instead, the Commission probably intended simply to allow a subscriber to block uninvited solicitations to new transactions by terminating any relationship based upon a prior, but completed, transaction between the subscriber and a calling party.<sup>7</sup>

In light of the R&O's failure to specifically address this issue, Household petitions the Commission to provide unequivocal clarification that the continued existence of an unpaid debt affords a creditor an "existing business relationship" exemption for debt collection calls, despite any attempt by the debtor to "terminate" or "sever" the relationship for other purposes. In the event Household is incorrect as to the Commission's intent in this regard, it is hereby requested that the Commission reconsider this aspect of the R&O and promulgate either (1) an

---

<sup>7</sup> Footnote 47 to the R&O infers that a debtor, by "severing" any established business relationship between himself and a creditor, may block that creditor from making telephone "solicitations" seeking new transactions. That footnote does not make clear, however, that the creditor may continue to make debt collection calls to the debtor in reliance upon the still existing business relationship arising out of the unpaid debt, despite the "severance" of the relationship for purposes of solicitation. Likewise, Footnote 63 to the R&O, while clearly barring "solicitations" after a subscriber's "termination" of an established business relationship, does not indicate whether the creditor may continue debt collection calls to that subscriber in reliance upon the unpaid debt obligation.

express exemption from TCPA's prohibitions for debt collection calls, or (2) a rule providing that an "established business relationship" survives a debtor's "severance" or "termination" thereof, but only for the limited purpose of exempting calls made solely to further the collection of a continuing debt.

#### Compliance with the Fair Debt Collection Practices Act

As recognized by the Commission in the NPRM, identification requirements for recorded messages under TCPA appear to conflict with certain privacy measures required of creditors by the Fair Debt Collection Practices Act ("FDCPA").<sup>8</sup> In responding to the NPRM, numerous commentors, including Household, proposed that the Commission make specific provision in its rules for the use of recorded momentary hold messages, without caller identification, at the beginning of debt collection calls.<sup>9</sup>

In the R&Q, the Commission rejected those proposals as "unnecessary."<sup>10</sup> In doing so the Commission "emphasize[d] that the identification requirements will not apply to debt collection calls because such calls are not autodialer calls (i.e., dialed using a random or sequential number generator) and hence are not

---

<sup>8</sup> 15 U.S.C. Section 1629b-c.

<sup>9</sup> Prerecorded momentary hold messages are used to request that a called party remain on the line until a live operator is available to handle the call. Such messages impart no substantive information, and may be immediately terminated by the called party hanging up its telephone.

<sup>10</sup> R&Q, at para. 39.

subject to the identification requirements for prerecorded messages in 64.1200(e)(4) of our rules" (emphasis added).<sup>11</sup>

Household is constrained to point out that the vast majority of debt collection calls are originated through the use of "autodialers", at least as that term presently is defined in the Commission's Rules.<sup>12</sup> The distinction significant to debt collection calls is that such calls are not directed to randomly or sequentially generated telephone numbers, but instead are directed to the specifically programmed contact numbers for the debtors.<sup>13</sup> In other words, for debt collection purposes, autodialers with the capacity to generate and dial random or sequential numbers are used strictly in a "predictive mode" (i.e., in a manner whereby only specified relevant numbers are programmed and dialed).

Household and several other commentors, including ABA and ACA, urged the Commission to either (1) define "autodialers" on the basis of how they are used (e.g., random/sequential mode

---

<sup>11</sup> Id., citing comments of American Bankers Association ("ABA") and American Collectors Association ("ACA").

<sup>12</sup> Section 64.1200(f)(4) of the Commission's Rules provides the following definition:

The terms "automatic telephone dialing system" and "autodialer" mean equipment which has the capacity to store or produce telephone numbers to be called using a random or sequential number generator and to dial such numbers (emphasis added).

<sup>13</sup> Household, and numerous other commentors, urged the Commission to differentiate between the use of autodialers in a random or sequential mode, and the use of such equipment in a specifically programmed or "predictive" mode.

versus predictive mode) rather than on the basis of their capacities, or (2) provide express exemptions for autodialers operating only in the "predictive" mode (e.g., when being used to contact specifically identified debtors). Although the R&Q acknowledged the material differences among the various modes of autodialer use, it did not make any regulatory distinctions to accommodate those differences. Household submits that the conflict between the requirements of TCPA and FDCPA should be accommodated by the promulgation of a limited exemption from present identification requirements, which exemption may be utilized only in connection with debt collection calls utilizing an autodialer operating in the predictive mode.

If the Commission intended the language of the R&Q to provide an exemption for prerecorded momentary hold messages utilized in debt collection calls because such calls are not randomly or sequentially generated, it should take appropriate steps to clarify the language of the R&Q on this point. Specifically, the Commission should rule that prerecorded momentary hold messages associated with debt collection calls generated by an autodialer operating strictly in a predictive mode are exempt from identification requirements.<sup>14</sup>

If, on the other hand, the Commission misinterpreted the comments of ABA, ACA, Household and others to represent that

---

<sup>14</sup> Of course, appropriate caller identification still would be required upon a live operator taking control of the debt collection call and establishing the identity of the answering party.

"autodialers" are not used in debt collection calls, even in a predictive mode, the premise underlying its conclusion as to the lack of necessity for an exemption is inherently flawed. In this latter case, the Commission must reconsider the conflict between TCPA and FDCPA. If the Commission does so, Household again urges it to adopt a specific provision allowing debt collection calls to use momentary hold messages without identifying the caller, even if the caller utilizes an autodialer, but only if the autodialer is operated in a predictive mode.<sup>15</sup>

#### CONCLUSION

In light of the foregoing, Household respectfully suggests that the Commission should either clarify the R&O's intentions with regard to debt collection calls, or reconsider the conclusions of the R&O with regard to such calls. In either event, the Commission should make clear that (1) creditors may continue to rely on the established business relationship exemption to make debt collection calls, even where a debtor has terminated the relationship for other purposes; and (2) the creditor identification restrictions of FDCPA are fully

---

<sup>15</sup> The Commission suggested that any conflict between TCPA and FDCPA could be resolved "through the use of live calls" (i.e., those dialed by live operators). R&O, at para. 39. This suggestion ignores the economy, accuracy and efficiency the use of "predictive dialers" brings to debt collection practices. The public interest certainly would be better served by providing a limited exemption allowing debt collection caller identification to be accomplished in a manner consistent with FDCPA. To do otherwise would be to impose substantial additional debt collection costs on industry, which costs will inevitably be passed on to consumers in the form of higher credit costs.

accommodated by an appropriate, limited exemption from the  
identification requirements of the regulations implementing TCPA.

Respectfully submitted,

HOUSEHOLD INTERNATIONAL

By: 

A. Thomas Carroccio  
Edward J. Smith, Jr.  
SANTARELLI, SMITH & CARROCCIO  
1155 Connecticut Avenue, N.W.  
Suite 900  
Washington, D.C. 20036  
202/466-6800

November 23, 1992

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of November, 1992, I mailed a copy of the foregoing "Petition for Reconsideration and Clarification" via first-class United States mail, postage prepaid, to the following:

Suzanne Hutchings, Esquire  
Domestic Services Branch  
Domestic Facilities Division  
Common Carrier Bureau  
Federal Communications Commission  
2025 M Street, N.W.  
Room 6338A  
Washington, D.C. 20554

Philips Corwin, Esquire  
American Bankers Association  
1130 Connecticut Avenue, N.W.  
Washington, D.C. 20036

Basil J. Mezines, Esquire  
Stein, Mitchell & Mezines  
1100 Connecticut Avenue, N.W.  
Washington, D.C. 20036  
Counsel for American Collectors Association

  
Michele A. Depasse

**SANTARELLI, SMITH & CARROCCIO**  
A PARTNERSHIP INCLUDING A PROFESSIONAL CORPORATION

A. THOMAS CARROCCIO  
DONALD E. SANTARELLI, P.C.  
EDWARD J. SMITH, JR.  
STEPHEN V. WEHNER  
RICHARD O. WOLF

1155 CONNECTICUT AVENUE, N.W.  
WASHINGTON, D.C. 20036-4306

TELEPHONE  
(202) 466-6800

TELECOPY  
(202) 463-0888

OF COUNSEL  
LANGHORNE M. BOND  
RICHARD E. HILL

**RECEIVED**

May 26, 1992

MAY 26 1992

Federal Communications Commission  
Office of the Secretary

Donna R. Searcy, Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Room 222  
Washington, D.C. 20554

Re: Comments of Household International  
CC Docket No. 92-90

Dear Ms. Searcy:

Transmitted herewith, on behalf of Household International, is an original and nine (9) copies of its Comments in the Commission's TPCA proceeding, CC Docket No. 92-90.

Should there be any questions regarding this matter, please communicate with the undersigned member of this firm.

Sincerely,

SANTARELLI, SMITH & CARROCCIO

By: 

A. Thomas Carroccio

No. 0710  
List A 5 E



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

RECEIVED

MAY 26 1992

Federal Communications Commission  
Office of the Secretary

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

COMMENTS OF HOUSEHOLD INTERNATIONAL

Toni A. Bellissimo, Manager  
Federal Government Relations  
HOUSEHOLD INTERNATIONAL  
1000 Connecticut Avenue, N.W.  
Suite 507  
Washington, D.C. 20036  
202/466-3561

A. Thomas Carroccio  
Edward J. Smith, Jr.  
SANTARELLI, SMITH & CARROCCIO  
1155 Connecticut Avenue, N.W.  
Ninth Floor  
Washington, D.C. 20036  
202/466-6800

May 26, 1992

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### SUMMARY

Household International ("Household"), in response to the NPRM initiating this proceeding, supports the adoption of 47 C.F.R. § 64.1100, as proposed. However, Household believes it is necessary and appropriate for the Commission to clarify both the basis for, and the extent of, certain exemptions set forth in the rule. Specifically, Household requests that the Commission make it clear that "debt collection calls" are exempt from certain provisions of the proposed rule for two reasons: (i) the existence of a business relationship between the creditor initiating the call and the debtor to whom the call is directed; and (ii) that the entry into certain agreements, including loan agreements, encompasses all parties' express consent to such contact, including telephone contact, as may be necessary to achieve full performance of the agreements.

Household believes there is no need for the Commission to adopt any further restrictions on telephone solicitation of residential subscribers, because the scope of the proposed rule effectively precludes the types of solicitation which consumers find annoying or invasive of their privacy. However, in the event the Commission determines some further restriction is necessary, Household believes that the only efficient, effective and non-intrusive means of further protecting residential telephone subscribers is through the use of company specific do-not-call lists.

RECEIVED

MAY 26 1992

Federal Communications Commission  
Office of the Secretary

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D. C.

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

COMMENTS OF HOUSEHOLD INTERNATIONAL

HOUSEHOLD INTERNATIONAL (hereinafter "Household"), by its attorneys, hereby submits comments in response to the Commission's Notice of Proposed Rulemaking (hereinafter "NPRM") initiating this proceeding.<sup>1</sup> For its comments, Household states as follows:

Procedural Status

1. The Telephone Consumer Protection Act of 1991 (hereinafter "TCPA") was enacted on December 20, 1991. TCPA amended the Communications Act of 1934 by adding new Section 227 thereto.<sup>2</sup>

2. TCPA directed, inter alia, that the Commission, within 120 days of TCPA's enactment, initiate a rulemaking proceeding "concerning the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object."<sup>3</sup> The Commission timely initiated this proceeding in

---

<sup>1</sup> Notice of Proposed Rulemaking in the Matter of the Telephone Consumer Protection Act of 1991, FCC 92-176, released April 17, 1992.

<sup>2</sup> 47 U.S.C. § 227.

<sup>3</sup> 47 U.S.C. § 227(c)(1).

response to that directive. In this proceeding, the Commission also "proposes implementing regulations, and tentatively defines the contours of statutorily permissible exemptions to the prohibitions of the [TCPA]."<sup>4</sup>

3. By the NPRM, the Commission seeks comments regarding its implementation of TCPA. As this day is the date specified for the submission of comments responsive to the NPRM,<sup>5</sup> these comments by Household are timely filed with the Commission.

#### Household's Interest in This Proceeding

4. Household, through its subsidiaries,<sup>6</sup> offers American consumers and American businesses a wide range of financial services, including: consumer loans, credit cards (national and private label), life insurance, mortgage lending, leasing, securities brokerage, certificates of deposit, IRA's, real estate brokerage, and checking, savings and money market accounts. Household has over 10,000 employees at various domestic locations, and markets its insurance products through approximately 9,100 independent agents throughout the country. Household provides its

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<sup>4</sup> NPRM, at para. 1.

<sup>5</sup> NPRM, at para. 38.

<sup>6</sup> A listing of Household's U.S. subsidiaries is set forth as Exhibit "A" to these comments. In addition, Household, upon any request by the Commission or the Staff, will make available copies of its annual report for 1991. Household, through its foreign subsidiaries, also offers financial services in Australia, Canada and the United Kingdom. The activities of those foreign subsidiaries, however, are not relevant to this proceeding.

customers some form of financial services in each of the United States.

5. Household presently utilizes interstate telephone facilities in connection with its marketing, customer service, and debt collection activities. Although Household, as a matter of good business, has refrained from the abusive telephone practices targeted by TCPA, both the restrictions imposed by TCPA and the regulations proposed or under consideration by the Commission will inevitably impact Household's future utilization of the interstate telephone system. Accordingly, Household's interest in this proceeding is apparent.

#### Business Relationship Exemptions

6. The Commission has wisely proposed expanding TCPA's exemptions for an "established business relationship"<sup>7</sup> so as to include a "prior or current business relationship"<sup>8</sup> within those exemptions. In doing so, the Commission seeks comment on "what qualifies as a 'business relationship'" and how the terms "prior" and "current" should be distinguished.<sup>9</sup>

7. Household concurs with the Commission's determination that the existence of a "business relationship" cannot be "based solely on a prior solicitation from the caller to a prospective customer." In fact, Household believes that the only valid

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<sup>7</sup> 47 U.S.C. § 227(a)(3)(B).

<sup>8</sup> 47 C.F.R. § 64.1100(c)(3), as proposed in the NPRM.

<sup>9</sup> NPRM, at para. 14.

criterion for determining the existence of a "business relationship" is an actual transaction between the parties.<sup>10</sup>

8. The existence of a "current" business relationship is easily determined by reference to an on-going transaction or an open account. By contrast, the extent to which a caller may rely on a "prior" business relationship can be determined only by considering several factors, including the nature of the previous relationship, the elapsed time since the previous relationship was on-going, and the relationship, if any, between the product involved in the previous relationship and the product which is the subject of a telephone call. The Commission should not attempt to set strict parameters regarding "prior business relationships," but, instead, should require a caller seeking to rely upon such a relationship to demonstrate, if challenged, a reasonable basis for its reliance.

9. In its order in this proceeding, the Commission should recognize that a company may initiate a call to a party in reliance upon a prior or existing business relationship between the called party and a company affiliated with the calling party, provided that the products offered by both companies are reasonably related. For example, one subsidiary of Household should be able to initiate a call to an individual in reliance upon that individual's on-going or recent relationship with another subsidiary of Household. In

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<sup>10</sup> It should be noted that, even in the absence of an actual transaction, parties may request future contacts from each other. In such cases, however, the requests for future contacts would constitute "prior express consent" obviating the need to base subsequent contacts on "business relationships."

such a situation, because the various financial products offered by Household's subsidiaries are reasonably interrelated, and because the called party has a business relationship with an affiliated company, the "business relationship" exemption should apply to the telephone contact.

#### Debt Collection Practices

10. While fully concurring with the Commission's decision to include debt collection calls within the "business relationship" exemption of proposed rule Section 64.1100(c)(3), Household urges the Commission to also declare such calls to fall within the scope of the "prior express consent" exceptions set forth throughout proposed rule Section 64.1100. It is submitted that one's entry into certain business relationships, including loan agreements, carries with it a clear expectation of, and therefore an express consent to, continuing communications regarding the status of those relationships. It is especially appropriate to construe "prior express consent" where the business relationship involves the parties' provision of contact telephone numbers to each other. In its order adopting the rules implementing TCPA, the Commission should acknowledge that "prior express consent" may be construed from the existence of certain current business relationships, including loan agreements.

11. In the NPRM, the Commission acknowledged that parties engaged in debt collection were concerned about a conflict between the identification requirements of 47 U.S.C. § 227(d)(3)(A) and the



provisions of the Fair Debt Collection Practices Act ("FDCPA"), specifically 15 U.S.C. § 1692c.<sup>11</sup> In response, the Commission simply indicated that "debt collectors should be able to draft identification messages that comply with both statutes."<sup>12</sup> Household shares the financial industry's concern regarding 15 U.S.C. § 1692c, but is even more concerned about the potential for conflict with the provisions of 15 U.S.C. § 1692b(1).<sup>13</sup>

12. If a debt collection call is placed to a number provided by a debtor, Household believes a creditor, or its collection agent, must reasonably determine that the individual receiving the call is, in fact, the debtor before disclosing the identity of the creditor. Household, and several others engaged in debt collection activity, use auto dialers operating in a predictive mode to contact debtors. The messages associated with such calls are intended for delivery by live operators, but, in instances where a

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<sup>11</sup> 15 U.S.C. § 1692c(b) prohibits communication, "in connection with the collection of any debt, with any person other than the consumer...."

<sup>12</sup> NPRM, at fn. 23.

<sup>13</sup> 15 U.S.C. § 1692b provides as follows:

Any debt collector communicating with any person other than the consumer for the purpose of acquiring location information about the consumer shall -

(1) identify himself, state that he is confirming or correcting location information concerning the consumer, and, only if expressly requested, identify his employer (emphasis added).

live operator is not immediately available to speak with an answering party, Household utilizes a short, recorded message requesting that the answering party remain on the line.<sup>14</sup> <sup>15</sup> Household does not believe the FDCPA allows its employees, or its agents, to identify Household in the stand-by message because the identity of the answering party has not yet been determined by a live operator.

13. Household requests that, to solve these conflicts, the Commission add a proviso exempting debt collection calls to proposed rule Section 64.1100(d)(1). Of course, any such proviso could require subsequent identification of the caller, in a manner consistent with FDCPA, during the course of the call.

#### Uses of Auto Dialers

14. Throughout proposed Section 64.1100 of its Rules, the Commission utilizes the term "automatic telephone dialing system" without further definition, presumably because the Commission intends the TCPA definition of that term to apply.<sup>16</sup> Household

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<sup>14</sup> The actual message utilized by Household is "Please hold for an important message."

<sup>15</sup> All auto dialer telephone calls initiated by Household are terminated immediately upon the answering party's hanging-up of its telephone receiver.

<sup>16</sup> 47 U.S.C. § 227(a)(1) sets forth the following definition:

The term 'automatic dialing system' means equipment which has the capacity -

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

supports the Commission's use of the discretion granted it by TCPA to effectively modify that definition by focussing on the actual mode of use of an auto dialer rather than the technical capabilities of auto dialers, generally. As recognized by the Commission, the auto dialer abuse TCPA seeks to restrict arises when an auto dialer is used to place telephone calls on a random or sequential basis, especially when the telephone call's message is delivered by artificial or pre-recorded voice.

15. Household, like other responsible companies engaged in telemarketing activities, only utilizes auto dialers in a "predictive" mode, whereby telephone calls are directed to specific telephone numbers utilized by individuals who either have business relationships with Household, have been identified as prospects for Household products, or have given Household an indication of interest in receiving information from Household. Such auto dialer use should not be construed to constitute either an invasion of privacy or an annoyance, irregardless of whether the resulting telephone message is delivered by a live operator, a pre-recorded or artificial voice, or any combination thereof.

16. Although the Commission, in proposed rule Section 64.1100(c), sets forth exemptions for certain legitimate uses of auto dialers, the limitation of those exemptions to proposed Section 64.1100(a)(2) unnecessarily exposes legitimate auto dialer users to liability under other provisions of Section 64.1100. For

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(B) to dial such numbers.

example, Section 64.1100(a)(1)(iii) prohibits auto dialer calls, without the prior express consent of the called party, "to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or any service for which the called party is charged for the call." Unless, as proposed in Paragraph 10 above, the caller is construed to obtain "prior express consent" from certain relationships (e.g., borrower-lender), a collection call to a debtor who has provided his lender only with telephone numbers of a character specified in Section 64.1100(a)(1)(iii) would result in a violation of the TCPA and the Commission's Rules.<sup>17</sup> Similarly, a violation of proposed rule Section 64.1100(a)(4) may occur through the inadvertent (or coincidental), simultaneous auto dialing of legitimately obtained numbers for two telephone lines of a multi-line business, even though the auto dialer is working in a predictive mode. The prohibitions of both 47 U.S.C. § 227(b)(1)(D) and proposed rule Section 64.1100(a)(4) were designed to prevent the lock-up of a business' sequentially numbered incoming telephone lines by the random auto dialing of sequential telephone numbers. Two calls coincidentally directed to two separate individuals within a multi-line business establishment at the same time should not cause a

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<sup>17</sup> The potential for such inadvertent violations will increase substantially upon the implementation of "700" type services where a single telephone number is utilized by the subscriber to receive all calls directed to him, irregardless of whether he is using his business line, residential line, or cellular or SMR unit.

legitimate caller to be in technical violation of TCPA or the Commission's Rules.

### Telephone Solicitation to Residential Subscribers

17. As noted above, 47 U.S.C. § 227(c) required the Commission to initiate this proceeding to consider the need to protect residential telephone subscribers from telephone solicitations to which they object.<sup>18</sup> The Commission also must determine what categories of telephone solicitations should be restricted in order to protect the privacy rights of residential telephone subscribers, and must develop appropriate methods and procedures, if necessary, to assure such protection.

18. As a starting point, the Commission should recognize that the exceptions to the definition of "telephone solicitation," if interpreted and applied as previously suggested by Household, will allow ample opportunity for legitimate telemarketing activity. At the same time, the provisions of TCPA, as implemented by the Commission's proposed rule, will severely restrict, if not totally

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<sup>18</sup> 47 U.S.C. § 227(a)(3) defines "telephone solicitation" as follows:

The term 'telephone solicitation' means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message (A) to any person with that person's prior express invitation or permission, (B) to any person with whom the caller has an established business relationship, or (C) by a tax exempt nonprofit organization.

negate, any continued use of the telemarketing practices which presently invade the privacy of residential telephone subscribers. Both the Congress, in enacting TCPA, and the Commission, in proposing the addition of Section 64.1100 to its Rules, have addressed, and have made provisions to terminate, the abuses with which this proceeding is concerned. Accordingly, Household believes there is no reason to impose further costly and cumbersome procedures on telemarketing activities.

19. Household recognizes that, despite the foregoing paragraph, the Commission may determine that some additional methods or procedures are necessary to protect the privacy of residential telephone subscribers. In fact, the Commission, in the NPRM, stated that it would consider five regulatory alternatives for the restriction of telephone solicitation. The five regulatory alternatives are as follows:

- (a) Databases (national or regional);
- (b) Network technologies;
- (c) Special directory markings;
- (d) Do not call lists (industry-based or company specific); and
- (e) Time of day restrictions.

It is Household's considered opinion that four of the five alternatives are either unworkable, ineffective or prohibitively costly.

20. The cost of establishing databases, either on a national or regional basis, would be prohibitive.<sup>19</sup> Household estimates that the cost of establishing a national database would be at least \$50 million, and may reach up to \$100 million. In addition to the cost of establishing the national database, each company required to utilize such a database in connection with its telemarketing activities would be required to make additional expenditures for its own compliance equipment and procedures. All such costs will inevitably be passed on to the consumer in the form of higher prices for goods and services. Small businesses, however, may not even have a sufficient customer base over which to reasonably spread database costs, and therefore, may be totally precluded from further telemarketing activity. Any such utilization of databases also will impair the ability of companies to promptly respond to consumer objections regarding telephone solicitations. Household estimates that consumer requests for exclusion from telephone solicitations will be delayed at the national database level for between six months and one year, depending on whether updated database information is distributed on a quarterly or semi-annual basis. After distribution of database updates, additional time must be afforded for the inclusion of national database information in the files of each company utilizing the database.

21. Network technologies cannot be expected to provide the consumer protection sought by the TCPA. There simply are not any

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<sup>19</sup> The Commission has made it abundantly clear that no governmental monies will be available for database establishment or operation.

presently available, or immediately foreseeable, network technologies which would allow for the blocking of telephone solicitations, especially on a selective basis. The idea that all telemarketing activities utilize only telephone lines with specified prefixes or exchanges is not realistic. Given the demands being placed on the present telephone numbering plan by new technologies and services, it would appear that it would be difficult, if not impossible, to identify sufficient exchange prefixes on a national basis to accommodate the present volume of telemarketing activity. In addition, such a scheme would require businesses to dedicate one or more lines solely to telemarketing activities. This requirement would necessitate expenditures for additional telephone lines, and would thereby impose a significant, but unnecessary, financial burden on all businesses, but most onerously on small businesses. The Commission should reject this option as technologically unfeasible and financially burdensome.

22. The special directory markings option must be rejected as extremely inefficient. Residential telephone directories are compiled and maintained on a local basis. The local nature of the directories, and the multiplicity of local directories, make the use of special directory markings cumbersome, at best. National companies would be compelled to integrate information from hundreds of local directories into their telemarketing databases in order to attain compliance. A directory marking system would deprive telephone subscribers of any flexibility to block only those solicitations they find annoying or invasive, and require them to



block desired solicitations along with undesirable ones. The Commission also should keep in mind that one of TCPA's primary objectives is the protection of residential telephone subscribers' privacy. Any marking in a widely distributed directory will call attention to the marked listing, and thereby make that subscriber a target for crank calls. Surely, it would be an invasion of a subscriber's privacy to have his choice regarding telephone solicitations made generally known in his community. The burden of compiling information from multiple directories, and the accentuation of particular telephone subscribers through directory markings, make it inappropriate to rely on such procedures for the protection of consumer privacy interests.

23. Household does not believe time of day restrictions will provide consumers with any effective protection against unwanted telephone solicitations. In order to be effective, such solicitations must reach consumers at a time when they are available, and more importantly, amenable to solicitation. It is hard to imagine that the Commission could develop reasonable time of day requirements which would be any more restrictive than the public relations considerations under which businesses now operate.

24. Household recommends that, in the event the Commission determines an additional method for restricting telephone solicitation must be developed and implemented, it adopt company specific do-not-call lists as that method. Such lists are efficient in that they need only be as extensive as a company's own telemarketing activities require. Therefore, each company can

control its own telemarketing budget, including compliance costs, without regard to such fixed costs as would be unilaterally imposed by a universal system, such as a national database. In addition, most responsible companies presently engaged in telemarketing activities already maintain such lists as a matter of good public relations. Household suggests, therefore, that company specific lists would provide immediate effectiveness at the lowest possible direct cost to the company, which low cost will result in minimal pricing pass throughs to consumers. It also is clear that company specific do-not-call lists will provide residential telephone subscribers with two important benefits, flexibility and privacy. A residential subscriber will be able to specifically eliminate those solicitations he finds annoying or invasive while maintaining the ability to receive solicitations in which he is interested. As company specific do-not-call lists will not be circulated, they will allow residential subscribers protection against unwanted solicitations without placing personal information in widely available databases. In sum, company specific do-not-call lists would efficiently provide the consumer with maximum protection without sacrificing either flexibility or privacy.

25. Household must caution the Commission that the benefits to be derived from company specific do-not-call lists are not applicable to industry-based do-not-call lists. For one reason, it will be extremely difficult, and probably impossible, to define industries, and to pigeon-hole every company, especially a broadly diversified company, into one specific industry. Also, such

industry lists would suffer from the same delays in compilation and distribution as databases. Further, the cost of establishment and operation of such industry lists would impose disproportionate economic burdens on the smaller members of an industry. Finally, member companies would be extremely reluctant to divulge the identities of their business prospects through a list distributed to their direct competitors.

26. For the reasons cited in Paragraphs 17 through 25 above, Household recommends that the Commission not mandate any methods for restricting telephone solicitations to residential subscribers, but, instead, rely upon the comprehensive provisions currently mandated by TCPA. If, despite the many reasons to the contrary, the Commission determines an additional method of restricting such telephone solicitations is warranted, Household strongly urges that the designated method be company specific do-not-call lists.

#### CONCLUSION

Household respectfully submits that the Commission should adopt 47 C.F.R. § 64.1100, as proposed in the NPRM, but, in its order adopting that rule, should clarify, in a manner consistent with Household's above suggestions, the basis for, and the extent of, the exemptions set forth in the rule. Household also submits that the Commission either should determine that there is no need for further restrictions on telephone solicitations of residential subscribers, or, in the event the Commission makes a contrary determination, that the privacy of residential telephone

subscribers can be best protected through the use of company  
specific do-not-call lists.

Respectfully submitted,  
HOUSEHOLD INTERNATIONAL

By: Toni A. Bellissimo  
Toni A. Bellissimo, Manager  
Federal Government Relations  
HOUSEHOLD INTERNATIONAL  
1000 Connecticut Avenue, N.W.  
Suite 507  
Washington, D.C. 20036  
202/466-3561

By: Al Thomas Carroccio  
A. Thomas Carroccio  
Edward J. Smith, Jr.  
SANTARELLI, SMITH & CARROCCIO  
1155 Connecticut Avenue, N.W.  
Suite 900  
Washington, D.C. 20036  
202/466-6800

May 26, 1992

EXHIBIT A

HOUSEHOLD INTERNATIONAL  
EXHIBIT "A"

DOMESTIC SUBSIDIARIES OF HOUSEHOLD INTERNATIONAL

Household Finance Corporation

Household Retail Services

Household Bank, F. S. B.

Household Mortgage Services

Land of Lincoln Realty

Household Credit Services (Household Bank, N. A.)

Household Commercial Financial Services, Inc.

Alexander Hamilton Life Insurance Company of America

Household Business Funding

Household Financial Services

Hamilton Investments

AMERICAN SERVICE  
TELEMARKETING, INC.

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FILE



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May 22, 1992

Office of the Secretary  
Federal Communications Committee  
1919 M Street N.W.  
Washington, D.C. 20554

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JUN - 1 1992

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

RE: Comment on Proposed Rulemaking for the  
Telephone Consumer Protection Act of 1991

Dear Commissioner:

I am submitting these comments on behalf of the interests of American Service Telemarketing Inc. (ASTI), based in Fort Worth, Texas. ASTI utilizes several small phone branches which each employ twenty to sixty employees. In total we employ close to 300 employees and spend over \$6,000,000 per year in payroll and benefits.

Our employees make phone calls to small businesses (those with ten or fewer employees) to see if those small businesses are interested in seeing a state licensed insurance agent regarding health insurance coverage. We do not "close" a sale over the phone. We do not use pre-recorded messages in any way. We do, however, find between 8,000 to 15,000 people per week who are interested in seeing our insurance agents and who are actively researching health insurance in order to get the best possible value. We sincerely believe that we are helping these people in their active purchase decision.

We have invested over \$800,000 in computer systems which predictively, automatically, dial our selected lists of potential prospects in order to get those phone calls to live operators. This computer system is commonly known in the telemarketing industry as a Predictive Dialing System and is utilized to help our telemarketing operators more efficient.

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List A B C D E

Although I think that the FCC has done an admirable job in its development of the proposed rules regarding TCPA, I have the following concerns and suggestions:

1) The proposed rules seem to confuse, or use synonymously, "auto dialers" and auto dialers which play recorded messages- Auto Dialing Recorded Message Players- ADRMP's. I believe, and hope, that the Congress meant to curtail the use of ADRMP's differently from Auto Dialers. ADRMP's, when used for "marketing" need to be severely restricted. Auto Dialers should be allowed to be used freely because they are technological developments which aid both employees and consumers.

Suggestion: Define ADRMP's and Auto Dialers separately, and treat them differently. Allow the use of Auto Dialers for marketing applications since they utilize live human operators who can disconnect the call immediately upon the prospect's request, as opposed to tying up their lines or answering machines. Severely restrict the use of ADRMP's since they seem to be the true target of consumer complaints as noted in paragraph 24 of your proposed rulemaking.

2) Broadening the restrictions on any telemarketing to include restrictions on calls to businesses would be detrimental to ASTI, its employees, and the markets which we serve. Businesses are usually in business to receive phone calls; the telephone facilitates commerce and employment. Also, many of the "businesses" which we and others telemarket to are also "residences": farms, ranches, self-employed people working out of their homes, plumbers, electricians, etc.

Suggestion: Limit the application on "do-not-call" suppressions techniques (whether databases, or list markings) to pure "residential" applications. Define "residence" as non-business residential phones.



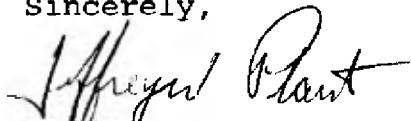
page 3 of 3

3) The "do-not-call list" or database concept is going to be difficult, if not impossible , to do well or at a bearable cost. Unless you change the way phone numbers are assigned, retired, and re-assigned, these lists will by their very nature be inaccurate, expensive to compile and maintain, and burdensome upon businesses like mine.

Suggestion: Allow businesses to keep track of those prospects who do not wish to receive calls from those specific businesses. Require businesses to prove that they have systems and intent to avoid calling those residences that do not wish to receive their calls.

On behalf of my business, its employees, and the thousands of business people who we help to find health insurance coverage each week, I would like to thank you for your serious consideration of our concerns. You hold the livelihood of many people and the vibrance of the marketplace in your hands with these decisions.

Sincerely,



Jeffrey W. Plaut  
General Manager

cc. Jess Jordan



92-90

ORIGINAL  
FILE

May 15, 1992

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JUN - 2 1992

CLINIC  
COMMISSION  
OF THE SECRETARY

Ms. Olga Madruga-Forti  
Common Carrier Bureau  
Federal Communications Commission  
1919 M Street NW  
Washington, DC 20554

Ref: Public Law 102-243

Dear Ms. Madruga-Forti:

I am writing to let you know where our business stands regarding Public Law 102-243.

The company that we contract with to do our circulation telemarketing employees one full-time person and up to fifteen part-time people. The 30,000 new subscribers that we receive from the telemarketing process generate in excess of one million dollars in revenue for us each year. About one-third become long term subscribers that generate revenues for several years. These subscriptions help build the businesses of the 597 independent contractors that deliver our newspaper, helping them to make more money. We use the predictive dialer to call all new starts from all sources to verify that service has begun, and that the bill has been received and understood.

In our telemarketing program, we always have a live operator to answer the telephone when the potential customer answers the call.

The predictive dialer allows us to be very efficient. Our number of subscriptions per hour worked has almost doubled since we changed from manual calling.

The predictive dialer not only allows us to be more efficient, but also has several features that help us to protect our market. One feature is a "Don't Call" list that keeps any phone number on the list from being called. We have entered all the numbers of people who have requested that we not call them. We have less than 3,000 numbers which have accumulated over the past 15 years. Our special number file also contains emergency numbers, police stations, and businesses that have multi-line phone systems that we never want to call. We filter out and do not call our current subscribers, businesses, numbers called within the past 90 days, and the "Don't Call" list.

No. of Copies rec'd

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215 South McDowell Street / P.O. Box 191 / Raleigh, NC 27602

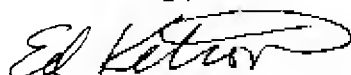
List ABC DE

Ms. Olga Madruga-Forti  
Common Carrier Bureau  
Federal Communications Commission  
May 15, 1992  
Page Two

It is very important to our newspaper and to our advertisers that we sell new move-ins as soon as possible. For this reason, we do call all numbers in an exchange in a geographical area. This also allows us to contact people of all demographics.

I appreciate your taking the time to review our procedures and considering our position concerning Public Law 102-243.

Sincerely,

A handwritten signature in cursive script, appearing to read "Ed Ketron".

Ed Ketron  
Circulation Marketing Manager

# Exhibit D

Federal Communications Commission      FCC 92-443  
{--- Unable To Translate Box ---}

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of)  
)  
Rules and Regulations Implementing)  
the Telephone Consumer Protection Act      CC Docket No.  
92-90)  
of 1991)

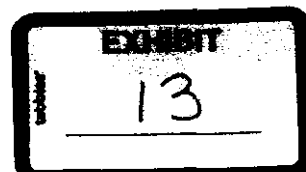
REPORT AND ORDER

Adopted: September 17, 1992

Released: October 16, 1992

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**Federal Communications Commission      FCC 92-443**  
 (... Unable To Translate Box ...)

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## I. INTRODUCTION

1. By this action, the Commission is amending its rules and regulations to establish procedures for avoiding unwanted telephone solicitations to residences, and to regulate the use of automatic telephone dialing systems, prerecorded or artificial voice messages, and telephone facsimile machines.

### 11. BACKGROUND

2. This proceeding was initiated by passage of the Telephone Consumer Protection Act of 1991, Public Law 102-243, December 20, 1991, which amended Title II of the Communications Act of 1934, 47 U.S.C. § 201 et seq., by adding a new section, 47 U.S.C. § 227 (TCPA). In its preamble, the TCPA recognizes the legitimacy of the telemarketing industry, but states that unrestricted telemarketing could be an intrusive invasion of privacy and, in some instances, a risk to public safety. Accordingly, the TCPA imposes restrictions on the use of automatic telephone dialing systems, the use of artificial or prerecorded voice, and on the use of telephone facsimile machines to send unsolicited advertisements. Specifically, the TCPA prohibits autodialed and prerecorded voice message calls to emergency lines, any health care facility or similar establishment, and numbers assigned to radio common carrier services or any service for which the called party is charged for the call, unless the call is made with the prior express consent of the called party or is made for emergency purposes.

The TCPA also prohibits calls made without prior consent to a residence using an artificial or prerecorded voice to deliver a message, unless it is an emergency call or is exempt by the Commission. Unsolicited advertisements may not be transmitted by telephone facsimile machines. Those using such machines or transmitting artificial or prerecorded voice messages are subject to certain identification requirements. The statute outlines various remedies for violations of the TCPA. Finally, the TCPA requires that the Commission consider several methods to accommodate telephone subscribers who do not wish to receive unsolicited advertisements, including live voice solicitations.

3. The TCPA notes that, "[i]ndividuals' privacy rights, public safety interests, and commercial freedom of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices." TCPA at Section 2(9). The preamble of the TCPA notes that the use of telemarketing is widespread, and generates more than \$400 billion in commercial activity each year, through more than 30,000 businesses employing more than 300,000 people. TCPA at Section 2(2) - (4).<sup>1</sup> Our task in this proceeding is to implement the TCPA in a way that reasonably accommodates individual's rights to privacy as well as the legitimate business interests of telemarketers.

4. In accordance with the requirements of the TCPA, the Commission, on April 10, 1992, adopted a Notice of Proposed Rulemaking (NPRM) in this proceeding.<sup>2</sup> The NPRM proposed rules implementing provisions of the TCPA which place restrictions on the use of automatic telephone dialing systems and artificial or prerecorded messages. The NPRM requested comment on the proposed rules, and requested comment and analysis regarding several alternative methods for restricting telephone solicitations to residential subscribers. Approximately two hundred and forty parties, including 83 newspapers, 25 industry and trade associations, 6 consumer advocacy groups, and 17 common carriers submitted comments or reply comments in response to the NPRM. A list of those parties is contained in Appendix A.<sup>3</sup>

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<sup>1</sup> The President signed the bill into law because it gives the Commission "ample authority to preserve legitimate business practices." Statement by the President upon signing the TCPA into law, December 20, 1991.

<sup>2</sup> See Notice of Proposed Rulemaking in CC Docket No. 92-90, 7 FCC Rcd 2736 (1992). The Commission designates Subpart L of Part 64 of its rules as the appropriate location for most of the rules implementing the TCPA. Additional rules implementing the TCPA which address certain requirements for terminal equipment are located in Part 68 of the Commission's rules. The full text of the TCPA is included as an appendix to the NPRM. The rules adopted in this order appear in Appendix B.

<sup>3</sup> In addition to comments filed by the Parties listed in Appendix A, we received numerous letters and other informal comments in response to the NPRM. We have considered each of these additional comments in adopting this Report and Order.

5. In this proceeding, we analyze the costs and benefits associated with each of the alternatives for meeting the goals of the TCPA. The rules we adopt attempt to balance the privacy concerns which the TCPA seeks to protect, and the continued viability of beneficial and useful business services. We adopt rules which protect residential telephone subscriber privacy by requiring telemarketers to place a consumer on a do-not-call list if the consumer requests not to receive further solicitations.<sup>4</sup> Further, we adopt, as proposed: (1) the prohibitions on calls made by automated telephone dialing systems and artificial or prerecorded voice messages (in the absence of an emergency or the prior express consent of the called party) to emergency lines, health care facilities, radio common carriers or any number for which the called party is charged for the call; (2) the prohibition on artificial or prerecorded voice message calls to residences; (3) the prohibition on the transmission of unsolicited advertisements by telephone facsimile machines; (4) the requirement that telephone facsimile machines and artificial or prerecorded voice messages identify the sender of such transmissions; (5) the requirements that artificial or prerecorded voice messages release the line of the called party within 5 seconds of the notification that the called party has hung up; and (6) the prohibition on calls which simultaneously engage two or more lines of a multi-line business. We exempt from the prohibition on prerecorded or artificial voice message calls to residences those calls: not made for commercial purposes; made for commercial purposes which do not transmit an unsolicited advertisement; made to a party with whom the caller has an established business relationship; and non-commercial calls by tax-exempt nonprofit organizations.

### III. DISCUSSION

#### A. Definitions

6. Many commenters request clarification, or offer their own definitions, of terms which appear in the NPRM and the TCPA. Accordingly, definitions of the following terms are set forth in section 64.1200(f) of our rules, 47 C.F.R. § 64.1200(f):<sup>5</sup> automatic telephone dialing system ("autodialer"); established business relationship; telephone facsimile machine; telephone solicitation, and; unsolicited advertisement.<sup>6</sup> We emphasize that the term autodialer does not include the transmission of an artificial or prerecorded voice. As indicated in the discussion below, we decline to adopt definitions offered by commenters where such definitions fit only a narrow set of circumstances, in favor of broad definitions

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<sup>4</sup> In this order, the term "telemarketer" refers to any person or entity making a telephone solicitation (regardless of the precise means used to place or complete such a call).

<sup>5</sup> See Appendix B.

<sup>6</sup> All terms except "established business relationship" are defined in the TCPA (see § 227(a)); we have incorporated those statutory definitions in our rules.



which best reflect legislative intent by accommodating the full range of telephone services and telemarketing practices.

**B. Procedures for Avoiding Unwanted Telephone Solicitations to Residences**

7. The TCPA and our rules, as adopted here, define "telephone solicitation" as the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message to (A) to any person with that person's prior express invitation or permission, (B) to any person with whom the caller has an established business relationship, or (C) by a tax-exempt nonprofit organization. Definitions of the terms "prior express consent" and "established business relationship" are set forth at paras. 29-35, *infra*. The TCPA requires that the Commission prescribe regulations to implement procedures for protecting the privacy rights of residential telephone subscribers in an efficient, effective, and economic manner. §227(c)(2). In determining which methods or procedures would best enable subscribers to avoid unwanted telephone solicitations, the Commission analyzed: the respective costs and benefits of several alternatives; which public or private entities are capable of administering the available alternatives; the impact of various alternatives on small businesses and second class mail permits holders; and whether there is a need for additional authority from Congress to further restrict telephone solicitations.<sup>7</sup>

1. Live vs. Artificial or Prerecorded Voice Solicitations.

8. In the NPRM, the Commission requested comment on whether it is in the public interest to recognize an inherent difference in the nuisance factor between artificial or prerecorded voice calls as opposed to live solicitations. Further, the NPRM raised the issue of whether regulation of live solicitation is necessary to protect residential subscriber privacy rights. Most commenters do not object to some form of restriction on live solicitations, but distinguish between live solicitations, particularly those made by predictive

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<sup>7</sup> 47 U.S.C. § 227(c). The TCPA also requires the Commission to consider whether specific regulations should be adopted regulating artificial or prerecorded voice calls to businesses. § 227(b)(2)(A). Concerns regarding telemarketer intrusions upon commerce are largely addressed in the rules, which prohibit autodialed and artificial or prerecorded message calls where the called party would incur costs for such calls, such calls would likely affect public health and safety, or where such calls would tie up two or more lines of a business simultaneously. See 47 C.F.R. § 64.1200 (a)(1), (a)(4), and (b). Commenters express concern that prerecorded message calls will affect public safety and impede commerce. Most commenters, however, do not raise privacy concerns with respect to prerecorded calls to businesses. Based on the record and on the scope of the prohibitions on autodialers and prerecorded messages in the rules we adopt today, we are not persuaded that additional prohibitions on prerecorded voice message calls to businesses are necessary at this time.

dialers (which deliver calls to live operators), and solicitations completed by artificial or prerecorded voice messages. These commenters contend that artificial or prerecorded voice solicitations are a greater nuisance and an invasion of privacy, and cite the relatively greater number of complaints to the Commission about this specific mode of solicitation to support this claim.<sup>8</sup> Several commenters, however, cite legislative history in asserting that Congress intended to regulate all solicitations, whether live or artificial or prerecorded voice, because both types of unwanted solicitations represent a nuisance and an invasion of **privacy**.<sup>9</sup> These commenters note that the figures on consumer complaints received by the Commission, suggesting that live solicitations are much less intrusive, do not fully reflect the volume of complaints regarding live solicitations because not all such complaints are reported directly to the Commission.<sup>10</sup>

9. While the commenters demonstrate that there are separate privacy concerns associated with artificial or prerecorded solicitations as opposed to live operator solicitations (e.g. calls placed by recorded message players can be more difficult for the consumer to reject or avoid), the record as a whole indicates that consumers who do not wish to receive telephone solicitations would object to either form of solicitation. We are persuaded by the comments, the numerous letters from individuals, and the legislative history that both live and artificial or prerecorded voice telephone solicitations should be subject to significant restrictions.<sup>11</sup> Accordingly, as discussed below, we select company-specific do-not-call lists as the most effective alternative to protect residential telephone subscribers from unwanted live and artificial or prerecorded

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<sup>8</sup> See, e.g., comments of American Telephone and Telegraph (AT&T).

<sup>9</sup> See, e.g., comments of Center for the Study of Commercialism (CSC) and National Consumers League (NCL). Commenters point to statements in reports on earlier versions of the TCPA noting that technology which permits a greater volume of solicitations with less personnel has led to an increasing number of consumer complaints and has prompted at least 40 states to enact restrictions on the use of autodialers, prerecorded message players, and unwanted solicitations. As examples of the source of consumer complaints, the reports note that callers making solicitations often fail to identify themselves, and that autodialers and prerecorded messages do not release a line after hangup. See Senate Report 102-177, 102d Cong., 1st Sess. (1991), p. 2; Senate Report 102-178 102d Cong., 1st Sess. (1991) pp. 2-3.

<sup>10</sup> Lejeune Associates of Florida (Lejeune) notes that Florida receives 300-500 complaints per month under its telephone solicitation statute. The Ohio public utilities Commission (OPUC) receives an average of 100 telephone solicitation complaints per month. The Direct Marketing Association (DA) notes that 400,000 consumers have asked to be included in its Telephone Preference Service, which functions as a do-not-call list for telemarketing industry.

<sup>11</sup> See Senate Report 102-177, 1st Sess., pp. 1-3 (1991); House Report 102-317, 1st Sess., pp. 8-10.

voice message solicitations. For the reasons discussed below, we believe that this alternative most effectively balances the privacy interests of residential subscribers who wish to avoid unwanted solicitations (whether live or by artificial or prerecorded message) against the interests of telemarketers in maintaining useful and responsible business practices and of consumers who do wish to receive solicitations.<sup>12</sup>

## 2. Alternatives to Restrict Telephone Solicitation to Residences.

10. As directed by the TCPA, the Commission has considered a number of alternatives for residential telephone subscribers to avoid receiving unwanted telephone solicitations. These include a national database, network technologies, special directory markings, time of day restrictions, and industry-based or company-specific do-not-call lists. The NPRM requested comment, as well as focused cost/benefit analyses, of these and any other methods proposed for protecting the privacy of residential telephone subscribers.

11. National Database. A majority of the commenters oppose this option because a national database of consumers who do not wish to receive telemarketing calls would be costly and difficult to establish and maintain. Estimates to start and operate a national database in the first year ranged from \$20 million to \$80 million, with commenters agreeing that operations would cost as much as \$20 million annually in succeeding years.<sup>13</sup> The American Express Company (AMEX) asserts that the Commission's original estimate did not include the costs of educating consumers about the database, gathering and disseminating the data, and regularly updating the database. Several commenters, noting that businesses participating in state do-not-call databases pay as much as \$1,500 annually, contend that many small businesses simply may not be able to afford participation in a national database.<sup>14</sup> Commenters assert that for most small businesses, participation would require an investment in computer software and hardware if the database were to be available on floppy disc, or would require additional personnel to review lists if a paper version of the list were made available to small businesses.<sup>15</sup> Many commenters express concern that consumers, as well as telemarketers, would ultimately bear the costs of a national database, either through higher prices charged by telemarketers or through costs incurred by a national database administrator and not recovered through fees on telemarketers. Further, several commenters question how participation in a national database would be enforced against telemarketers.<sup>16</sup>

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<sup>12</sup> Autodialer and prerecorded message Calls are subject to a stricter standard, as discussed in paras. 27-51 infra.

<sup>13</sup> See, e.g., comments of AT&T.

<sup>14</sup> See, e.g., comments of securities Industry Association (SA).

<sup>15</sup> see, e.g., comments of National Retail Federation (NRA).

<sup>16</sup> See, e.g., comments of Pacific Bell, Nevada Bell (Pacific Bell).

12. Numerous commenters argue that consumers would be disappointed in a national database because they would still receive unwanted calls after placing themselves in the national database, either because there will be a time lag in getting their preferences to telemarketers or because they would still receive calls from exempted businesses or organizations.<sup>17</sup> See paras. 32-41, *infra*. They note that since nearly one-fifth of all telephone numbers change each year, any database, whether local, regional, or national, would be continuously obsolete and would require constant updates *in* order to remain accurate.<sup>18</sup> Commenters assert that quarterly or semiannual updates would not be sufficiently frequent to avoid obsolescence or to accommodate consumer expectations.<sup>19</sup> AT&T states that **a** national database would contain millions of names and addresses, and that at least 20 percent of those would change every year as people move, change telephone numbers, disconnect service, or simply decide to enter or leave the database. Commenters also oppose this option because consumers must make an all or nothing choice: either reject all telemarketing calls, even those which the consumer might wish to receive, or accept all telemarketing calls, including those which the consumer does not wish to **receive**.<sup>20</sup> Moreover, several commenters question whether the confidentiality of telephone subscribers information could be adequately protected if it were maintained on a widely accessible list, and note that such information could be misused to compile telemarketing lists.<sup>21</sup> Other commenters contend that a national do-not-call database would destroy the confidentiality of subscribers having unpublished or unlisted numbers.<sup>22</sup>

13. Commenters who support the creation of a national do-not-call database contend that it is the most efficient and effective means for avoiding unwanted telephone solicitations. Lejeune Associates and CSC contend that the do-not-call database which Lejeune currently operates in Florida could easily be expanded to form a national do-not-call database. CSC and OPUC suggest that an independent organization (such as the National Exchange Carrier Association or a telemarketing trade association) could administer a national database, perhaps under the supervision of a board of governors from government, the industry, and the public. Consumer Action envisions a system in which all telemarketers would send their calling lists to a third party administrator who would compare and remove all names which appear on the administrator's national do-not-call database. It maintains that such a system would allow

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<sup>17</sup> See, *e.g.*, comments of Safecard Services, Inc. (Safecard); and Sprint.

<sup>18</sup> See, *e.g.*, comments of AT&T.

<sup>19</sup> See, *e.g.*, comments of Sprint.

<sup>20</sup> See, *e.g.*, comments of DA.

<sup>21</sup> See, *e.g.*, comments of consumer Bankers Association (CBA).

<sup>22</sup> See, *e.g.*, comments of J.C. Penney. Southwestern Bell Telephone (SWBT) notes that laws in each of the states it serves prohibit SWBT from breaching the confidentiality of subscribers having unpublished or unlisted numbers.

participation by subscribers with unpublished numbers, and would lower the risk of breaches in subscriber confidentiality. The Independent Telecommunications Network (TIN) suggests that the Line Information Database (LIDB) currently maintained by local exchange carriers (LECs) could be used to register subscriber do-not-call preferences nationwide, and could be accessed by telemarketers with the proper equipment for a minimal fee for each query.

14. Upon careful consideration of the costs and benefits of creating a national do-not-call database, we believe that the disadvantages of such a system outweigh any possible advantages. A national database would be costly and difficult to establish and maintain in a reasonably accurate form. As noted above, the most comprehensive estimates assume costs of \$20 million in the first year of operation alone. The impact of the costs of retooling or hiring additional personnel for compliance would be greater on small or startup businesses. Moreover, the greater these costs to smaller entities, the more likely that such costs would be passed on to consumers.<sup>23</sup> Telemarketers' only means of making up the difference, given the absence of federal involvement in the establishment, operation, or maintenance of a national database, would be to pass along such costs to consumers.<sup>24</sup> Commenters supporting a national database suggest that it be updated at least every three months. However, frequent updates would increase costs for both the database administrator and telemarketers. In addition, many commenters point out that each update would increase the potential for error in publishing or recording the telephone numbers of consumers requesting placement on the list. Regional or local telemarketers could be required to purchase a national do-not-call database even if they made no solicitations beyond their states or regions; additional rules to compensate for such varied telemarketing practices would, as with rules to compensate for such varied telemarketing practices would, as with small businesses, increase the complexity and cost of implementing a national database. Additionally, commenters indicate

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<sup>23</sup> we note that the TCPA prohibits any alternative which calls for any charge for participation to residential subscribers. § 227(c)(2). The Florida database, for example, charges subscribers for their participation in the database. Nynex Telephone Companies (Nynex) states that although New England Telephone has spent more than \$1 million to implement a statewide do-not-call database in Massachusetts, only nine telemarketers have purchased the \$300 do-not-call list. Nynex further notes that Massachusetts allows New England Telephone to recover costs of its state do-not-call database from the subscriber rate base.

<sup>24</sup> Commenters largely support the Commission's tentative conclusion in the **NPRM** that a national database should neither receive federal funds nor a federal contract for its establishment, operation, or maintenance. NCL objects to the finding, arguing that the failure of self-regulation, along with the TCPA, require strict federal regulatory oversight of telemarketing practices. In light of the action taken in the TCPA and in our rules to restrict the most abusive telemarketing practices, and in the absence of more persuasive evidence to support federal expenditures to further restrict such practices, we find that it is not in the public interest to pass on to taxpayers the cost of a national database system.

that on-line computer databases present significantly greater technological difficulties.<sup>25</sup>

15. We are persuaded by the comments that a national database which includes information in addition to telephone numbers (for greater accuracy and for verification purposes) could make national database information a target for unscrupulous telemarketers, and would prevent problems in protecting telemarketer proprietary information. A national database would similarly risk the privacy of telephone subscribers who have paid to have unpublished or unlisted numbers. While a national database would serve those who wish to avoid all telemarketing calls, commenters point to the success of telemarketing as proof that telephone subscribers by and large would like to maintain their ability to choose among those telemarketers from whom they do and do not wish to hear.<sup>26</sup> In view of the many drawbacks of a national do-not-call database, and in light of the existence of an effective alternative (company-specific do-not-call lists), we conclude that this alternative is not an efficient, effective, or economic means of avoiding unwanted telephone solicitations.

16. Network Technologies. Most commenters oppose this option because they contend that it is not technologically feasible and is too costly.<sup>27</sup> The use of a special area code or telephone number prefix for telemarketers, for example, requires the called party to be provided with a means to reject telephone solicitations by using automatic number identification (ANI) or a Caller ID service to block calls from a designated telemarketer prefix. Commenters concur that the SS7 technology which facilitates call blocking is costly to deploy; that the SS7 technology is not available to all telephone subscribers in all areas of the nation; that the North American Numbering Plan (NANP) may lack sufficient numbers to set aside an entire prefix for telemarketers; and that a service blocking all telemarketer calls would force consumers to sacrifice any choice between telemarketers from which they do and do not wish to hear.<sup>28</sup> Even if this option were feasible, commenters argue that businesses would have to change their telephone numbers and all references to those numbers in every medium, which would be prohibitively expensive. Moreover, businesses may decide to invest in separate telephone lines for telemarketing to customers with an ongoing business relationship, an expense smaller enterprises perhaps could not afford.<sup>29</sup> GTE Service

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<sup>25</sup> See, e.g., comments of Sprint.

<sup>26</sup> See, e.g., comments of AMEX and Olan Mills. Moreover, based upon the comments, we are not persuaded that the current state of technology would permit the rapid and cost-efficient utilization of LIDB to function as a national do-not-call database. See, e.g., comments of ITN, Pacific Bell, Southern New England Telephone (SNET), SWBT, and Sprint.

<sup>27</sup> See, e.g., comments of AT&T, Lejeune Associates, and Sprint.

<sup>28</sup> See, e.g., comments of SNET, Sprint.

<sup>29</sup> see, e.g., comments of SA.

Corporation (GTE), SNET, and U.S. West express concern that exchange carriers would be required to finance the implementation of this option, when telemarketers alone should bear the costs of protecting subscribers from unwanted telephone solicitations. Commenters concur that any ubiquitous call blocking system would require costly switch upgrades by LECs to accommodate the SS7 technology which permits call blocking.<sup>30</sup> In contrast, Intervoice and ITN argue that much of the infrastructure necessary to implement call blocking network technology nationally is already in place, and that this technology is an effective means for avoiding unwanted solicitations.

17. In view of the costs and technological uncertainties associated with implementation, we reject the network alternative for avoiding unwanted telephone solicitations. This alternative would ultimately place the cost of consumer privacy protection on telemarketers, local exchange carriers, and consumers alike. The more than 30,000 businesses engaged in telemarketing would be required to incur costs associated with changing their telephone numbers to numbers which carry a telemarketing prefix, and would perhaps be forced to obtain new lines for conducting operations other than solicitations. All LECs would be forced to upgrade their networks without regard to demand for technology. Moreover, it is unclear whether fees on telemarketers would be sufficient to cover the costs of making call blocking technology universally available, raising the possibility that such costs would be passed on to residential telephone subscribers, in violation of the TCPA. Based on the commenters' assessments of the cost and technological barriers to implementation of this alternative, we conclude that network technologies are not the best means for accomplishing the objectives of the TCPA at this time.

18. Special Directory Markings. A majority of commenters oppose this alternative because it would require telemarketers to purchase and review thousands of local telephone directories, at great cost and to little ultimate effect. Commenters note, for example, that telemarketing firms compile calling lists from many sources other than local telephone directories.<sup>31</sup> Hence, many telemarketers would not ordinarily discover a subscriber's do-not-call preference in the process of targeting likely prospects. Commenters argue that this alternative has many of the disadvantages of the national database option, because subscribers would have to make an all or nothing choice about receiving telemarketing calls, and subscribers would be disappointed at the time lag in entering their preference, during which they would continue to receive unwanted calls. Moreover, since directories are published only once a year, the subscriber preference information would quickly become obsolete, and telemarketers would pay enormous costs to access any computerized telephone directories.<sup>32</sup>

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<sup>30</sup> See, e.g., comments of Bell Atlantic; BellSouth; Pacific Bell; and SNET.

<sup>31</sup> See, e.g., comments of CSC, GTE.

<sup>32</sup> See, e.g., comments of J.C Penney, North American Telecommunications Association (NATA) and Safecard. Nynex states that

Commenters also argue that special directory markings would not permit subscribers with unpublished or unlisted numbers to avoid telephone solicitations.<sup>33</sup> BellSouth and Consumer Action argue that this option unfairly divides responsibility for curbing unwanted calls between LECs and telemarketers, when telemarketers alone should bear any relevant costs or administrative burdens.<sup>34</sup> Moreover, U.S. West contends that disappointed subscribers will seek relief from the LEC rather than an offending telemarketer if preferences are not respected or are not communicated to telemarketers in a timely fashion.

19. We agree with commenters that this alternative would be too costly and burdensome for telemarketers to implement efficiently, regardless of their size, especially given the existence of an effective alternative (company-specific do-not-call lists). Such a system would rely on much obsolete information and could not be updated in a timely fashion. Significantly, implementation of special directory markings would place much of the burden of cost and implementation on LECs, which could not pass on such costs to residential telephone subscribers because the TCPA prohibits charges to consumers for privacy protection. § 227(c)(2). Unpublished and unlisted numbers could not be included in such a system. Ultimately, this option combines the disadvantages of maximum cost to all participants with minimal potential effectiveness, and therefore is not a suitable means of accomplishing the goals of the TCPA.

20. Industry-Based or Company-Specific Do-Not-Call Lists. A majority of commenters support company-specific do-not-call lists as the most effective, most easily implemented, and the least costly of each of the methods proposed to curb unwanted telephone solicitations.<sup>35</sup> Commenters supporting this approach state that the company-specific do-not-call list alternative appropriately places the burden of compliance squarely on telemarketers.<sup>36</sup> These commenters view this method as less costly and less burdensome because many telemarketers already maintain company-specific do-not-call lists, and because most telemarketers can readily verify and compare subscriber

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inserting an asterisk to mark do-not-call preferences in its directories would cost its publishing division \$100,000, in addition to \$300,000 for an additional 400 tons of paper and \$125,000 in printing costs. Nynex's experiment in using an asterisk to mark customer preferences received complaints that marks confused readers. BellSouth provided special directory markings in its state of Florida directory from October 1, 1987 to October 1, 1990. In its comments, BellSouth states that the service proved to be largely ineffective in reducing unwanted solicitations and was withdrawn. See comments of BellSouth at 9, n. 13.

<sup>33</sup> See, e.g., comments of BellSouth and Consumer Action.

<sup>34</sup> See, e.g., comments of National Telephone cooperative Association (NTCA) and Pacific Bell.

<sup>35</sup> See, e.g., comments of Citicorp; Olan Mills; Sprint; and SWBT.

<sup>36</sup> See, e.g., comments of CUC International, Olan Mills, Pacific Bell.



information with information drawn from their own customer lists.<sup>37</sup> Commenters favoring this option note several reasons for implementing it: (1) it is effective in halting unwanted solicitations; (2) it accords greater recognition of consumer privacy interests than a national database or special directory markings; (3) it eliminates anticompetitive concerns in special directory markings or a national database, in which phone companies could have access to proprietary information; (4) it allows desired solicitations; (5) it places costs squarely on telemarketers, yet avoids undue costs or restrictions for telemarketers; (6) it avoids burdening Commission resources; and (7) it appropriately balances legitimate privacy expectations against legitimate uses of telemarketing.<sup>38</sup>

21. In response to our observation in the **NPRM** that telemarketers would be required to produce evidence of compliance with any requirement mandating company or industry-based do-not call lists, several commenters suggest that telemarketers be required to follow certain guidelines for maintaining such lists. For example, commenters propose that telemarketers be required to: (1) maintain a written policy implementing its do-not-call procedures; (2) inform and train telemarketing representatives in the existence and implementation of the company-specific do-not-call list; (3) inform subscribers of their rights to be placed on such a list; (4) place a telephone subscriber on a do-not-call list within reasonable time after the request is made (or not later than 60 days); and (5) maintain the request for a reasonable period after the request is made.<sup>39</sup> Commenters assert that telemarketers who can certify and demonstrate compliance with the above should be afforded a legal presumption of compliance with the rules and allowed to use such demonstration as a defense in any private or Commission enforcement action.<sup>40</sup> A few commenters propose that telephone subscribers be notified of Commission policy and telemarketer procedures through telemarketer mailings, local subscriber phone directories, news, bill inserts, or in a live preamble prior to solicitation.<sup>41</sup> Some commenters propose that residential subscribers be given the option of contacting DA, which maintains an industry-based do-not-call list (through its Telephone Preference Service), in lieu of contacting numerous companies individually.

22. Commenters opposed to industry-based or company-specific do-not-call lists contend that existing industry-based and company-specific lists have not reduced the number of unwanted telephone

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<sup>37</sup> See, e.g., comments of Ameritech Operating Companies (Ameritech) and Cox Enterprises, Inc. (Cox).

<sup>38</sup> See, e.g., comments of American Telemarketing Association (ATA), Citicorp.

<sup>39</sup> See, e.g., comments of Citicorp; DA; reply comments of AMEX. and Ameritech.

<sup>40</sup> See, e.g., comments of AMEX. Citicorp.

<sup>41</sup> see, e.g., comments of Ameritech, Citicorp.

solicitations, and that Congress has found such efforts ineffective.<sup>42</sup> Further, these commenters argue that these alternatives provide no affirmative method for the consumer to avoid or reject a telemarketer's first call in advance. Moreover, Private Citizen, Inc. (Private Citizen) contends that telemarketers do not always heed an initial do-not-call request, and may call a consumer several times before honoring a consumer's request not to receive further calls or solicitations.

23. The legislative history suggests that properly implemented company-specific do-not-call lists would satisfy the statutory requirements of the TCPA.<sup>43</sup> In light of that assertion, and upon weighing the costs and benefits of company-specific and industry-based do-not-call lists against the costs and benefits of the other alternatives presented in the record, we conclude that the company-specific do-not-call list alternative is the most effective and efficient means to permit telephone subscribers to avoid unwanted telephone solicitations.<sup>44</sup> Such lists are already maintained on a voluntary basis by many telemarketers and could be established swiftly by individuals, small businesses, or large companies. Mandatory company-specific do-not-call lists would allow residential subscribers to selectively halt calls from telemarketers from which they do not wish to hear. Such lists would also afford residential telephone subscribers with a means to terminate a business relationship in instances in which they are no longer interested in that company's products or services. Additionally, businesses could gain useful information about consumer preferences, and can comply with such preferences without overly burdensome costs or administrative procedures. This alternative would best protect residential

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<sup>42</sup> CSC cites House Report 102-317 at 19-20, finding the existing DA list to be unsatisfactory because it is "not comprehensive in nature." See also comments of Consumer Action, Lejeune, and U.S. West.

<sup>43</sup> "With respect to both company-specific and industry-wide databases, the Commission should consider whether making such practices mandatory, and imposing substantial sanctions for violations would increase their effectiveness to the point that they could satisfy the statutory requirements of this Act." House Report 102-317, 102d Cong.. 1st Sess. (1991) at 20.

<sup>44</sup> Several commenters oppose the implementation of mandatory industry-based lists, arguing that this alternative raises the same problems of cost, confidentiality, and obsolescence as a national database. See, e.g., comments of Bell Atlantic and CUC International. Industry-based do-not-call lists may be appropriate for smaller telemarketers who find it more economical or efficient to maintain do-not-call lists in cooperation with other telemarketers in the same region or industry. See, e.g., comments of Time Warner, Inc. (TWI). Therefore, our decision to choose the company-specific do-not-call list alternative does not preclude telemarketers from voluntarily maintaining an industry-based do-not-call list as long as that method comports with the rules set forth in § 64.1200(e) for maintaining do-not-call lists. We emphasize that, regardless of the method chosen, the person or entity making a telephone solicitation, or on whose behalf a telephone solicitation is made, will ultimately be held responsible for compliance with our rules. See para. 24, infra.

subscriber confidentiality because do-not-call lists would not be universally accessible, and could be verified with a telemarketer's own customer information. Company-specific do-not-call lists would impose the costs of protecting consumer privacy squarely on telemarketers rather than telephone companies or consumers who do not wish to be called. Moreover, the costs of maintaining a do-not-call list are less likely to be passed on to residential telephone subscribers even indirectly, because they would be minimal, involving only the addition of do-not-call preferences to existing calling lists.<sup>45</sup> Such lists are more likely to be accurate than a national database because a single party would be responsible for recording and maintaining do-not-call requests, and that party could verify a consumer's identification with its own customer information. In sum, the company-specific do-not-call list alternative represents a careful balancing of the privacy interests of residential telephone subscribers against the commercial speech rights of telemarketers and the continued viability of a valuable business service. For these reasons, we conclude that the company-specific do-not-call list is the alternative that best accomplishes the purposes of the TCPA.

24. The comments persuade us that we must mandate procedures for establishing company-specific do-not-call lists to ensure effective compliance with and enforcement of the requirements for protecting consumer privacy.<sup>46</sup> See § 64.1200(e). Unlike the DA list cited by CSC at n. 42, supra, the alternative we adopt today requires the compliance of all telemarketers engaged in telephone solicitation as defined in the TCPA. Thus, any person or entity engaged in telephone solicitation is required to maintain a list of residential telephone subscribers who request not to be called by the telemarketer.<sup>47</sup> The requirements will help ensure that residential subscriber privacy is protected from further undesired solicitations and will avoid the wide dissemination of information regarding a subscriber's do-not-call request. Each person or entity making a telephone solicitation, or on whose behalf a telephone solicitation is made, will be held ultimately responsible for maintenance of its do-

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<sup>45</sup> We emphasize that § 227(c)(2) prohibits the imposition of any charge on residential subscribers from procedures to protect them from unwanted solicitations.

<sup>46</sup> See, e.g., comments of DA.

<sup>47</sup> Tax-exempt nonprofit organizations are not subject to this requirement because the TCPA excludes such organizations from the definition of "telephone solicitation." See § 227(a)(3). Therefore, tax-exempt nonprofit organizations need not maintain do-not-call lists.

The definition of "telephone solicitation" in § 227(a)(3) also excludes calls made to parties with whom the caller has an established business relationship and calls for which the calling party has received the called party's prior express invitation or permission. We emphasize, however, that subscribers may sever any business relationship, i.e., revoke consent to any future solicitations, by requesting that they not receive further calls from a telemarketer, thus subjecting that telemarketer to the requirements of § 64.1200(e).

not-call list and will be fully accountable for any problems arising in the maintenance and accuracy of the list.<sup>48</sup> Telemarketers are required to maintain do-not-call lists on a permanent basis, so that consumers will not be burdened with periodic calls to renew a do-not-call request. Moreover, in the absence of a specific request by the subscriber to the contrary, a residential subscriber's do-not-call request shall apply to the particular business entity making the call (or on whose behalf a call is made), and will not apply to affiliated entities unless the consumer reasonably would expect them to be included given the identification of the caller and the product being advertised.<sup>49</sup> Finally, § 227(C)(5) of the TCPA provides that a telemarketer's implementation, with due care, of reasonable practices and procedures in compliance with the requirements for protection of residential subscribers from unwanted telephone solicitations will be an affirmative defense to a cause of action brought regarding a violation of such requirements.<sup>50</sup>

25. Time of Day Restrictions. While many commenters support reasonable time of day restrictions on telemarketing calls,<sup>51</sup> several state that such restrictions are unnecessary because responsible telemarketers already restrict their calls to reasonable hours as a sound business practice.<sup>52</sup> The OPUC notes that many telemarketing complaints mention the late or unreasonable hour of the call. Several commenters urge the Commission not to adopt time of day restrictions which would conflict with the requirements of the Fair Debt Collection Practices Act (FDCPA).<sup>53</sup>

26. We concur with commenters that responsible telemarketers are likely to restrict their calls to reasonable hours. However, both the record and the legislative history indicate that early morning and

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<sup>48</sup> See n. 44, *supra*. The TCPA enforcement mechanisms are discussed in paras. 55-56, *infra*.

<sup>49</sup> See House Report 102-317, 102d Cong., 1st Sess., pp. 13-17 (1991).

<sup>50</sup> The Newspaper Association of America suggests that alternative methods and procedures should be permitted for second class mail permit holders if the national database alternative is mandated, but states that separate treatment would not be necessary under the company-specific do-not-call list option. In light of our selection of the company-specific do-not-call list as the preferred alternative for limiting unwanted telephone solicitations, we do not believe that separate methods and procedures are required for small businesses, independent contractors, or holders of second class mail permits. We conclude that the benefits of company-specific do-not-call lists are the same, e.g. cost, efficiency, and effectiveness, for small entities and for holders of second class mail permits as they are for larger enterprises, and therefore these entities will be subject to the same requirements under our rules.

<sup>51</sup> See, e.g., comments of Ameritech; CBA; and NATA.

<sup>52</sup> See, e.g., comments of Bell Atlantic.

<sup>53</sup> See, e.g., comments of American Collectors Association (ACA). The FDCPA prohibits calls before the hour of 8 AM and after 9 PM, local time at the called party's location. 15 U.S.C. § 1692c(1). See also paras. 36-39 *infra*.

late night telephone solicitations are a significant nuisance to telephone subscribers. In light of the record and the legislative history, we conclude that it is in the public interest to impose time of day restrictions on telephone solicitations as reasonable limitations to invasions of residential subscriber privacy. We concur with the commenters that any conflict between the requirements of the TCPA and the FDCPA would make compliance with both statutes confusing. Accordingly, telemarketers will be subject to the same time of day restrictions as are imposed on debt collectors under the FDCPA. These regulations will coincide with the FDCPA prohibition against calls before the hour of 8 **AM** and after 9 PM, local time at the called party's location. We believe that time of day restrictions will protect consumers from objectionable calls while not unduly burdening legitimate telemarketing activity.

### **C. Autodialers and Artificial or Prerecorded Messages**

#### **1. General Prohibitions**

27. The TCPA prohibits the use of autodialers and prerecorded messages to place calls to an emergency telephone line, to health care facilities, to radio common carrier services, and to services for which the called party is charged for the call, except in emergencies or with the prior express consent of the called party. The TCPA, however, permits the Commission to exempt from the residential prohibition calls which are non-commercial and commercial calls which do not adversely affect the privacy rights of the called party and which do not transmit an unsolicited advertisement. §§ 227(b)(2)(B). Accordingly, the NPRM proposed to exempt these calls from the residential prohibitions, as well as calls from parties with which the called party has an established business relationship and calls from tax-exempt nonprofit organizations.

28. Commenters generally support the prohibitions in the NPRM on the use of autodialers and prerecorded messages. Specifically, Centel Corporation (Centel) and Citicorp concur that the restrictions set forth in the NPRM properly balance consumer privacy concerns and legitimate telemarketing practices. Many commenters, however, request clarification regarding the scope of these prohibitions. As discussed below, we adopt the general prohibitions and the exemptions proposed in the NPRM, clarifying their scope as requested.

#### **2. Prior Express Consent**

29. The TCPA allows autodialed and prerecorded message calls if the called party expressly consents to their use. Several commenters express concern that they would unintentionally incur liability by placing calls to individuals who provided a number at one of the "prohibited destinations" (for example, a hospital or an emergency line) as the number at which that individual could be reached.<sup>54</sup> Commenters note that they have no way of knowing whether numbers provided to them fall in one of the categories of destinations to

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<sup>54</sup> see, e.g., comments of American Bankers Association (ABA)

which calls are prohibited, or whether such numbers have been changed without notification.<sup>55</sup>

30. Many commenters express the view that any telephone subscriber that provides his or her telephone number to a business does so with the expectation that the party to whom the number was given will return the call. Hence, any telephone subscriber who releases his or her telephone number has, in effect, given prior express consent to be called by the entity to which the number was released.<sup>56</sup> Private Citizen urges the Commission to reject this interpretation and points out that some 800 numbers have the capacity to record the telephone number of an incoming call without the caller's knowledge or consent. It urges the Commission to clarify that telemarketers may not use the telephone numbers of persons who call to make inquiries without expressly requesting permission to use the number for that purpose.

33. We emphasize that under the prohibitions set forth in § 227(b)(1) and in §§ 64.1200(a)-(d) of our rules, only calls placed by automatic telephone dialing systems or using an artificial or prerecorded voice are prohibited. If a call is otherwise subject to the prohibitions of § 64.1200, persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary.<sup>57</sup> Hence, telemarketers will not violate our rules by calling a number which was provided as one at which the called party wishes to be reached. However, if a caller's number is "captured" by a Caller ID or an ANI device without notice to the residential telephone subscriber, the caller cannot be considered to have given an invitation or permission to receive autodialer or prerecorded voice message calls. Therefore, calls may be placed to "captured" numbers only if such calls fall under the existing exemptions to the restrictions on autodialer and prerecorded message calls.

### 3. Exemptions to Prohibited Uses of Artificial or Prerecorded Messages.

32. Established Business Relationship. The NPRM tentatively concluded that the privacy rights the TCPA intended to protect through the prohibition on prerecorded message calls to residences are not adversely affected where the called party has or had a voluntary business relationship with the caller. Most commenters support the proposed exemption in the NPRM for calls to persons with whom the caller has a prior or existing business relationship. CSC argues that the proposed exemption is overbroad because it extends beyond current

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<sup>55</sup> See, e.g., comments of BellSouth.

<sup>56</sup> See, e.g., comments of Citicorp and J.C. Penney.

<sup>57</sup> See House Report, 102-317, 1st Sess., 102nd Cong. (1991), at p.13. which supports this interpretation, noting that in such instances "the called party has in essence requested the contact by providing the caller with their telephone number for use in normal business communications."

or ongoing business relationships to prior business relationships. Further, CSC contends that the TCPA intended to exempt business relationship calls only from its restrictions on live operation solicitations and not from the autodialer prohibitions. CSC maintains that, at a minimum, the Commission should require actual consent to telephone solicitations and must clearly provide a means by which consumers may terminate any such relationship.

33. In addition, we sought comment on the proper scope of this exemption and on the definition of the term "business relationship." However, comments regarding the proper definition and scope of this exemption vary widely. Many commenters concur that an existing business relationship could not be formed with a residential telephone subscriber solely on the basis of a prior **solicitation**.<sup>58</sup> Many commenters contend that the Commission should adhere to the broadest possible definition of the business relationship, rather than a narrow definition which may exclude many categories of appropriately exempted calls.<sup>59</sup> Other commenters suggest various factors for determining the existence of a business relationship, including an exchange of consideration; a transaction between the caller and the called party within some specified period prior to the telephone solicitation; a previous inquiry or an application made by the called party to the caller for products or services; time elapsed since last inquiry or transaction; and prior express consent by the called party to the caller for future calls.<sup>60</sup>

34. Although the TCPA does not explicitly exempt prerecorded message calls from a party with whom the consumer has an established business relationship, it provides an exemption for commercial calls which do not adversely affect residential subscriber privacy interests and do not include an unsolicited advertisement. We conclude, based upon the comments received and the legislative history, that a solicitation to someone with whom a prior business relationship exists does not adversely affect subscriber privacy interests. Moreover, such a solicitation can be deemed to be invited or permitted by a subscriber in light of the business relationship.<sup>61</sup> Additionally, the legislative history indicates that the TCPA does not intend to unduly interfere with ongoing business relationships;<sup>62</sup> barring autodialer solicitations or requiring actual consent to prerecorded message calls where such relationships exist could significantly impede communications between businesses and their customers. Thus, we are not persuaded that the TCPA precludes the use of prerecorded messages to make solicitations to a party with whom the telemarketer has an established business relationship. In view of the support in the record for the exemption and the legislative history, we conclude that the TCPA permits an exemption for established business relationship

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<sup>58</sup> See, e.g., comments of OPUC.

<sup>59</sup> See, e.g., comments of ACA and AMEX.

<sup>60</sup> See, e.g., comments of ABA and ACA.

<sup>61</sup> See, e.g., comments of Intervoice.

<sup>62</sup> See House Report, 102-317, 102d Cong., 1st Session (1991), p. 13

calls from the restriction on artificial or prerecorded message calls to residences.<sup>63</sup> We decline to create more specific business relationship exemptions as requested by several commenters, such as utility companies, in favor of an exemption broad enough to encompass a wide range of business relationships. Finally, consistent with our conclusions at para. 24 *supra*, we find that a consumer's established business relationship with one company may also extend to the company's affiliates and subsidiaries.<sup>64</sup>

35. Many commenters concur with our tentative conclusion that a business relationship should be defined broadly rather than narrowly (e.g., an exchange of consideration), but that it cannot be formed solely on the basis of a prior solicitation.<sup>65</sup> Based on the record in this proceeding and the legislative intent to address a broad range of business relationships in the rules, we adopt our tentative conclusion.<sup>66</sup> Accordingly, the rules define "established business relationship" as a prior or existing relationship formed by a voluntary two-way communication between the caller and the called party, which relationship has not been previously terminated by either party. The relationship may be formed with or without an exchange of consideration on the basis of an inquiry, application, purchase or transaction by the residential telephone subscriber regarding products or services offered by the telemarketer.<sup>67</sup> A broad definition of the business relationship can encompass a wide variety of business relationships (e.g., publishers with subscribers, credit agreements) without eliminating legitimate relationships not specifically mentioned in the record. Accordingly, we reject proposals to define a business relationship by reference to consideration or to a period of time because such narrow definitions may exclude legitimate categories of business relationships.

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<sup>63</sup> We emphasize, however, that a business may not make telephone solicitations to an existing or former customer who has asked to be placed on that company's do-not-call list. A customer's request to be placed on the company's do-not-call list terminates the business relationship between the company and that customer for the purpose of any future solicitation. *See* n. 47. *Supra*.

<sup>64</sup> *See* House Report, 102-317, 102d Cong., 1st Session (1991), pp. 13-17, noting that solicitations by persons or entities affiliated with businesses which have an established business relationship with the consumer would be permissible in certain circumstances, but that companies should honor requests not to call again notwithstanding any business relationship with the consumer.

<sup>65</sup> *See, e.g.*, comments of AMEX, TWI

<sup>66</sup> *See, e.g.*, House Report 102-317, 102d Cong., 1st Session (1991), pp. 13-17.

<sup>67</sup> As we noted in para. 31, *supra*, a party making an inquiry cannot be considered to have given prior express consent to future autodialed or prerecorded message calls simply because that party's number has been "captured" by an ANI device or similar system. Nor can a consumer inquiry be considered to create a business relationship where the consumer's number has been captured absent that consumer's express invitation or permission to be contacted at the captured number.



36. Debt Collection Calls. In the NPRM, we observed that all debt collection circumstances involve a prior or existing business relationship. In addition, we tentatively concluded that debt collection calls are exempt from the TCPA's prohibitions against prerecorded message calls because they are commercial calls which do not convey an unsolicited advertisement and do not adversely affect residential subscriber rights.

37. Commenters generally support an exemption for debt collection calls.<sup>68</sup> Commenters concur that debt collection calls are exempt as calls to parties with whom the caller has a prior or existing business relationship, and further argue that debtors have given prior express consent to such calls by incurring a debt.<sup>69</sup> AFSA requests the Commission to explicitly exempt calls where terms of a credit agreement are not met. Moreover, AFSA argues that debt collection calls should be exempted as commercial calls not transmitting an unsolicited advertisement and not adversely affecting privacy rights. A number of commenters urge the Commission to include language clarifying that calls made on behalf of a creditor or other entity attempting to collect a debt are exempted. CSC opposes a debt collection exemption, arguing that such an exemption would increase the potential for harassment. Other commenters maintain that prerecorded message calls are the least intrusive means of debt collection, and that elimination of this option could lead to higher transaction and loan servicing costs.<sup>70</sup>

38. Many commenters request clarification of the identification requirements for artificial or prerecorded voice messages because these requirements appear to conflict with the requirements of the FDCPA. The FDCPA prohibits debt collection agents from revealing the identity of the creditor or the purpose of the call to third parties, and that a debt collector determine that the called party is the debtor before revealing the purpose of the call.<sup>71</sup> If the call is delivered using an artificial or prerecorded voice message, the message must be fashioned so that the purpose of the call is not revealed to a third party. The TCPA, on the other hand, requires prerecorded messages to identify the individual, business, or other

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<sup>68</sup> See comments of ABA; American Financial Services Association (AFSA); the Coalition; Citicorp; CBA; Gannett; Household International; National Retail Federation; Teknekron; and Wells Fargo.

<sup>69</sup> See comments of ACA; AFSA; Ameritech; Citicorp; CBA; Household International; Ohio Student Loan Commission; and Wells Fargo.

<sup>70</sup> See comments of the Coalition; CBA; Digital Systems International; and the National Retail Federation.

<sup>71</sup> Debt collectors subject to the FDCPA are prohibited from conveying any information to third parties, even inadvertently, with respect to the existence of a debt. 15 U.S.C. § 1629b-c. The FDCPA requires a collector initiating a call answered by a third party to identify himself by name but not to disclose the name of his employer unless asked. 15 U.S.C. § 1629b(1). See comments of ACA.

entity placing the call at the beginning of the message. Some commenters urge the Commission to provide specific language for use in prerecorded messages. Other commenters simply urge the Commission not to adopt requirements which would conflict with the requirements of the FDCPA. The ABA suggests that the Commission adopt language to the effect that no requirements under § 227(d)(3) of the TCPA be deemed to preempt the requirement of other federal or state laws.

39. Upon consideration of these comments, we conclude that an express exemption from the TCPA's prohibitions for debt collection calls is unnecessary because such calls are adequately covered by exemptions we are adopting here for commercial calls which do not transmit an unsolicited advertisement and for established business relationships. As proposed in the NPRM, these exemptions would also apply where a third party places a debt collection call on behalf of the company holding the debt. Whether the call is placed by or on behalf of the creditor, prerecorded debt collection calls would be exempt from the prohibitions on such calls to residences as: (1) calls from a party with whom the consumer has an established business relationship, and (2) commercial calls which do not adversely affect privacy rights and which do not transmit an unsolicited advertisement.<sup>72</sup> With respect to concerns regarding compliance with both the FDCPA and our rules in prerecorded message calls, we emphasize that the identification requirements will not apply to debt collection calls because such calls are not autodialer calls (i.e., dialed using a random or sequential number generator) and hence are not subject to the identification requirements for prerecorded messages in 64.1200(e)(4) of our rules.<sup>73</sup> Accordingly, we reject as unnecessary proposals that we provide specific language for use in prerecorded debt collection messages. In any event, to the extent any conflicts exist, compliance with both statutes is possible through the use of live calls.

40. Tax-Exempt Nonprofit Organizations and Non-Commercial Calls. In the NPRM, we sought comment on whether tax-exempt nonprofit organizations should be exempt from the TCPA's prohibitions on prerecorded message calls to residences either because such calls are not made for commercial purposes, or because they are commercial calls which do not adversely affect privacy interests and which do not transmit an unsolicited advertisement. See § 64.1200(a)(2). We observed that the TCPA seeks primarily to protect subscribers from unrestricted commercial telemarketing activities. Commenters generally support the proposed exemption. However, a number of commenters object to such exemptions for calls from nonprofit organizations, arguing that such calls are also a nuisance and an invasion of

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<sup>72</sup> A creditor may solicit a residential subscriber using a prerecorded message as long the established business relationship has not been previously severed by the debtor. This interpretation reflects the legislative intent expressed in House Report. 102-317, 102d Cong., 1st Session (1991), PP. 14-17.

<sup>73</sup> See comments of ABA, ACA. See also paras. 25-26 supra.

privacy.<sup>74</sup> The legislative history of the TCPA contrasts calls made by tax-exempt nonprofit organizations with commercial calls and indicates that commercial calls have by far produced the greatest number of complaints about unwanted calls.<sup>75</sup> Moreover, no evidence has been presented in this proceeding to show that non-commercial calls represent as serious a concern for telephone subscribers as unsolicited commercial calls. Accordingly, based on the comments and the legislative history of TCPA, we conclude that tax-exempt nonprofit organizations should be exempt from the prohibition on prerecorded message calls to residences as non-commercial calls. Therefore, we will not seek additional authority to curb calls by tax-exempt nonprofit organizations.

41. Some commenters urge the Commission to expressly exempt specific categories of additional organizations such as market research or polling organizations, whose activities are not invasive of residential privacy rights and were not intended to be prohibited by the TCPA.<sup>76</sup> We find that the exemption for non-commercial calls from the prohibition on prerecorded messages to residences includes calls conducting research, market surveys, political polling or similar activities which do not involve solicitation as defined by our rules.<sup>77</sup> We thus reject as unnecessary the proposal to create specific exemptions for such activities.

#### 4. Clarifications.

42. Elderly Home. The TCPA prohibits autodialer and prerecorded message calls to "elderly homes" absent prior express consent or unless it is an emergency call. AFSA requests clarification of the term, as it appears in § 227(b)(1)(A)(ii) and in the proposed rules, § 64.1200(a)(1)(ii), noting that the term is sufficiently ambiguous to include the private homes of elderly telephone subscribers as well as health care establishments. Since the TCPA does not define the term, we must apply the plain meaning of the words in interpreting the statute. This term clearly refers to a residential setting for the elderly, but also suggests the vernacular for institutions like nursing homes and other long term health care facilities. Its placement in a section which refers to other health care facilities rather than in the following section regarding calls to residential telephone subscribers also suggests that the words are

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<sup>74</sup> See, e.g., comments of NCL and OPUC.

<sup>75</sup> See, House Report 102-317 at 16-17 stating that "most unwanted telephone solicitations are commercial in nature" and that "the two main sources of consumer problems--high volume of solicitations and unexpected solicitations-- are not present in solicitations by nonprofit organizations." See also, Senate Report 102-177 at 6, to accompany Bill S. 1410. 102d Cong., (1991).

<sup>76</sup> See comments of Congressman Brewster and Public Forum.

<sup>77</sup> See para. 45, *infra.*, emphasizing that market research or surveys would be prohibited under § 227 of the TCPA and § 64.1200(a)(1) if the called party were charged for the call without the party's prior express consent or if such calls contain unsolicited advertisements.

meant to describe an institutional setting in which the elderly reside, as opposed to any reference to the private homes of the elderly. Given the placement of this term in the statute and the lack of evidence in the legislative history suggesting any contrary meaning, we conclude that the words "elderly home" do not refer to the private homes of the elderly, and that the words are intended to include in the general prohibition against autodialer and artificial or prerecorded voice messages calls made to health care facilities and those institutions which house primarily elderly persons.

43. Radio Common Carriers. The TCPA prohibits autodialer and prerecorded message calls to radio common carrier services or any service for which the called party is charged for the call. § 227(b)(1)(iii). The Cellular Telecommunications Industry Association (CTIA) and Centel Corporation urge the Commission to exempt from the prohibitions on autodialers and prerecorded messages those calls made by cellular carriers to cellular subscribers (as part of the subscriber's service) for which the called party is not charged. These commenters point out that cellular customers are not charged for calls which, for example, monitor service or issue warnings to "roamers" that they are moving out of the carrier's service area. Therefore, such calls should either be exempted from the prohibitions of § 64.1200(a)(1)(iii), or should be interpreted as not intended to be prohibited by Congress.

44. In addition, West Marketing Services (West), a market research firm, states that it licenses a program, CelShare, which places calls to cellular phones to measure a cellular carrier's share of a given cellular market. The CelShare program monitors cellular telephone company messages to determine whether a random sample of telephone numbers is active or inactive. To avoid actually reaching a cellular customer, calling devices are normally used in the middle of the night, are set to two rings, and immediately disconnect if a cellular customer answers the call. West states that three live connections are made for every 1,000 calls. Since the primary function of its program is market research, and since no telemarketing is involved, West urges the Commission to allow its program to operate under the proposed rules. West notes that several states have specifically exempted its program from the definition of prohibited autodialer calls.

45. Based on the plain language of § 227(b)(1)(iii), we conclude that the TCPA did not intend to prohibit autodialer or prerecorded message calls to cellular customers for which the called party is not charged. Moreover, neither TCPA nor the legislative history indicates that Congress intended to impede communications between radio common carriers and their customers regarding the delivery of customer services by barring calls to cellular subscribers for which the subscriber is not called. Accordingly, cellular carriers need not obtain additional consent from their cellular subscribers prior to initiating autodialer and artificial and prerecorded message calls for which the cellular subscriber is not charged. However, the market research calls to cellular carriers, as conducted by the West CelShare program, are clearly prohibited absent

the prior express consent of the cellular customer called. While West appears to take pains to avoid calls which will result in charges to cellular subscribers, the fact that its market research calls result in such charges and are made without prior consent from the subscribers places its service under the prohibitions of the TCPA and the rules.<sup>78</sup>

46. Voice Messaging Services. Several commenters request clarification that services which store and forward messages for later delivery to the called party are not intended to be prohibited by the TCPA or by the proposed rules.<sup>79</sup> In urging the Commission to create a specific exemption for such services, the commenters point to numerous statements in the legislative history in which members of Congress expressed an expectation that such services would be exempted from the prohibitions of the TCPA.<sup>80</sup> Bell Atlantic asserts that the intent of Congress was to restrict unsolicited advertising, not communications services which store and transmit individual customer messages. MessagePhone concurs and references the Modified Final Judgment,<sup>81</sup> which, inter alia, permits the regional Bell Operating Companies to engage in such services, and lends support for such an exemption. Commenters contend that the Commission has already found such services to be in the public interest, citing a recent Commission decision granting a waiver to permit the delivery of Coin Message Delivery Services,<sup>82</sup> which has been recently deployed by Bell Atlantic. Ameritech urges the Commission to clarify whether the prerecorded message identification requirement applies to the local operating company or the person leaving the message, or both, for messages recorded using services like the Public Telephone Message Delivery Service (PTMDS). Ameritech contends that if the person leaving the message identifies himself or herself, then further identifying information (such as a telephone number or address) is unnecessary.

47. The TCPA did not carve out a specific exemption for voice messaging services. However, the services referred to by the commenters would appear to fall either outside the TCPA's prohibitions or under an exemption. The prohibitions of § 227(b)(1) clearly do not apply to functions like "speed dialing," "call forwarding," or public

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<sup>78</sup> A few commenters note that the NPRM omitted from the proposed rules the phrase "or other radio common carrier service," as it appears in § 227(b)(1)(A)(iii) of the TCPA. This language was indeed inadvertently omitted from the text of the proposed rule, and has been included in § 64.1200(a)(1)(iii) to mirror the language of the TCPA. See Appendix B.

<sup>79</sup> See comments of Ameritech and MessagePhone.

<sup>80</sup> See comments of Ameritech and reply comments of Ameritech at 4, n. 9.

<sup>81</sup> See United States v. American Tel. and Tel. Co., 552 F.Supp. 226 (D.D.C.1982), aff'd mem. sub nom. Maryland v. United States, 460 U.S. 1001 (1983), modified United States v. Western Elec. Co., 673 F.Supp. 525 (D.D.C.1987), 714 F.Supp. 1 (D.D.C.1988), affirmed in part and reversed in part 900 F.2d 283 (D.C.Cir.1990).

<sup>82</sup> See Bell Atlantic Order, 6 FCC Rcd at 3400, 3401 (Com.Car.Bur.1991).

# Exhibit E

telephone delayed message services (PTDMS), because the numbers called are not generated in a random or sequential fashion.<sup>83</sup> Voice messaging services used to send personal prerecorded voice messages are not subject to the identification requirements of 227(d)(3) and § 64.1200(d) of our rules because such calls do not use autodialers to transmit prerecorded messages. Moreover, under the rules adopted here, artificial and prerecorded message calls to residences are exempt from the TCPA's prohibitions in an emergency, where the caller received prior express consent, or if the call is exempted by the Commission as either a non-commercial call or a commercial call which does not include an unsolicited advertisement and does not adversely affect the called party's privacy interests. Thus, Automated Alternate Billing Systems (AABS), used by common carriers to perform operator services with artificial or prerecorded voice prompts, are exempt from the prohibition against artificial or prerecorded voice calls to residences to the extent they are non-commercial calls. However, voice message calls, as prerecorded messages, would be subject to the prohibitions of § 227(b)(1) and § 64.1200(a) of our rules. Thus, voice message calls could not be directed to an emergency line, a health care facility, radio common carrier services or other services for which the called party is charged for the call except in an emergency or with the prior express consent of the called party.

48. In light of the foregoing, we believe that the prohibitions set forth in the rules are not a barrier to the continued use and expansion of voice messaging service, and that the rules adopted here will be effective in preventing any potential abuse by telemarketers. See §§ 64.1200(a)-(d). Accordingly, a specific voice messaging exemption is not necessary to permit the present and future voice messaging services.

49. Public Utilities. Many public Utilities note that they communicate with their customers through prerecorded message calls and automatic telephone dialing systems to notify customers of service outages, to warn customers of discontinuance of service, and to read meters for billing purposes. They note that under normal circumstances, customers can continue using their telephones normally as the meter information is being gathered and forwarded to a central office. The utilities urge the Commission to exempt such calls from the autodialer prohibitions, either under the existing business relationship exemption or under the "emergency" exemption for calls related to public health and safety because information about service outages and about possible discontinuance of service affect public health and safety. Moreover, many public utilities state that they have a third party notification service for their customers, in which

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<sup>83</sup> We emphasize that where such services are used for the purpose of telephone solicitation in violation of our rules and the TCPA, the users of the services, not the carriers providing the services, would be held liable, consistent with Congress' policy that carriers not be held responsible for the content of messages transmitted through the network. See Statement of Senator Hollings, Congressional Record, S 18785 (November 27, 1991). Of course, carriers initiating telephone solicitations on their own behalf using such service would be subject to our rules and the TCPA.

the utility agrees to contact a party designated by the customer in the event that a delinquent bill or a service outage threatens interruption of that customer's service. This program is designed to assist persons who have difficulty maintaining their accounts or who otherwise desire assistance in ensuring that service is not interrupted. However, several commenters express concern that a broad emergency exception could be a vehicle for campaigns targeted at the elderly, who in the past have been subjected to telemarketing calls involving vitamins, security systems, or other items purported to be important to the "health and safety" of the called party.

50. BellSouth concurs with the public utilities and contends that the legislative history<sup>84</sup> indicates an intent to permit autodialed calls for the purpose of notifying customers of potential power outages, maintenance, or termination. In some jurisdictions, BellSouth is required by tariff to notify customers before disconnecting service. BellSouth requests the Commission to exempt from the prohibitions of § 64.1200(a)(1) autodialed calls regarding the installation, maintenance, or termination of telephone service in emergency situations. Further, Ameritech contends that the use of Automatic Meter Reading Systems by utility companies clearly satisfies the TCPA's requirements regarding prior express consent, and that such services were not intended by Congress to be prohibited.

51. Each of the circumstances described by the utilities is included within either the broad exemption for emergency calls, or the exemption for calls to which the called party has given prior express consent. Service outages and interruptions in the supply of water, gas or electricity could in many instances pose significant risks to public health and safety, and the use of prerecorded message calls could speed the dissemination of information regarding service interruptions or other potentially hazardous conditions to the public. Similarly, public utilities providing a third party notification service do not violate the prohibition against prerecorded calls to residences where the third party has given his or her prior express consent to the notification or the call relates to a public health and safety matter. In light of the comprehensive nature of the current exemptions, a specific exemption for public utilities to the general prohibition against autodialers and artificial or prerecorded voice message calls is not required.<sup>85</sup>

#### D. Technical and Procedural Standards

##### 1. Line Seizure—5 Second Hang-up Requirement.

52. The TCPA requires, and the rules we adopt provide, that automatic telephone dialing systems used to transmit artificial or prerecorded messages shall automatically release the called party's line within 5 seconds of the time that the calling party's system is notified of the called party's hang-up. The ACA requests clarification of this requirement in order to ensure proper

<sup>84</sup> Congressional Record, H 11310 (November 26, 1991).

<sup>85</sup> We emphasize that telephone solicitations as defined in our rules can never be classified as "emergencies." See § 64.1200(b).



compliance. For the purposes of this rule section, the 5 second period begins when the called party's hang-up signal reaches the dialing system of the caller. Commenters generally do not indicate that they anticipate problems in complying with this requirement.<sup>86</sup>

## 2. Identification Requirements for Artificial or Prerecorded Voice Systems.

53. The TCPA mandates that all artificial or prerecorded telephone messages delivered by an autodialer state clearly the identity of the caller at the beginning of the message and the caller's telephone number or address during or after the message, § 227(d)(3)(A), and we adopt this requirement in our rules, 64.1200(d). A number of commenters request that prerecorded messages be required to state the identity of the caller and the caller's telephone number (other than that of any autodialing system used to place the call) or address within 30 seconds after the message begins, so that the called party would not have to listen to the entire message before deciding whether to hang up. We reject the proposal to require that a telephone number or address be stated within 30 seconds of the beginning of an artificial or prerecorded message, because the TCPA requires only that the caller's identity be stated at the beginning of the message. See § 227(d)(3)(B). We have been presented with no evidence to persuade us to request additional authority to adopt such a restriction. Finally, as suggested by several commenters, we will require callers leaving a telephone number to provide a number other than that of the autodialer or prerecorded message player which placed the call because the autodialer or message player number may be in constant use and not available to receive calls from the called party. § 64.1200(e)(4).

## 3. Facsimile Machines.

54. The TCPA requires that identifying information be placed on all telephone facsimile transmissions, and that telephone facsimile machines be capable of placing such information on all transmissions. § 227(d). The TCPA further prohibits the use of telephone facsimile machines to send unsolicited advertisements.<sup>87</sup> § 227(b)(1)(C).

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<sup>86</sup> Commenters point out that the proposed rules, in the prohibition against line seizure, § 68.318, refer to "automatic dialing devices," a term not employed elsewhere in the rules or the TCPA. Reading § 227(d) as a whole, it is clear that the requirement refers only to automatic telephone dialing systems. The title and language of that section will thus be revised to read "automatic telephone dialing systems."

<sup>87</sup> Mr. Fax and National Faxlist urged the Commission not to impose a ban on unsolicited telephone facsimile advertisements; National Faxlist suggested that a telephone facsimile do-not-call list be created in lieu of a complete prohibition on such unsolicited advertisements. GTE requested clarification that the identification requirement does not apply to each page of messages transmitted through imaging systems.

In banning telephone facsimile advertisements, the TCPA leaves the Commission without discretion to create exemptions from or limit the effects of the prohibition (see § 227(b)(1)(C)); thus, such transmissions are

Parties commenting on the facsimile requirements for senders of facsimile messages urge the Commission to clarify that carriers who simply provide transmission facilities that are used to transmit others' unsolicited facsimile advertisements may not be held liable for any violations of § 64.1200(a)(3).<sup>88</sup> We concur with these commenters. In the absence of "a high degree of involvement or actual notice of an illegal use and failure to take steps to prevent such transmissions," common carriers will not be held liable for the transmission of a prohibited facsimile message. Use of Common Carriers, 2 FCC Rcd 2819, 2820 (1987).

## E. Enforcement

### 1. Private Right of Action

55. The TCPA provides consumers with a private right of action, if otherwise permitted by state law or court rules, for any violation of the autodialer or prerecorded voice message prohibitions and for any violation of the guidelines for telephone solicitations. § 227(c)(5). Absent state law to the contrary, consumers may immediately file suit in state court if a caller violates the TCPA's prohibitions on the use of automatic telephone dialing system and artificial or prerecorded voice messages. § 227(b)(3). A consumer may also file suit in state court if he or she has received more than one telephone call within any 12-month period by or on behalf of the same company in violation of the guidelines for making telephone solicitations. § 227(c)(5). Telemarketers who have established and implemented reasonable practices and procedures in compliance with the latter section may present such compliance as an affirmative defense to any action for violation of telephone solicitation guidelines. § 227(c)(5). The TCPA also permits states to initiate a civil action in federal district court against a telemarketer who engages in a pattern or practice of violations of the TCPA. §§ 227(f)(1) and (2). States retain the power to initiate action in state court for violations of state telemarketing statutes. § 227(f)(6). Finally, consumers may request that the Commission take enforcement action regarding violations of § 227, consistent with the Commission's existing complaint procedures.<sup>89</sup>

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banned in our rules as they are in the TCPA. § 64.1200(a)(3). We note, however, that facsimile transmission from persons or entities who have an established business relationship with the recipient can be deemed to be invited or permitted by the recipient. See para. 34, supra. Furthermore, the term "telephone facsimile machine" as defined in the TCPA and identically in our rules, § 64.1200(f) clearly includes imaging systems. The rules state that the first page or each page of a transmission to a facsimile machine must include identifying information.

<sup>88</sup> See comments of SNET, Sprint, and reply comments of AT 6 T.

<sup>89</sup> Pacific Bell asserts that complaint proceedings brought under § 208 of the Communications Act, 47 U.S.C. § 208, and based on violations of § 227 of the Act, 47 U.S.C. § 227, could only be instituted against common carriers. Pacific Bell is correct with respect to complaints filed under Section 208 of the Act. In addition to the private right of action noted above, aggrieved

## 2. State Law Preemption

56. The TCPA, in § 227(e), sets forth a standard for preemption of state law on autodialing, artificial or prerecorded voice messages, and telephone solicitations. The TCPA does not preempt state law which imposes more restrictive intrastate requirements or regulations regarding: the use of facsimile machines to send unsolicited advertisements; the use of automatic telephone dialing systems; the use of artificial or prerecorded voice messages; or the making of telephone solicitations. However, the TCPA specifically preempts state law where it conflicts with the technical and procedural requirements for identification of senders of telephone facsimile messages or autodialed artificial or prerecorded voice messages. § 227(e).

## 3. Other Matters

57. A number of commenters urge the Commission to request additional authority from Congress to protect consumer privacy interests, arguing that the NPRM errs on the side of protecting commercial speech and does not adequately protect telephone subscribers from invasions of privacy by telemarketers. These commenters point out that telephone subscribers must receive at least one unwanted solicitation before making a claim under the rules. The National Consumers League urges the Commission to withdraw the NPRM and begin the rulemaking process anew, stating that the Commission failed to make specific proposals for meeting the requirements of the TCPA.

58. Based upon our actions here, we find that no further authority is required at the present time to accomplish the goals of the TCPA to restrict unwanted telephone solicitations. The regulations implemented satisfy the TCPA's requirements that residential subscribers be provided with a means to avoid unwanted telephone solicitations, and that autodialers and prerecorded or artificial voice messages be used responsibly in ways that do not impede commerce or threaten public health and safety. The record supports our conclusion that the proposed rules strike a reasonable balance between privacy rights, public safety interests, and commercial freedoms of speech and trade, which Congress cited as its paramount concerns in enacting the TCPA.<sup>90</sup> Moreover, contrary to the allegation of the National Consumers League, the NPRM asked for comment on a variety of proposals for restricting telephone solicitations to residences and weighed their benefits, as directed by § 227(c) of the TCPA. Specific information on the various proposals was supplied in the comments and our decision is based upon the record. Accordingly, we find at this time that renewal of the

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persons or entities may report violations of the TCPA to the Commission and request action on such violations through the informal procedures set forth in Section 1.41 of the rules, 47 C.F.R. § 1.41. See, e.g., 47 U.S.C. §§ 312 and 503(b).

<sup>90</sup> See Section 2 of the TCPA.

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rulemaking process is not warranted and would unduly delay implementation of consumer privacy protections.

59. However, we are concerned that consumers be fully informed of their rights under the TCPA. In addition to disseminating our own public notices, we will work with consumer groups, industry associations, local telephone companies, and state agencies to assure that the rules we adopt today are well publicized. We also will monitor closely any reports of alleged violations of the TCPA or the rules that are filed with the Commission to determine whether additional action is necessary to protect consumers from unwanted solicitations. If our current approach is not successful, a number of options are available. For example, we could convene a cross-industry board or advisory council to evaluate the complaints received and recommend effective solutions. Both Congress and the Commission have found telemarketing serves a valuable role in our economy, and it is appropriate for responsible telemarketers, who benefit from the activity, to devise solutions to problems. Alternatively, based upon our experience with the rules, it may be necessary to initiate a rulemaking proceeding to establish more stringent restrictions, or even to recommend to Congress that it increase penalties or make other statutory changes. Our objective in this proceeding has been to hold telemarketers accountable for their activities without undermining the legitimate business efforts of telemarketing. Existing Commission procedures will permit us to continue to do so.

#### **IV. CONCLUSION**

60. This rulemaking proceeding seeks to protect consumers from automated calls which may pose a threat to health and safety as well as from unwanted solicitations. Section § 64.1200(a) prohibits calls using autodialers or prerecorded messages to emergency lines, health care facilities, and calls to radio common carriers or other numbers for which the called party may be charged for the call. Prerecorded message calls to residences are generally prohibited. We have created specific exemptions to this prohibition where the record demonstrates that the calls do not adversely affect the privacy interests of residential subscribers: non-commercial calls, commercial calls not transmitting an unsolicited advertisement, calls from parties with whom a resident has an established business relationship, and calls from tax-exempt nonprofit organizations. Finally, residential subscribers will be protected from unwanted telephone solicitations by the requirement that telemarketers maintain do-not-call lists for any telephone solicitations.

#### **V. PROCEDURAL MATTERS**

61. Final Regulatory Analysis: Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. Section 601, et seq., the Commission's final analysis in this Report and Order is as follows:

1. Need and purpose of this action:

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This Report and Order amends Part 64 of the Commission's rules by adding § 64.1200 to restrict the use of automatic telephone dialing systems and artificial or prerecorded voice messages for telemarketing purposes or for transmitting unsolicited telephone facsimile advertisements. The rules require that persons or entities making telephone solicitations establish procedures to protect residential subscribers from unwanted solicitations, and set forth exemptions to certain prohibitions under this Part. The Report and Order also amends Part 68 of the rules by revising § 68.318(c)(2) and adding § 68.318(c)(3) to require that automatic telephone dialing systems delivering a recorded message release the called party's line within 5 seconds of notification of hang-up by the called party, and to require that telephone facsimile machines manufactured on and after December 20, 1992 must clearly identify the sender of a facsimile message. The amendments implement the Telephone Consumer Protection Act of 1991, which, inter alia, adds Section 227 to the Communications Act of 1934, as amended, 47 U.S.C. Section 227. The rules are intended to impose reasonable restrictions on autodialed or prerecorded voice telephone calls consistent with considerations regarding public health and safety and commercial speech and trade, and to allow consumers to avoid unwanted telephone solicitations without unduly limiting legitimate telemarketing practices.

II. Summary of issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis:

No comments were submitted in direct response to the Initial Regulatory Flexibility Analysis.

III. Significant alternatives considered:

The NPRM in this proceeding requested comments on proposed regulations implementing the TCPA and comments on several proposals restricting telephone solicitations to residential telephone subscribers. The Commission has considered all comments and has adopted regulations to implement the prohibitions and technical requirements mandated by the TCPA as well as regulations which allow consumers to avoid unwanted telephone solicitations through placement on company-specific do-not-call lists. The Commission considers its Report and Order to be the most reasonable course of action under the mandate of Section 227 of the Communications Act, as amended.

VI. ORDERING CLAUSES

62. Accordingly, It Is Ordered, that, pursuant to authority contained in Sections 1, 4(i), 4(j), 201-205, 218, and 227 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201-205, 218 and 227, Parts 64 and 68 of the Commission's Rules and Regulations ARE AMENDED as set forth in Appendix B hereof, effective December 20, 1992.

63. It Is Further Ordered, that, the Secretary shall cause a summary of this Report and Order to be published in the Federal Register which shall include a statement describing how members of the

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public may obtain the complete text of this Commission decision. The Secretary shall also provide a copy of this Report and Order to each state utility commission.

64. It Is Further Ordered, that, this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy  
Secretary

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Parties Filing Comments

Aberdeen American News  
Alpha Information  
Altoona Mirror  
American Bankers Association (ABA)  
American Civil Liberties Union  
American Collectors Association (ACA)  
American Council of Life Insurance and the National Association of Life Underwriters  
American Express Company (AMEX)  
American Financial Services Association (AFSA)  
American Newspaper Publishers Association (Reply Comments by Newspaper Association of America)  
American Resort Development Association  
American Service Telemark  
American Telemarketing Association, Inc. (ATA)  
Ameritech Operating Companies (Ameritech)  
Amway  
Ann Arbor News  
Annenberg School for Communications  
Argus Leader  
Arizona Republic/Phoenix Gazette  
Association of National Advertisers, Inc.  
Asheville Citizen-Times  
American Telephone and Telegraph Company (AT & T)  
Audio Technical  
Avon  
Baltimore Gas and Electric Company  
Baltimore Sun  
Banc One Corporation, California Bankers Clearing House Association, First USA Bank, New York Clearing House Association, QVC Network, VISA U.S.A., Inc. a (the Coalition)  
Bell Atlantic  
BellSouth  
Bellingham Herald  
Bellville News-Democrat  
Blue Cross & Blue Shield  
Brazosport Facts  
Brewster, Congressman Bill J. aa  
Buchan MD, Janet H. and Robert R.C.  
Bucks County Courier Times (Mark Gursky)  
Bucks County Courier Times (Arthur E. Mayhew)  
California Department of Justice  
California Public Utilities Commission  
Capital Newspapers  
Cellular Telecommunications Industry Association  
Centel Corporation (Centel)  
Center for the Study of Commercialism (CSC)  
Centre Daily Times  
Chico Enterprise-Record

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Citicorp  
Clark County Rural Electric Cooperative  
CMS A/R Services  
Coalition of Higher Education Assistance Organizations  
ComCast Cellular  
Community Benefits Corporation  
Conservation Fund  
Consumer Action  
Consumer Bankers Association (CBA)  
Contractors Clearing House  
Courier-Journal  
Cox Enterprises, Inc. (Cox)  
CUC International, Inc.  
CUNA Mutual Insurance Group  
Daily News, Bowling Green, KY (Pipes Gaines)  
Daily News, Lebanon, PA (Blake L. Sanderson)  
Daily News, Los Angeles, CA (Kirk Felgenhauer)  
Daily News, Los Angeles, CA (Lynne Hanchett)  
Daily News, Los Angeles, CA (Chuck Schussman)  
Detroit Newspaper Agency  
Digital Systems International, Inc.a  
Direct Marketing Association (DA)  
Direct Selling Association  
Electronic Information Systems, Inc.  
Firelands Rural Electric Cooperative, Inc.aa  
Florida Today/USA Today  
Forum  
Franklinton Financial  
Free Press Standard  
Gadsden Times  
Gannett Co., Inc.a  
Gazette Printing Company  
Gleaner  
Goshen News  
Grand Island Independent  
Grand Rapids Press  
Green Bay Press  
GTE Service Corporation (GTE)  
Guam Attorney General  
Hartford Courant  
Household International  
Huntsville Times  
Idaho State Journal  
Illinois Student Assistance Commission  
Illinois, University of  
Indianapolis Star, Indianapolis News  
Independent Telecommunications Network, Inc.a (ITN)  
Infiniti Group, Inc.  
International Communications Association  
International Telesystems Corporation  
InterVoice  
Inventures  
Investor's Business Daily  
ITI Marketing Services, Inc.



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Investment Company Institute  
J. Blenkarn Systems  
J.C. Penney Company, Inc.  
Jersey Journal  
Johnstown Tribune Publishing Company  
Jones Intercable  
Journal and Courier  
Kalamazoo Gazette/Weekly Gazette, Hometown Gazette  
Kauffman Group  
King TeleServices  
Knight Ridder, Inc.  
La Crosse Tribune  
Lansing State Journal  
LCS Direct Marketing Services  
Lee County Electric Cooperative, Inc.  
Lejeune Associates of Florida (Lejeune)  
Mary Kay Cosmetics  
MBNA America Bank, N.A.  
MCI Telecommunications Corporation  
Merrill Lynch, Pierce, Fenner & Smith, Inc.  
MessagePhone, Inc.a  
Metrocall  
Midland Daily News  
Minnesota Attorney General  
Mktg. Inc.aa  
Mobile Press Register  
Montgomery Advertiser, Alabama Journal  
Morning Call (Donald J. Belasco)  
Morning Call (Richard E. Forgay II)  
Mr. Fax  
Muskegon Chronicle  
National Association of Realtors  
National Association of Water Companies  
National Consumers League (NCL)  
National FaxList  
National Retail Federation (NRA)  
National Rural Electric Cooperative Association  
National Telephone Cooperative Association (NTCA)  
NationsBank  
New Haven Register  
News and Observer  
Newspaper Association of America (Initial Comment by American  
Newspaper Publishers Association)  
New York Department of Public Service  
New York State Consumer Protection Board  
New York Times  
Newsday  
Nonprofit Group  
North American Telecommunications Association (NATA)  
Norwest Card Services  
Nynex Telephone Companies  
Ohio Newspaper Association  
Ohio Public Utilities Commission (OPUC)  
Ohio Student Loan Commission

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Olan Mills, Inc.a  
Oregonian  
Orlando Sentinel  
Pacesetter Corporation  
Pacific Bell, Nevada Bell (Pacific Bell)  
Palm Beach Post  
Pennsylvania Newspaper Publishers' Association  
Pueblo Chieftain  
Pierce-Pepin Electric Cooperative  
Pioneer Electric Cooperative  
Pitney Bowes  
Plain Dealer  
PNC Financial Corporation  
Press Journal  
Princeton Packet, Inc.  
Privacy Times  
private Citizen, Inc.a (Private Citizen)  
Public Forum  
Record Journal Publishing  
Reese Brothers, Inc.  
Review  
RMH Telemarketing  
Rochester Telephone Corporation  
Rocky Mountain BankCard System  
SafeCard Services, Inc.a (Safecard)  
San Francisco Newspaper Agency  
Santa Barbara News-Press  
Santa Cruz, County of  
Santa Monica, City of  
Scottsdale Progress  
Sears, Roebuck and Co.  
Securities Industry Association (SA)  
Sentinel-Record  
Shotten 111, Bert K.  
Southern New England Telephone Company (SNET)  
Southwestern Bell Telephone Company (SWBT)  
Spokesman-Review, Spokane Chronicle  
Sprint a  
Star-Ledger  
Stockton Record  
Student Loan Marketing Association  
Sun, The  
Syracus Herald-Journal, Post-Standard, Herald American  
Tampa Tribune  
Tandy Corporation  
Teknekron Infoswitch Corporation  
Telecheck Services  
Telegram & Gazette  
Telemarketing Magazine aa  
Telocator, the Personal Communications Industry Association  
Texarkana Gazette  
Texas Public Utilities Commission  
Thomas Construction  
Thomasville Times-Enterprise

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Time Warner Inc.  
Times-Picayune  
Union-News. Sunday-Republican  
Unisys  
United Electric Cooperative, Inc.  
United States Postal Service  
United States Telephone Association  
United Student Aid Funds, Inc.aa  
U.S. Intelco Networks, Inc.  
U.S. West Communications, Inc. (U.S. West)  
USAA Federal Savings Bank  
Utilities Telecommunications Council  
Vanguard Cellular Systems, Inc.  
verde Independent  
Vermont Public Service Board  
Victoria Advocate  
Waco Tribune  
Wachovia  
Washington State Attorney General  
Wells Fargo Bank  
West Marketing Services  
Western Express Service Company  
Wisconsin, State of, Department of Justice  
Worcester Telegram & Gazette  
Zacson Corporation

(a) also filed reply comments  
(aa) filed only reply comments

Appendix B

Title 47 of the Code of al Regulations, parts 64 and 68, are amended as follows:

1. The table of contents for part 64 is amended by adding subpart L to read as follows:

Subpart L - Restrictions on Telephone Solicitation

§ 64.1200 Delivery restrictions.

2. The authority citation for subpart L is added to part 64 to read as follows:

Authority: 47 U.S.C. secs. 151, 154(i), 154(j), 201-205, 218, and 227.

3. Subpart L is added to part 64 to read as follows:

Subpart L - Restrictions on Telephone Solicitation

§ 64.1200 Delivery restrictions.

(a) No person may

(1) Initiate any telephone call (other than a call made for emergency purposes or made with the prior express consent of the called party) using an automatic telephone dialing system or an artificial or prerecorded voice,

(i) To any emergency telephone line, including any 911 line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency;

(ii) To the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or

(iii) To any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service For which the called party is charged for the call;

(2) Initiate any telephone Call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the

Call is initiated for emergency purposes or is exempted by sec. 64.1200(c) .

(3) Use a telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine.

(4) Use an automatic telephone dialing system in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.

(b) For the purpose of sec. 64.1200(a) the term "emergency purposes" means calls made necessary in any situation affecting the health and safety of consumers.

(c) The term "telephone call" in sec. 64.1200(a)(2) shall not include a call or message by, or on behalf of, a caller:

(1) that is not made for a commercial purpose,

(2) that is made for a commercial purpose but does not include the transmission of any unsolicited advertisement,

(3) to any person with whom the caller has an established business relationship at the time the call is made, or

(4) which is a tax-exempt nonprofit organization.

(d) All artificial or prerecorded telephone messages delivered by an automatic telephone dialing system shall:

(1) At the beginning of the message, state clearly the identity of the business, individual, or other entity initiating the call, and

(2) During or after the message, state clearly the telephone number (other than that of the autodialer or prerecorded message player which placed the call) or address of such business, other entity, or individual.

(e) No person or entity shall initiate any telephone solicitation to a residential telephone subscriber .

(1) before the hour of 8 A.M. or after 9 P.M. (local time at the called party's location), and

(2) unless such person or entity has instituted procedures for maintaining a list of persons who do not wish to **receive** telephone

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solicitations made by or on behalf of that person or entity. The procedures instituted must meet the following minimum standards:

(i) Written policy. Persons or entities making telephone solicitations must have a written policy, available upon demand, for maintaining a do-not-call list.

(ii) Training of personnel engaged in telephone solicitation. Personnel engaged in any aspect of telephone solicitation must be informed and trained in the existence and use of the do-not-call list.

(iii) Recording, disclosure of do-not-call requests. If a person or entity making a telephone solicitation (or on whose behalf a solicitation is made) receives a request from a residential telephone subscriber not to receive calls from that person or entity, the person or entity must record the request and place the subscriber's name and telephone number on the do-not-call list at the time the request is made. If such requests are recorded or maintained by a party other than the person or entity on whose behalf the solicitation is made, the person or entity on whose behalf the solicitation is made will be liable for any failures to honor the do-not-call request. In order to protect the consumer's privacy, persons or entities must obtain a consumer's prior express consent to share or forward the consumer's request not to be called to a party other than the person or entity on whose behalf a solicitation is made or an affiliated entity.

(iv) Identification of telephone solicitor. A person or entity making a telephone solicitation must provide the called party with the name of the individual caller, the name of the person or entity on whose behalf the call is being made, and a telephone number or address at which the person or entity may be contacted. If a person or entity makes a solicitation using an artificial or prerecorded voice message transmitted by an autodialer, the person or entity must provide a telephone number other than that of the autodialer or prerecorded message player which placed the call.

(v) Affiliated persons or entities. In the absence of a specific request by the subscriber to the contrary, a residential subscriber's do-not-call request shall apply to the particular business entity making the call (or on whose behalf a call is made), and will not apply to affiliated entities unless the consumer reasonably would expect them to be included given the identification of the caller and the product being advertised.

(vi) Maintenance of do-not-call lists. A person or entity

**Federal Communications Commission . FCC 92-443**

{--- Unable To Translate Box ---}

making telephone solicitations must maintain a do-not-call list for the purpose of any future telephone solicitations.

(f) As used in this section:

(1) The terms "automatic telephone dialing system" and "autodialer" mean equipment which has the capacity to store or produce telephone numbers to be called using a random or sequential number generator and to dial such numbers.

(2) The term "telephone facsimile machine" means equipment which has the capacity to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.

(3) The term "telephone solicitation" means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message

(i) to any person with that person's prior express invitation or permission,

(ii) to any person with whom the caller has an established business relationship, or

(iii) by a tax-exempt nonprofit organization.

(4) The term "established business relationship" means a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.

(5) The term "unsolicited advertisement" means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission.

4. The authority citation for subpart D of part 68 is revised to read as follows: Authority:

Federal Communications Commission      FCC 92-443  
[--- Unable To Translate Box ---]

47 U.S.C. secs. 151, 154, 155, 201-205, 218, 227, and 303.

5. Section 68.318(c) is amended by revising paragraph (c)(2) and adding paragraph (c)(3) to read as follows:

§ 68.318 Additional limitations.

\* \* \*

(c) \* \* \*

(2) Line seizure by automatic telephone dialing systems. Automatic telephone dialing systems which deliver a recorded message to the called party must release the called party's telephone line within 5 seconds of the time notification is transmitted to the system that the called party has hung up, to allow the called party's line to be used to make or receive other calls.

(3) Telephone facsimile machines; identification of the sender of the message. It shall be unlawful for any person within the United

States to use a computer or other electronic device to send any message via a telephone facsimile machine unless such message clearly contains, in a margin at the top or bottom of each transmitted page or on the first page of the transmission, the date

and time it is sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual. Telephone facsimile machines manufactured on and after December 20, 1992 must clearly mark such identifying information on each transmitted message.



**B**

CAUSE NO. 00-08709-H

CAROL KONDOS, <i>et al.</i> ,	§	IN THE DISTRICT COURT
	§	
Plaintiffs,	§	
	§	
v.	§	DALLAS COUNTY, TEXAS
	§	
LINCOLN PROPERTY CO., <i>et al.</i> ,	§	
	§	
Defendants.	§	160TH JUDICIAL DISTRICT

**CLASS CERTIFICATION ORDER**

Before the Court is Plaintiffs' motion for class certification. The issue has been extensively briefed, and counsel for all parties appeared for hearing on June 1, 2001. Based on the argument of counsel and the record before the Court, the Court finds that certain of the claims and putative classes should be certified, for the reasons discussed below. The class and claims that the Court finds should be certified are: the TCPA claim of the holders of telephone numbers that were confirmed to have received faxes from ABF on behalf of LPC. This Order constitutes the Court's findings of fact and conclusions of law in connection with class certification.

**I. FACTUAL BACKGROUND**

Defendant American Blast Fax, Inc. ("ABF") was in the business of sending mass facsimile ("**fax**") advertisements on behalf of its customers to a large number of fax machines. ABF maintained a computer database of fax numbers that could be geographically grouped. Customers would identify the geographic areas they desired to target with their advertisements and enter into a contract with ABF at a price determined



by the quantity of **fax** numbers in that area. ABF would then transmit mass fax advertisements to the specified numbers. The telephone numbers were identified on a mass basis by automated equipment and the transmissions were sent on a mass basis by automated equipment. **ABF** did not engage in any recipient-specific process to determine who would receive its advertisements, but rather treated numbers in its database on a collective basis as a group.

Some receiving fax equipment has the ability to confirm for the sender that the facsimile has been successfully received; ABF's practice **was** to maintain records of those numbers for which transmission was confirmed. Absence of a confirmation does not necessarily indicate that the transmission was not received, as the receiving equipment **m y** not be able or may not be configured to reply with confirmation, or some vagary of telephones may have permitted the transmission to go through but not the confirmation. The presence of a confirmation, however, is highly suggestive that the transmission was successful.

Defendant Lincoln Property Co. ("LPC") is proprietor of numerous apartment complexes in the Dallas area and elsewhere; LPC operates through a sophisticated structure, which does not presently appear to be material to the class certification issues before the Court. **The** Court will refer to LPC and its affiliates simply as "LPC." In order to market its apartments to prospective tenants, LPC entered into a series of contracts with ABF for mass fax advertising. For some of those contracts, receipt logs exist; for some they do not exist. There is no indication that the missing logs were intentionally

destroyed or misplaced, or that LPC had anything whatsoever to do with the retention or destruction of any logs.

LPC is a significant commercial presence in the Dallas area. Its apartments house thousands of people, and have in the past housed thousands more. It is a large employer with numerous present **and former** employees and has commercial relations with numerous suppliers in the Dallas **area**, who likewise have **numerous** employees. It **markets** its **apartments** extensively in the Dallas area and has had contact with numerous prospective tenants. Some of those prospective tenants filled out written forms indicating their interest in leasing an apartment from LPC, and some of those prospective tenants included fax numbers on those forms so LPC to provide **them** with information by fax.

## II. LEGAL BACKGROUND

In 1991, Congress passed the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227. The TCPA makes it unlawful for any person to "use any telephone facsimile machine, computer, or any other device to send an unsolicited advertisement to a telephone facsimile machine." 42 U.S.C. § 227(b)(1)(C). **An** unsolicited advertisement is "any material **advertising** the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's **prior** express invitation or permission." 42 U.S.C. § 227(a)(4). The TCPA provides a private right of action against a sender of **an** unsolicited advertisement, **id.** § 227(b)(3), with damages of \$500 or actual damages, whichever is greater, for each violation, **id.** § 227(c)(5), which

are subject to trebling by the Court if the violations were willful or knowing. *Id.* § 227(b)(3).

The Court has put off deciding the so-called “EBR” issue as long *as* it practically could do so, but it can do so no longer. The Federal Communications Commission (“FCC”) has reviewed the provisions of the TCPA above and suggested **that** when there is an established business relationship (“EBR”) between the sender and the **recipient**, such a relation can give rise to an inference **that** permission to send a fax is implied from the relationship. In re Rules and Regulation Implementing the TCPA, Docket No. 92-90 (F.C.C. October 16, 1992), at ¶ 54 n.87. The Court gives great deference to the construction of a statute creating a regulatory scheme by the agency charged with administering such regulation, *e.g.*, *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981); however, “no deference is due to agency interpretations at odds with the plain language of the statute itself.” *Public Employee Retirement System v. Betts*, 492 U.S. 158, 171 (1989). Here, the FCC’s interpretation of the EBR defense would act to amend the TCPA’s definition of unsolicited advertisement from a fax sent without the recipient’s “prior express invitation or permission,” to a fax sent without **the** recipient’s prior express *or implied* invitation or permission. That interpretation conflicts with the plain language of the statute

Moreover, Congress did expressly provide an established business relationship exclusion in the provisions of the TCPA dealing with telephone solicitations, *see* 47 U.S.C. § 227(a)(3). “Where Congress includes particular language in one section of a

statute and but omits it in another section of the same Act, it is generally presumed that Congress **acts** intentionally and purposely in the disparate inclusion or exclusion.” *Rodriguez v. United States*, 480 U.S. 522, 525 (1987) (citations **omitted**). With respect to faxes, then, in contrast to telephone solicitations, Congress intended to limit the effect of prior invitation only to *express* invitations; the FCC’s interpretation **would** effectively delete that limitation from the statute. The Court cannot **support an** interpretation that reverses the effect of the words chosen by Congress. Accordingly, the Court holds that there is no “EBR” or “implied permission” exception to the definition of unsolicited advertisement for faxes.

### III. CLASS CERTIFICATION REQUIREMENTS

#### A. Prerequisites

Rule 42 of the Texas Rules of Civil Procedure governs the requirements for class certification. Rule 42(a) provides for four prerequisites for class certification: numerosity, commonality, typicality, and representativeness. The putative class here numbers in the thousands and is, therefore, sufficiently numerous. The questions of law and fact, as set forth in more detail below, are common among the class members. The claims of the putative class representatives are typical of those of the class. The representative **parties** will fairly and adequately protect the interests of the class.

#### B. Specific Type of Class Action

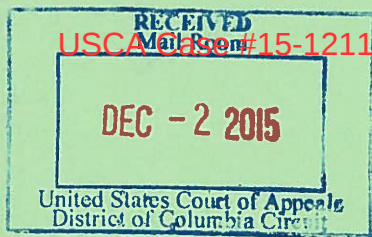
The Court notes preliminarily that it finds only Rule 42(b)(4) certification is appropriate. Under the facts of this case, the prosecution of individual actions would not

create a **risk** of inconsistent or varying adjudications that would establish incompatible standards of conduct for the party opposing the class; indeed, there is very little chance ~~that~~ independent actions would be prosecuted at all if this class is not certified. Accordingly, certification under Rule 42(b)(1)(A) is not proper. Similarly, adjudication by individuals would not as a practical matter impair or impede the ability of other members to protect their interests; unlike typical **limited** fund classes, there is not a limited pool of money available to satisfy class members that is being depleted inequitably absent a class action. **As** mentioned, absent a class action there appears to be no individual litigation by putative class members, and certainly not to a degree that threatens LPC's ability to respond to \$500 claims. Accordingly, certification under Rule 42(b)(1)(B) is not proper. Thirdly, although the defendants have acted on grounds generally applicable to the class, this action is primarily for monetary damages and attorneys' fees and does not appear to be appropriate for final injunctive relief with respect to the class as a whole; indeed, it appears that ABF may have been driven out of business, one presumes by claims such as these, and there is no need for prospective injunctive relief. Accordingly, certification under Rule 42(b)(2) is not proper.

The Court now turns to Rule 42(b)(4). That provision requires the court to consider whether common issues predominate and whether a class action is superior to other methods of resolving the dispute. Common issues here include: the manner in which the faxes were sent; whether intrastate transmissions are **within** the scope of the TCPA; whether a principal is liable under the TCPA for the acts of an independent

# Exhibit F





**ORIGINAL**

No. 15-1211 (and consolidated cases)

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

---

**ACA INTERNATIONAL**

Petitioner,

v.

**FEDERAL COMMUNICATIONS COMMISSION,**

Respondent.

---

**BRIEF OF  
AMICUS CURIAE CHARLES R. MESSER IN SUPPORT OF  
ACA INTERNATIONAL'S PETITION**

---

Charles R. Messer  
California State Bar no. 101094  
CARLSON & MESSER LLP  
5959 West Century Boulevard, Suite 1214  
Los Angeles, California 90045  
Telephone: (310) 242-2202  
Email: messerc@cmtlaw.com

*Amicus Curiae Charles R. Messer, pro se*

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Charles R. Messer  
California State Bar no. 101094  
CARLSON & MESSER LLP  
5959 West Century Boulevard, Suite 1214  
Los Angeles, California 90045  
Telephone: (310) 242-2202  
Email: messerc@cmtlaw.com

*Amicus Curiae Charles R. Messer, pro se*

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## GLOSSARY

ATDS	Automatic Telephone Dialing System as defined by the TCPA (see 47 U.S.C. section 227(a)(1)).
ATDS Rules	The Federal Communications Commission's rules which modified and expanded the definition of an ATDS under the TCPA. See <i>In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991</i> , 18 FCC Rcd. 14014 (2003), <i>In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991</i> , 23 FCC Rcd. 559 (2008), and <i>In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991</i> , 30 FCC Rcd. 7961 (2015).
Auto-dialer	Any automated system that is capable of dialing telephone numbers, including but not limited to ATDS's.
FCC	Federal Communications Commission.
TCPA	Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394, codified at 47 U.S.C. sections 227 <i>et seq.</i>

**1. Statement of identity, interest in this case, and source of authority to file an amicus brief.**

I am a lawyer in private practice who, among other things, represents defendants in civil cases that allege violations of the Telephone Consumer Protection Act (“TCPA”).

This Amicus Brief reflects my personal legal perspective of the FCC’s ATDS Rules. I do not know whether this brief represents the personal views of my colleagues at Carlson & Messer LLP, represents the view of any of my firm’s clients or of any organization which we have represented or consulted with, or represents the views of petitioner ACA International or of any other petitioner.

My interest in this case stems from my personal belief that the government should never rely on false or dishonest claims, and on the fact that the FCC has consistently relied on false and dishonest claims about changes in auto-dialer technologies to justify its ATDS Rules. Governmental reliance on false and dishonest claims destroys respect for law, and it undermines the integrity of courts.

The parties ask the court to determine whether the FCC lacks regulatory authority to expand the definition of an ATDS, but this brief demonstrates a different point that could make that determination unnecessary: The FCC’s factual bases of its 2003, 2008, and 2015 Orders that expanded the definition of an ATDS (changes in technologies since the TCPA was enacted in 1991) were false in 2003,



were false in 2008, and are false today. The FCC's 2003 and 2015 Orders claim that an auto-dialer that dials telephone numbers from a list is a new post-TCPA technology, but this brief demonstrates that that technology was patented in 1976 (see U.S. Patent no. 3,989,899) and was widely used by 1985. And the FCC's 2008 and 2015 Orders claim that predictive auto-dialing is another new post-TCPA technology, but this brief demonstrates that predictive auto-dialers were developed during the 1980's (see U.S. Patent nos. 4,599,493 and 4,933,964) and were widely used before the TCPA was enacted in 1991. The Court of Appeals should know that the FCC has consistently published and relied upon false and dishonest claims to justify its ATDS Rules.

I have concurrently filed a Motion for Leave to file this brief. Rule 29(a), Federal Rules of Appellate Procedure.

2. **The FCC generally claims that changes in technology justify its ATDS Rules.**

Congress defined an Automatic Telephone Dialing System, ATDS, in section 227(a) of the TCPA. This brief will demonstrate that since the TCPA was enacted in 1991, the FCC has relied on false claims about, "changes in technologies," to justify its unauthorized and abusive expansions of the definition of an ATDS.

The FCC's June 18, 2015 Declaratory Ruling and Order states that the basis of its regulatory authority to expand the definition of an Automatic Telephone Dialing System, ATDS, is post-TCPA changes in auto-dialer technologies:

*Since the TCPA's enactment, calling technology has changed, and businesses have grown more vocal that modern dialing equipment should not be covered by the TCPA and its consumer protections.*

FCC's Declaratory Ruling and Order, June 18, 2015, section 2 (*emphasis added*).

And this:

In the 2003 TCPA Order, the Commission found that, in order to be considered an "automatic telephone dialing system," the "equipment need only have the "capacity to store or produce telephone numbers." (fn. 47). The Commission stated that even when dialing a fixed set of numbers, equipment may nevertheless meet the autodialer definition.

FCC's Declaratory Ruling and Order, June 18, 2015, section 12. The Commission's footnote 47 referred to this:

It is clear from the statutory language and the legislative history that Congress anticipated that the FCC, under its TCPA rulemaking authority, might need to consider *changes in technologies*.



FCC's Report and Order of July 3, 2003, section 132 (*emphasis added*).

Auto-dialer technologies have changed, but when? The TCPA was enacted in 1991. In the context of the FCC's regulatory authority and this case, it is critical to distinguish between pre-enactment and post-enactment technologies. The FCC itself recognizes that critical distinction in its June 18, 2015 Declaratory Ruling and Order, "*Since the TCPA's enactment*, calling technology has changed...." (see p. 3, above, *emphasis added*).

Section 3 of this brief sets forth the FCC's specific claims about changes in auto-dialer technologies. Section 4 demonstrates that the FCC's claims about "changes in technology" are false.

**3. The FCC specifically claims that auto-dialers that dial from lists, or that dial predictively, are post-enactment technologies.**

The TCPA was enacted in 1991. In its 2003 and 2015 Orders, the FCC claims that auto-dialers that dial telephone numbers from lists, or from databases, are new post-1991 technologies:

In the past, telemarketers may have use dialing equipment to create and dial 10-digit telephone numbers arbitrarily. As one commenter points out, the evolution of the teleservices industry has progressed

to the point where using lists of numbers is far more cost effective.

The basic function of such equipment, however, has not changed—the capacity to dial numbers without human intervention. We fully expect automated dialing technology to continue to develop.

FCC's Report and Order of July 3, 2003, section 132. The FCC's 2015 June 18, 2015 Declaratory Ruling and Order confirmed and endorsed this 2003 Order. See section 12 cited at page 3, above.

In its 2008 and 2015 Orders, the FCC claims that auto-dialing predictively is another post-1991 technology:

In the 2008 *ACA Declaratory Ruling*, the Commission “affirmed that a predictive dialer constitutes an automatic telephone dialing system and is subject to the TCPA’s restrictions on the use of autodialers.” (fn. 50).

FCC's Declaratory Ruling and Order, June 18, 2015, section 13. The Commission's footnote 50 referred to this:

[T]he evolution of the teleservices industry had progressed to the point where dialing lists of numbers was far more cost effective, but that the basic function of such dialing equipment, had not changed—the capacity to dial numbers without human intervention.

The Commission noted that it expected such automated dialing technology to continue to develop and that Congress had clearly anticipated that the FCC might need to consider *changes in technology*.

FCC's Report and Order, January 4, 2008, section 13 (*emphasis added*).

**4. U.S. Patents are the world's most reliable records about changes in technologies, and those records demonstrate that the FCC's claims are false.**

The world's most reliable records about changes in technologies are United States Patents. The Patent Office's archive of patents is easily searchable. The TCPA was enacted in 1991. Old auto-dialer patents, and the knowledge of their inventors, obliterate the FCC's false claims that auto-dialing from lists, or auto-dialing predictably, are new technologies which were developed after the TCPA was enacted.

A Quick Search through the Patent Office's website for pre-TCPA auto-dialer patents identifies inventors such as Ellis K. Cave, who is a knowledgeable historian about the evolution of auto-dialer technology:

---

### DECLARATION OF ELLIS K. CAVE

I, Ellis K. ("Skip") Cave, certify and declare as follows:

1. I am over the age of 18 years and not a party to this action. I have personal knowledge of the facts set forth herein, and if called as a witness I could and would testify to these facts.

2. I have a Bachelor of Science degree in Electrical Engineering, which was awarded by the University of Kansas in 1969. Since 1992, I have been a principal of Cave Consulting Services, which provides design, installation, and maintenance services for telephone and computer systems to small- and medium-sized businesses in the Dallas-Fort Worth area. Cave Consulting is currently located in Frisco, Texas, a few miles north of Dallas.

3. Since 1978, I have designed and developed communications and telephony systems and services. I have been issued 37 patents by the U.S. Patent Office, and I have 9 patent applications currently pending.

4. From 1978 to 1988 I was employed by Telephone Broadcasting Systems ("TBS") as Vice President of Research and Development. In 1978 and 1979, TBS was known as Dycon, and in

1980 it was known as Bank-By-Phone. During my work at TBS, I designed one of the first automatic dialing systems, and I pioneered many of the key concepts in predictive dialing. During that time, several of my inventions were issued patents by the U.S. Patent Office. I have been awarded more than two dozen patents in the fields of telecommunications and automatic dialing systems.

5. Auto-dialers that dialed telephone numbers that were generated by random or sequential number generators were marketed in the 1970's and 1980's.

6. By 1980, we at TBS understood that randomly generated numbers meant ten-digit telephone numbers that were computer-generated without any order or underlying sequence. Also at that time, we understood that sequentially generated telephone numbers meant computer-generated telephone numbers such as (310) 211-1111, (310) 211-1112, and so forth.

7. Auto-dialers that dialed telephone numbers that were generated by a random or sequential number generator are an older technology, as compared with auto-dialers that dial telephone numbers that are retrieved from a database.

8. I know that in our marketing and research efforts at TBS, we knew as of 1980, if not earlier, that auto-dialers that dialed telephone numbers that were generated by random or sequential number generators were disliked by our customers because, among other reasons, they resulted in calls to hospitals and emergency lines. Also, TBS's customers needed auto-dialers that would dial the telephone numbers of their clients and customers. From 1978 to 1988, my work at TBS, and the company's marketing efforts, were focused on inventing, producing, and selling automatic dialers that dialed telephone numbers that were stored in databases with customers' names.

9. United States Patent no. 3,989,899, issued on November 2, 1976, generally describes a technology that allows an auto-dialer to dial telephone numbers that are stored in a pre-determined list or database, along with the names of the intended persons to be contacted. This technology did not utilize or need a random or sequential number generator. To the best of my knowledge, database auto-dialers (i.e., auto-dialers that did not use number generators) were first marketed in the late 1970's, and they were commonly used by banks and creditors by 1985.

10. During the time that I worked as the Vice President of Research and Development for TBS, TBS never, to the best of my knowledge, marketed an auto-dialer that dialed telephone numbers that were generated by a random or sequential number generator. All of our auto-dialers were designed to dial telephone numbers that were stored in, and retrieved from, databases.

11. United States Patent no. 4,599,493, issued on July 8, 1986, is one of my patents that improved the efficiency of TBS's predictive auto-dialers. From 1983 to 1989, TBS sold predictive auto-dialers to, among others, creditors and collection agencies. During those years, all of TBS's predictive auto-dialers dialed telephone numbers that were retrieved from databases which also contained the names of intended contacts. None of TBS's auto-dialers was designed to dial telephone numbers that were generated by a random or sequential number generator.

12. Based on my work as TBS's Vice President of Research and Development and on my knowledge of auto-dialers that were marketed from 1978 to 1988, I know that by 1988, predictive auto-dialers that dialed telephone numbers that were retrieved from databases were in wide-spread use by banks, creditors, and other

businesses. And to the best of my knowledge, older-technology auto-dialers that dialed telephone numbers that were generated by a random or sequential number generator were never utilized by banks or creditors.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on November 23, 2015 in Parker, Texas.



Ellis K. Cave

---

Two points here. First, in the FCC's 2003 and 2015 Orders, the FCC claimed that an auto-dialer that dials telephone numbers from lists is a new post-TCPA technology. But this technology was patented in 1976 (U. S. Patent no. 3,989,899) and it was widely used by 1985, long before the TCPA was enacted in 1991 (Declaration of Ellis K. Cave, paragraph 9 at page 9, above). The FCC's 2003 and 2015 claims that an auto-dialer that dials numbers from a list or database is a post-enactment, post-1991 technology, are false.

Second, the 2008 and 2015 Orders in which the FCC characterized predictive auto-dialers as another post-enactment, post-TCPA technology, are also



false. Predictive auto-dialers were widely marketed and utilized in the 1980's, before the TCPA was enacted in 1991 (Declaration of Ellis K. Cave, paragraphs 11 and 12 at pp. 10-11, above). That fact can be corroborated or discovered by a few clicks through the Patent Office's website (new patents cite old patents) which yields these historical insights from U.S. Patent no. 4,933,964 for an improved predictive auto-dialer, *circa* 1989:

#### Field of the Invention.

The present invention generally relates to call origination management systems of the type wherein telephone calls are automatically dialed and, when a call results in an answer, transferred to an available operator. More particularly, the invention is directed to an improved pacing system which regulates the rate at which calls are dialed to maximize the time an operator talks to clients and to minimize the number of answered calls for which there is no operator available.

#### Description of the Prior Art.

Automated calling systems which dial clients, listens for the call result (i.e., ringing, busy signal, answer, no answer, etc.), and when a call results in an answer, automatically transfers the call to

an available operator *are in general use today by a variety of businesses, groups and organizations*. For example, banks and other creditors use these systems for debt collection, publishers use them for soliciting subscriptions, and charitable and political organizations use them to promote their causes and solicit funds. In all these cases, the client contact is by an operator whose job is to deliver the message, answer questions and input data to the system. The purposes of such call origination management systems are to automate the process of calling clients and to process the data input in the course of a call with a client, thereby increasing the productivity of the operators.

U.S. Patent no. 4,933,964, filed July 25, 1989, and issued June 12, 1990 (*emphasis added*). Pacing systems are a component of predictive auto-dialers (i.e., predictive features are designed to predict when operators will be available and to pace dialing accordingly), and this patent demonstrates that such systems were invented and widely used before the TCPA was enacted in 1991.

United States Patents are the world's most reliable records about changes in technology. The Patent Office's searchable archive sheds historical light where the FCC offers only dark dishonesty.

The FCC falsely claimed in its 2003, 2008, and 2015 Orders that auto-dialing from lists, or predictively, are new technologies that were developed after the TCPA was enacted. Contrary to the FCC's false and dishonest claims, those technologies were patented and utilized before the TCPA was enacted in 1991. This court should not endorse or support the FCC's false and dishonest claims.

**5. The FCC's false and dishonest claims are abusive.**

As demonstrated above, the FCC's expanding definitions of an ATDS (its 2003, 2008, and 2015 ATDS Rules) are based on its false and dishonest claims. The consequence of the FCC's unfair expansion of the definition of an ATDS has been a tsunami of TCPA cases against companies that never used auto-dialers with random or sequential number generators. See the November 25, 2015 Joint Brief for Petitioners, Document #1585568 at pages 10-11, "TCPA Litigation Explodes." Because the TCPA imposes statutory damages of \$500 or \$1,500 per call, TCPA class actions have threatened to annihilate companies on account of their lawful infrastructure (that is, computerized telephone systems that do not use random or sequential number generators). Some district courts have declined to enforce the FCC's ATDS Rules, *Marks v. Crunch San Diego, LLC*, 55 F. Supp. 3d 1288, 1290-93 (S.D. Cal. 2014), but other courts have ruled that they must enforce those Rules

because they lack jurisdiction to do otherwise. *Morse v. Allied Interstate, LLC*, 65 F. Supp. 3d 407, 411-412 (M.D. Pa. 2014).

The FCC's ATDS Rules, which are based on the FCC's false and dishonest claims about changes in technology, have caused companies in numerous industries to pay millions to settle non-meritorious TCPA class actions. Hundreds of other companies have been sued because of the FCC's false and dishonest ATDS Rules, and many courts have been misled to enforce those Rules, based on their assumption that the FCC acted with integrity when it promulgated these Rules. Companies which have settled TCPA class actions include providers of apparel, automotive services, communications equipment and services, debt collection, education, electronics, entertainment, financial services, fitness/gymnasiums, healthcare, home services, marketing, pharmacies, pizza restaurants, professional sports teams, and utility companies.

None of those defendants ever used an auto-dialer with a random or sequential number generator (i.e., an ATDS as defined by Congress in the TCPA). But all of those defendants felt compelled to settle TCPA class actions because of the FCC's reliance on false and dishonest claims to promulgate its unfair and abusive ATDS Rules.

The cost of unfair and abusive TCPA cases that are based on the FCC's false and dishonest claims exceeds a billion dollars.

The FCC's 2003, 2008, and 2015 ATDS Rules are unfair and abusive, and this court should not endorse or support the FCC's false and dishonest claims that are the foundation of those rules.

**6. The court should not endorse the FCC's abusive ATDS Rules.**

A regulation promulgated upon false assumptions is invalid. *Emily's List v. Federal Election Commission*, 581 F.3d 1, 26 (D.C. Cir. 2009) (“[b]ecause that necessary assumption is false, these regulations remain invalid”). Regulations that are promulgated on an insufficient administrative record are invalid. *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 100 S. Ct. 2844, 65 L. Ed. 2d 1010 (1980) (affirming the unenforceability of a standard promulgated by the Secretary of Labor pursuant to The Occupational Safety and Health Act of 1970 because it was based on findings that were unsupported by the administrative record). And where an administrative agency fails to provide findings or evidence to support a regulation, the regulation is invalid. *Diplomat Lakewood Inc. v. Harris*, 613 F.2d 1009, 1022 (D.C. Cir. 1979) (holding regulation invalid where “[W]e are forced to conclude that [the Secretary of Health,

Education and Welfare] either was not aware of the problem at all or he chose to ignore it. In either event, he has provided us with no findings or evidence in the record to support the distinction.”)

In this case, the FCC’s 2003, 2008, and 2015 Orders that expanded the definition of an ATDS are based on its false and dishonest claims that auto-dialers that dial predictively, or from lists, are new technologies that were developed after the TCPA was enacted in 1991. But pre-TCPA patents and the Declaration of Ellis K. Cave, above, demonstrate that those technologies were invented and widely used before the TCPA was enacted in 1991. The FCC’s claims are false.

## 7. **Conclusion.**

This court should not endorse or support the FCC’s false and dishonest claims about changes in technologies, and this court should not endorse or support the FCC’s abusive ATDS Rules that are based on the Commission’s false and dishonest claims.

For the reasons stated herein and by the petitioners, the petitions should be granted.

Dated: December 1, 2015

Respectfully submitted,

By:



Charles R. Messer

California State Bar no. 101094

CARLSON & MESSER LLP

5959 West Century Boulevard, Suite 1214

Los Angeles, California 90045

(310) 242-2202

messerc@cmtlaw.com

*Amicus Curiae Charles R. Messer, pro se*

**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

This brief complies with applicable rules and orders because it contains 3,996 words, as determined by the word-counting feature of Microsoft Word.

Dated: December 1, 2015



Charles R. Messer

California State Bar no. 101094

CARLSON & MESSER LLP

5959 West Century Boulevard, Suite 1214

Los Angeles, California 90045

(310) 242-2202

messerc@cmtlaw.com

*Amicus Curiae Charles R. Messer, pro se*



**STATEMENT PURSUANT TO RULE 29(c)(5)**

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), the undersigned Amicus Curiae states as follows:

(A) Ellis Cave and I wrote the Declaration of Ellis K. Cave that is located at pages 7-11 of this brief. I personally wrote all other parts of this brief.

(B) A party's counsel did not author this brief in whole or in part.

(C) A party or party's counsel did not contribute any money that was intended to fund the preparation or submission of this brief.

(D) I used the resources of Carlson & Messer LLP to prepare and submit this brief and, if he ever sends an invoice for this matter, to compensate Mr. Cave.

Dated: December 1, 2015



Charles R. Messer

California State Bar no. 101094

CARLSON & MESSER LLP

5959 West Century Boulevard, Suite 1214

Los Angeles, California 90045

(310) 242-2202

messerc@cmtlaw.com

*Amicus Curiae Charles R. Messer, pro se*

**PROOF OF SERVICE**

STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

) ) ss

I am employed in the County of Los Angeles, State of California.

I am over the age of eighteen years and not a party to the within action. My business address is 5959 W. Century Blvd., Suite 1214, Los Angeles, California 90045.

On **December 1, 2015**, I served two (2) copies of the foregoing document(s) described as: **BRIEF OF AMICUS CURIAE CHARLES R. MESSER IN SUPPORT OF ACA INTERNATIONAL'S PETITION** on all interested parties in this action as follows:

**SEE ATTACHED SERVICE LIST**

- ☒ **BY MAIL:** I sealed such envelope(s) and placed it (them) for collection and mailing on this date following the ordinary business practices of Carlson & Messer LLP. I am readily familiar with the business practices of Carlson & Messer LLP for collection and processing of correspondence for mailing with the United States Postal Service. Such correspondence would be deposited with the United States Postal Service at Los Angeles, California this same day in the ordinary course of business with postage thereon fully prepaid.
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- ☐ **(STATE):** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.
- ☒ **(FEDERAL):** I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed this 1<sup>st</sup> day of **December, 2015** at Los Angeles, California.

  
Nora Knadjian

**SERVICE LIST***ACA International v. Federal Communications Commission*

Case No: 15-1211

File No. 08297.00

Brian Ross Melendez  
Direct: (612) 486-1589  
Email: [bmelendez@dykema.com](mailto:bmelendez@dykema.com)  
Fax: (866) 637-2804  
[COR LD NTC Retained]  
Dykema Gossett PLLC  
Firm: (612) 486-1900  
4000 Wells Fargo Center  
90 South Seventh Street  
Minneapolis, MN 55402

Attorney for Petitioner  
ACA International

Scott Matthew Noveck, Counsel  
Direct: (202) 418-7294  
Email: [scott.noveck@fcc.gov](mailto:scott.noveck@fcc.gov)  
[COR LD NTC Gvt US Agency]  
Federal Communications Commission  
(FCC) Office of General Counsel  
Firm: (202) 418-1720  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

Attorneys for Respondent,  
Federal Communications Commission

Richard Kiser Welch, Deputy Associate General Counsel  
Direct: (202) 418-7225  
Email: [Richard.Welch@fcc.gov](mailto:Richard.Welch@fcc.gov)  
Fax: (202) 418-2819  
[COR LD NTC Gvt US Agency]  
Federal Communications Commission  
(FCC) Office of General Counsel  
Room 8-A765  
Firm: (202) 418-1720  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

Jacob M. Lewis, Associate General Counsel  
Direct: (202) 418-1700  
Email: [Jacob.lewis@fcc.gov](mailto:Jacob.lewis@fcc.gov)  
Fax: (202) 418-2822  
[COR LD NTC Gvt US Agency]  
Federal Communications Commission  
(FCC) Office of General Counsel  
8<sup>th</sup> Floor  
Firm: (202) 418-1720

1 445 12<sup>th</sup> Street, SW  
Washington, DC 20554

2 Steven Jeffery Mintz, Esquire, Attorney  
3 Direct: (202) 353-0256  
4 Email: [steven.mintz@usdoj.gov](mailto:steven.mintz@usdoj.gov)  
5 Fax: (202) 514-0536  
6 [COR LD NTC Gvt US DOJ]  
7 U.S. Department of Justice  
(DOJ) Antitrust Division  
950 Pennsylvania Ave., NW  
Washington, D.C. 20530

Attorneys for Respondent,  
United States of America

8 Kristen Ceara Limarzi  
9 Direct: (202) 353-8629  
10 Email: [Kristen.limarzi@usdoj.gov](mailto:Kristen.limarzi@usdoj.gov)  
11 Fax: (202) 514-0536  
12 [COR NTC Gvt US DOJ]  
13 U.S. Department of Justice  
(DOJ) Antitrust Division, Appellate Section  
14 3224  
Firm: (202) 514-2413  
950 Pennsylvania Ave., NW  
Washington, D.C. 20530

15 Thomas Collier Mugavero  
16 Direct: (703) 280-9260  
17 Email: [tmugavero@wtplaw.com](mailto:tmugavero@wtplaw.com)  
18 Fax: (703) 280-8948  
19 [COR LD NTC Retained]  
20 Whiteford Taylor & Preston, LLP  
Firm: (703) 836-5742  
3190 Fairview Park Dr., Suite 300  
Falls Church, VA 22042

Intervenor for Petitioners,  
Cavalry Portfolio Services, LLC;  
Diversified Consultants, Inc.; MRS  
BPO, LLC; Mercantile Adjustment  
Bureau, LLC

21 Jonathan Goldman Cedarbaum  
22 Direct: (202) 663-6315  
23 Email: [jonathan.cedarbaum@wilmerhale.com](mailto:jonathan.cedarbaum@wilmerhale.com)  
24 [COR LD NTC Retained]  
25 Wilmer Cutler Pickering Hale and Dorr, LLP  
Firm: (202) 663-6000  
1875 Pennsylvania Ave., NW  
Washington, D.C. 20006

Intervenors for Petitioner,  
National Association of Federal Credit  
Unions

26 Jonathan Edward Paikin  
27 Direct: (202) 663-6703  
28 Email: [jonathan.paikin@wilmerhale.com](mailto:jonathan.paikin@wilmerhale.com)  
Fax: (202) 663-6363  
[COR NTC Retained]

1 Wilmer Cutler Pickering Hale and Dorr, LLP  
2 Firm: (202) 663-6000  
3 1875 Pennsylvania Ave., NW  
4 Washington, D.C. 20006

5 Steven A. Augustino, Esquire, Attorney  
6 Direct: (202) 342-8400  
7 Email: [saugustino@kelleydrye.com](mailto:saugustino@kelleydrye.com)  
8 Fax: (202) 342-8451  
9 [COR NTC Retained]  
10 Kelley Drye & Warren, LLP  
11 Firm: (202) 342-8400  
12 3050 K. Street, NW, Suite 400  
13 Washington, D.C. 20007

Intervenor for Petitioners,  
Conifer Revenue Cycle Solutions, LLC;  
Council of American Survey Research  
Organizations; Marketing Research  
Association

14 Bryan Kyle Clark, Attorney  
15 Direct: (312) 609-7810  
16 Email: [bclark@vedderprice.com](mailto:bclark@vedderprice.com)  
17 [COR LD NTC Retained]  
18 Vedder Price, PC  
19 Firm: (312) 609-7500  
20 222 North La Salle Street, Suite 2600  
21 Chicago, IL 60601

Intervenor for Petitioner,  
Gerzhom, Inc.