

COMMENTS ON FEDERAL COMMUNICATIONS COMMISSION
NOTICE OF PROPOSED RULEMAKING
AND
MEMORANDUM AND ORDER
CG Docket No. 02-278

Thomas M. Pechnik

BACKGROUND

My name is Thomas M. Pechnik. I am a resident in North Royalton, Ohio, a suburb of Cleveland, Ohio. I have resided at my present location for 49 years. I have had the same residential phone line for all of that time

I retired from my job a few years ago and was amazed at the number of telemarketing calls that I was getting during the day. They were mostly for credit cards or from stockbrokers or investment bankers. There were also a lot of home improvement and travel offers in the mix.

I had been aware that there was a Federal law that controlled telemarketing. I understood that if I told a telemarketer to place my number on their Do-Not-Call list, that they could not call me again for some period of time without being subjected to a civil penalty.

I began issuing Do-Not-Call requests to the telemarketers that called. I thought that I would remember when a telemarketer called me after I had previously issued a Do-Not-Call request. With all the similar sounding names and my imperfect memory, this was impossible.

Finally, I began keeping a log on a notepad next to my phone. I recorded the date and time of the call. I tried to indicate the person who called and the company they were calling on behalf of. Often I would get only a first name and letters indicating the company name or a shortened version of the company name. Hardly ever was I offered a phone number or address.

Within a couple of weeks, I received a call from one company that had called me twice before and had been issued Do-Not-Call requests. I researched the law and brought suit against the company in small claims court. Since then, I have brought suit against several more companies for TCPA violations.

I have since added Caller-ID to my telephone service. I have also been somewhat more diligent in my record keeping. I make it a point to request that my name be placed on the Do-Not-Call list. I ask the caller for his/her first and last names. I try to find out the name of the company on whose behalf the call is made and I ask for a phone number or address. Normally, this information is supplied, sometimes reluctantly. A significant number of times some of this information is not supplied. I also make it a point to demand that they send me a copy of their written Do-Not-Call list maintenance policy. Often I am told that the company does not have a written policy or that they will not send a copy to me. I always try to give them my home address to send the policy to and ask to speak to a supervisor.

I will address my specific comments regarding the Proposed Rulemaking by paragraph number in the Notice.

14. The company-specific do-not-call approach has been a dismal failure.

For example, just recently (yesterday, as I am writing this) I instructed a customer service representative to place my name on the company's do-not-call list, I then talked to the day supervisor in the telemarketing department. She assured me that my name would be entered on the do-not call list as soon as our conversation ended. Less than 2 hours later, I received a second telemarketing call from that same company from the same location. This is not an isolated example. I have many incidents of calls received after do-not-call requests. In fact, several do-not-call policies specifically state that they will call consumers after one year to see if that consumer had changed his mind about his do-not-call request. SBC-Ameritech has told me that my number had been placed on their "1-year callback list" after I had received two letters from them assuring me that they would honor my do-not-call request for 10 years. I have had further telephone solicitations from a company that I had sued for TCPA violations and had won a judgment in court.

Quite often I am told that it will take 30 to 60 days for my number to be "removed from all of our calling lists". I insist that the FCC regulations require that the company honor my do-not-recall request "from the time that it is made" and that I am asking to be ADDED to the do-NOT-call list as required by the regulations. This is usually ignored as I am usually told that that is exactly what they will do, delete my name from their calling list.

Usually I am given an opportunity to request that my name be added to the do-not-call list, however, often the representative hangs up on me before I have an opportunity to request a copy of the company's written do-not-call list maintenance policy.

15. "Hang-up" or "dead-air" calls have been a serious problem in the past and are becoming more prevalent. As the FCC Consumer Alert "Predictive Dialing: Silence on the Other End of the Line" points out, these "hang-up" calls do not permit a consumer to request that his number be placed on the do-not-call list nor to demand a copy of the do-not-call list maintenance policy. Also, the identification requirements are not satisfied. Some of these "hang-up" calls are placed outside of the allowable time-frame. Recently I received a "hang-up" call at 4:14 in the morning. This call was traced to an individual who maintains telephone systems throughout the country to "war dial" for fax machines. These "war dialers" are placed in residences throughout the country. It appears that this one is set up to dial numbers throughout the night.

I can conceive of no legitimate business or commercial speech interest that is promoted by these "hang-up" calls. There is absolutely no reason why predictive dialers should be set with drop-out rates exceeding 0%. Strict identification requirements should be enforced on such calls including a ban on blocking caller ID information. When caller ID information is blocked or unavailable for these calls, the local phone company providing the residential services should be required to provide this information upon request of the subscriber.

16. I firmly believe that the company-specific do-not-call list approach is preferable to a national do-not-call list based on the constraints of the existing laws and for other reasons to be detailed later.

17. If the existing company-specific do-not-call list method is retained by the FCC, I believe that the present method of requesting to be added to the

list should be adequate and minimizes the burden on the telemarketing companies. Unless there were a centralized list of all the companies who use telemarketing for advertising or solicitation purposes, consumers would not know whose list they should request to be placed on. Often the company name would not identify to the consumer which company or products would be represented. Some consumers would request to be placed on lists for companies that would never have called them.

It would be somewhat of a burden for companies to respond affirmatively or provide some means of confirmation that do-not-call requests have been processed. However, due to the telemarketing industry's previous performance, confirmation should be required. In my case the additional burden is minimal. I always request that the company send me a copy of their written do-not-call list maintenance policy. I do not specifically request confirmation of my do-not-call request. When I get a response, it is usually in the form of a short letter or note that my number has been added to the company's do-not-call list. Usually there is no policy included. I estimate that I get responses to about one third of all the requests I make and probably only one fourth of those responses include a "do not call policy" either in the body of the letter or attached. I am careful to provide my mailing address and usually ask the person taking the address to confirm.

When I receive additional telemarketing calls after having requested to be placed on do-not-call lists, I ask to confirm that my number had, in fact been placed on the list when I had previously requested. Usually I am told that it will take some time, up to several weeks, to determine whether my name had been placed on the list. Sometimes I talk to the same person whom I had talked to previously and she remembers ordering that my number be placed on the list. Often I am told that no record can be found of my previous request even when I have provided the date and time of the request.

Sometimes I am told that a company recently changed computer systems and that some of the previous do-not-call list could not be imported into the new system. One compliance officer of a New York brokerage firm told me that they maintained their do-not-call list in a spiral notebook, handwritten in chronological order as the requests are received. He stated that it would be impossible for each of his brokers to consult the list before placing calls. That firm's do-not-call policy states that each representative will be provided with a copy of the do-not-call list and is required to manually check each number before calling to be sure that it is not on the list.

As the above examples indicate, we cannot trust the existing "honor system" to be sure that do-not-call requests are properly processed. Thus, because of the failure of companies to properly follow the laws and regulations on the matter, it is necessary that verification must be required.

20. I believe that the Commission has overstepped its authority in suggesting that an "established business relationship" exemption exists for artificial or prerecorded messages. I can find no authority for such an exception in 47 U.S.C. '227.

I'm sure that there are other comments concerning the "established business relationship" exemption, but I feel that a do-not-call request should "trump" any EBR exemption. There is no reason that a company with an EBR could not obtain express permission (preferably in writing) from its existing customers to communicate using live or prerecorded telephone

messages. Absent specific permission, the company can still communicate with its existing customer base by means other than by telephone. Prior express permission should always be required before any artificial or prerecorded messages should be allowed.

22. This is the crux of the problems with implementing an effective TCPA. It involves the proper identification of the telemarketers. Many consumers pay extra to receive caller ID information in order to control the use of their telephone and to protect their privacy. In my experience, over 90% of my calls come through with blocked or missing caller ID information. These calls are indicated as "UNAVAILABLE" or "PRIVATE" on my caller ID recorder. Telemarketers must be required to provide adequate and correct caller ID information. The telephone companies must be required to transmit this information to the called party. Blocking or altering this information by telemarketers must be strictly forbidden. I have received calls purportedly from non-existent telephone numbers. For instance, I received two calls in a short period of time that indicated "123-456-7890" on my caller ID recorder. I have heard reports of "Caller ID Ads" on cell and regular phones where the "calling party" is indicated as "FREE SATELLITE" or some other advertising indication.

Requiring that caller ID information be transmitted and available to the called party will greatly alleviate the problem of "hang-up" or "dead-air" calls also. Failure to provide correct caller ID information should be handled similar to violations under 47 U.S.C. ' 227 (b) (3) since the caller ID function is handled by automatic telephone dialing equipment. If this information is missing or incorrect, the local telephone provider should be required to furnish the correct information to the subscriber within a reasonable time and the calling party should be held liable for the damages under (b) (3) as well as the entity on whose behalf the call was made. This requirement may require the modification of other Commission rules, but this is such an important matter that this action should be undertaken.

There should be no privacy issue here as far as withholding the identity of the caller. After all, the caller is a business and wishes to communicate with the public. Otherwise it would not have made the call in the first place. It should be proud to reveal its identity. How else will the public know who is making the terrific offer over the phone? These telemarketing calls are not personal. There is no threat to the well-being of the caller by revealing the its identity.

Calls placed from commercial phone lines should always carry correct caller ID information. When commercial calls are placed from residential lines, such as from home offices or work from home enterprises, the caller ID information should be required to be transmitted.

23. The FCC rules regarding "autodialers" and "artificial or prerecorded messages" is confusing. First, the definition of "automatic telephone dialing system" is too limited in ' 227. For the consumer, it is of no discernable difference whether the call was placed as a result of a random generated number, a sequential number, or a number obtained from a published database. The result of any automated system that dials a consumer's phone number is that the phone rings (assuming that the line is not busy). If the telemarketing firm is using a predictive dialer system, then there can be a pause of several seconds before a live representative is put on the line, or the call may be "dropped" if no representative is available. There is no difference as far as the consumer is concerned. If the telemarketing

firm is using artificial or prerecorded messages then the message will be delivered. Here it does not matter whether the call was placed by automated equipment or even by manual dialing.

The Statute specifically states in (b) (1) that "It shall be unlawful for any person within the United States - ... (B) to 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 ...". There is no statutory requirement that the call be initiated using an "automated telephone dialing system" or an "autodialer". The headings under (b), Restrictions on the use of automated telephone equipment, and (1), Prohibitions, are given no weight under the law.

Section (b) (1) (A) uses the disjunctive, OR, between the terms "any automatic dialing system" and "an artificial or prerecorded voice". Thus the Commission's rule regarding "all artificial or prerecorded messages delivered by an autodialer" is inappropriate. All artificial or prerecorded messages should be subject to the identification requirements regardless of how the telephone call was initiated.

The Commission is somewhat limited by the actual wording of the law in regards to the definition of an "automatic telephone dialing system". The Commission should not restrict the application of the law or its rules any more than the law provides. The rules should be as broad as possible within the statutory definitions, after all, the TCPA is a consumer remedial statute and should be given as broad an interpretation as possible.

24. The premise that use of autodialers can generate far more calls than a live solicitation needs to be examined. It is not the autodialing equipment, itself, that increases the number of calls possible, rather it is the use of predictive dialing techniques. If a telemarketing representative only needs to press a button when he/she completes a live solicitation in order to dial the next preselected phone number, little is gained over using autodialing equipment. It is only when the predictive dialing system is set with a call reject rate greater than 0% that significant additional calls can be made. The predictive dialer allows the autodialer to reject "no answer" calls, answering machines, disconnected services, fax machines or computers, and busy signals. Of course, the intolerable downside is that consumers are subjected to increased numbers of hang-up calls.

The Commission asks whether an autodialer can generate phone calls from a database of existing phone numbers. Of course! Telemarketers have been calling numbers in existing databases for years now using automated dialing equipment. If the query is whether the existing definition of "automatic telephone dialing systems" includes the equipment that can dial from a database of existing phone numbers, the answer must be "yes". The database itself is a sequential listing of phone numbers. The sequence can be by address, subscriber name, phone number, or simply the order that it is entered in the database.

The Commission further asks how a telemarketer using technology that dials random numbers can comply with the law prohibiting calls to emergency phone lines, health care facilities, pager numbers, and wireless telephone numbers. The Commission forgot to include numbers on the company's do-not-call list in the prohibited call list. The answer to the question is that it is not possible to prevent calling these numbers if the technology truly calls random numbers. If the called numbers are first screened

against the do-not-call list database, then it is possible to screen against other databases including all the prohibited numbers. However, the availability, accuracy, and timeliness of all these prohibited number databases is not guaranteed.

25. I cannot think of any legitimate business purpose for calling large blocks of telephone numbers in order to identify lines that belong to telephone facsimile machines. If a line is found that belongs to a facsimile machine, there is no legitimate message that can or should be transmitted to that facsimile machine. Advertisements cannot be sent to that machine because prior express permission had not been granted. Other business communications should not be sent to the facsimile machine until the sender is informed that the machine is ready to accept those facsimile messages and that the recipient wishes to receive the transmission. Public service announcements need not be sent to these machines because other facsimile machines may already exist at that entity's premises where public service announcements are more properly transmitted and may be welcomed and expected by the recipient. Also, prior permission to send these public service announcements should be obtained even though not required by law. I have heard of cases where newly installed facsimile lines have received unsolicited facsimile advertisements even before the lines have been declared operational by their owners and the personnel designated to use those lines and facsimile machines have even been notified of their existence.

Calling large blocks of telephone numbers is the reason that my residential phone rang at 4:14 in the morning. Also, the court in Summit County, Ohio got it right when they ruled in *Irvine v Akron Beacon Journal* that calling in the middle of the night (to see if phone numbers are reconnected in this case) is really the first step in an advertising campaign. The practice of calling large blocks of telephone numbers to determine whether the lines belong to facsimile machines or whether they have been reconnected should be strictly prohibited.

26. If the purpose of the calls is within the definition of "telephone solicitation", then calls made by predictive dialers are subject to the TCPA restrictions. The identification requirements cannot be met by transmission of the caller ID information only. Many consumers do not subscribe to caller ID service and some may subscribe, but do not have a caller ID display device connected to the line. Also, as the telemarketing industry and the telephone industry points out, the caller ID information is not transmitted on all calls. The consumer alert titled "Predictive Dialing: Silence on the Other End of the Line" points out that the identification requirements are not met by hang-up calls and the consumer is prohibited from making a do-not-call request or a demanding a copy of the do-not-call maintenance policy.

Predictive dialers, if not specifically banned, should be required to be set with a 0% abandonment rate. Telemarketers who use predictive dialers should be required to transmit caller ID information. They should be prohibited from blocking the caller ID information and the local carrier should be required to report to the local phone subscriber the identity of the entity making abandoned calls if that subscriber should report the incident to the local carrier's annoyance call bureau. Requiring that a complaint be made to the local police department would ensure that the complaints are legitimate.

27. It is my contention that abandoned calls are much more annoying and frustrating than "dead air" while the call is being transferred. In any event, having an AMD direct that a prerecorded message be left on the answering machine is a violation of the TCPA's restriction on artificial or prerecorded calls. A live operator should be available when the call is placed and if an answering machine is detected, the live operator should leave the required identifications on the answering machine. Caller ID information should be transmitted in the event that the recorder does not properly receive the message.

In my personal experience, Answering Machine Detection (AMD) has recently been used for the opposite purpose from that described. Often, if a call is answered by a live person, a prerecorded message announcing "sorry, wrong number" is given. Several times I have answered the phone to hear a prerecorded message start off with "(S)orry I missed you, ..." Either the AMD algorithm is not properly detecting who is answering or the caller is intentionally trying to deceive the person called into possibly think that prerecorded calls left on an answering machine are permitted. I have had calls that I pick up where the message starts out with the "(S)orry I missed you, ..." ruse but later request that if I wish to receive further information, "please press the number 1 key on your keypad." Obviously, if the AMD is working properly, they would know that an answering machine picked up the call and that I was not available to press the 1 key.

AMD in and of itself is not bad, however, use of the AMD along with a predictive dialer which has an abandonment rate greater than 0% or in conjunction with artificial or prerecorded messages is the problem that should be addressed. I feel that rules restricting the use of AMDs are not needed and would be difficult to enforce because the consumer probably would not be able to detect when an AMD is being used. Better enforcement of the restrictions on predictive dialers and artificial or prerecorded messages would allow the AMD technology to be used effectively by the telemarketing industry without affecting the consumers right to privacy. The restrictions on abandoned calls should be such that using AMD equipment in such a manner that calls are abandoned unless an answering machine is detected would be discouraged.

28. I feel strongly that the identification requirements should apply to "telephone solicitations" as well as to other calls made for commercial, political, or charitable purposes. There should be no exception made for calls made for public opinion surveys or other commercial purposes. The US Patriot Act allows the Commission to require that charitable organizations provide their name and mailing address in calls to solicit charitable contributions, donations, or gifts. The Commission should immediately adopt such provisions. These should be included in 64.1200.

Printed and mailed political ads must reveal the source of the advertisement, why not telephonic ads? During the recent national election I received several political ads over my residential phone line. None of them revealed what organization placed the ad, nor who was speaking in the ad. Most of the ads were made using prerecorded messages. This trend will only continue to expand. Again, the prerecorded messages are much more disturbing to me than the live calls. At least during the live call I am allowed the opportunity to question the caller. The existing regulations under (d) (1) and (2) require identification for "(a)ll artificial or prerecorded telephone messages delivered by an automatic telephone dialing system". There are no exceptions for non-commercial, non-profit, political,

or any other type of artificial or prerecorded call. The commission should make it clear that violation of this provision is actionable under 227 (b) (3).

29. I believe that the present regulations under 47 ' 64.1200 already require identification for calls made by predictive dialers even when the call is abandoned. One only has to look at the purpose of the call to realize that this is so. Once a call covered by the TCPA is placed and my telephone "rings", the caller is subject to the identification requirements of the TCPA. This is pointed out in the Commission's Consumer Alert on hang-up calls mentioned earlier.

30. The Commission should reconsider the exceptions for commercial calls that do not contain any unsolicited advertisement. If the commission relies on Paragraph 41 of the Report and Order, then the Commission should note carefully the comments of Congressman Brewster that are cited in footnote 76. The Commission will note that the types of research, market surveys, political polling, and similar activities mentioned are the type normally performed by educational, consumer activity, and news media organizations. The results of such polling or surveying is usually made public shortly after the survey is completed or at least available for use by other educational institutions, etc. There should be no exception for a survey or poll made on behalf of a particular commercial entity or group of commercial entities and the results will be used for their commercial purposes only. The ultimate purpose of such a telephone call is strictly for the commercial or economic benefit of the calling entity or entities. While it may not target the specific person to whom it is directed for direct sales or exposure to a product or services, it is a significant step in the marketing process and should be considered the same as an outright advertisement to the resident. Especially annoying are the prerecorded "market surveys" that I have received. As pointed out in the previous paragraph, I believe that the Commission should reconsider its position with regard to political and religious speech as well as the present non-profit exemption.

Some telemarketers have recently tried to get around the TCPA restrictions by posing questions in their calls. Qualification questions, such as "are you over older than 18?" or "are you paying too much for your present health care insurance?" are not legitimate public opinion polls. Nor are questions such as "how are you today?" If the purpose of the call is of a commercial nature used in an overall marketing plan for a particular for-profit enterprise, then the call should be covered by the TCPA restrictions. Only true public opinion polls for public research or possibly for news gathering purposes should be allowed. But here also, any "do not call" request to the polling organization should be honored under the TCPA regulations as well as the identification requirements.

31. Of course the Commission should clarify that calls containing offers for free goods or services are prohibited without the prior express consent of the called party. Nowhere in the statute is there a requirement that the goods or services covered must offered for a payment of some sort. An advertisement is an advertisement. The end purpose is to entice consumers to purchase some product or service or at least to consider a particular product or service for purchase. When a retail store offers free balloons or prizes just for visiting the store, it is advertising. The purpose of the offer is to entice the consumer to visit the store and to be presented with offers to purchase goods or services. I would certainly hope that clarification of the rules would reduce the number of unwanted telephone

solicitations.

32. Prerecorded messages sent by radio stations are commercial advertisements that are covered under the TCPA prohibitions. They are advertising the availability of radio broadcasts. The broadcasts are made for a commercial purpose, to expose the sponsor's products or services. There is no need to balance consumers' interest with commercial freedoms of speech. A telephone call is an entrance to the consumers' property. It causes a telephone to ring in the consumer's home. This encroachment on the consumer's property should enjoy the same protections as available for door-to-door solicitors. If the consumer wishes to post a "no trespassing" sign in his yard or on his phone, he should, and does, have a right to do so protected by the first amendment. Why shouldn't he be allowed the same rights as regards his telephone?

33. I and others have noticed an alarming rise in the number of calls placed "on behalf" of a non-profit or charitable organization. The calls typically benefit only the commercial or for-profit entity making the call or contracting the telemarketing company to make the call, and, of course, the telemarketing company itself. Often the mention of a non-profit or charitable entity is strictly for the purpose of appearing to qualify under the TCPA exemption. Joint calls for the purpose of benefiting for-profit organizations should be covered by the Commission's rules regardless of the split in benefit. As pointed out earlier, the US Patriot Act permits the Commission to require non-profit organizations to identify themselves in phone calls seeking contributions, donations, or gifts. The TCPA imposes identification requirements on calls made for commercial purposes. The Commission should clarify that calls made for either purpose or for joint purposes also require proper identification.

34. The Commission has overstepped its authority in "permitting" an established business relationship exemption to the restrictions on artificial or prerecorded calls to residences. 47 USC 227 does not contain such an exemption and does not authorize the Commission to establish one. The Commission should quantify the minimum requirements for establishing a business relationship for the purpose of an exemption to the other TCPA requirements. Merely releasing one's residential phone number (even voluntarily) should not be enough to establish such a relationship.

With today's technology many customer inquiries are made on the internet. Often the inquiry forms will not be processed unless a residential phone number is given. Release of a phone number in this manner should not be considered adequate to establish an existing business relationship because the consumer has no choice but to release the number if he wishes to receive further information on the internet. If the release of his phone number would be optional and a notice, prominently displayed, that release of the phone number would authorize telemarketing calls, then an EBR could be said to have been established. Also, some telemarketers have argued that publication of one's residential phone number in telephone directories or membership records constitutes a desire to receive telemarketing calls. This should not be considered adequate to establish a business relationship for purposes of the TCPA exception.

35. Termination of an EBR is an issue that should be addressed by the Commission. Even after the EBR is established and independent of whether the consumer continues a relationship with a particular firm that uses telemarketing techniques, a notice by the consumer that he does not wish to

receive further telemarketing calls should be adequate to sever the EBR with respect to telemarketing calls. Charvat v Dispatch Publishing treats this subject and should be followed by the Commission. As the Ohio Supreme Court pointed out in oral arguments in the Charvat case, to decide otherwise would permit a department store, for instance, to call a store card holder at any time of the day or night and for whatever purposes it desires, even to market products or services from unrelated entities unless the consumer is allowed to sever the EBR for telemarketing purposes if the consumer still wishes to shop at that particular department store.

36. In my experience, the present time of day restrictions have not been a problem. Only twice in the last 4 years do my records show that I received a telemarketing call outside of the allowed hours.

However, periodically I have received hang-up calls outside of the permissible hours allowed in the TCPA. One of these calls (at 4:14 AM) has been traced to a war dialer trying to sniff out fax machines. As previously discussed, war dialing should be severely restricted if not banned altogether. Present technology requires that the called number be answered before the war dialer can ascertain whether a fax machine is hooked up to the particular line or not.

47. Due to the confusion on the part of consumers as well as telemarketers, the Commission should clarify the requirements for a consumer's right to file a suit under the TCPA. In addition to the question of whether a right to file suit occurs after the first or second call, exactly what damages are recoverable in a lawsuit under the TCPA must be clarified. The statute specifically establishes that a consumer shall recover actual monetary loss or a statutory amount in damages "for each such violation". The Commission must make it absolutely clear that damages are to be assessed for each and every violation of the TCPA requirements. The damages can reach back to a first call even if a private right of action had not been established at the time. And the damages are for each violation, not per phone call in violation of the requirements. Telemarketing supervisors and defense attorneys are fond of proclaiming that the violator is entitled to "one free call under the law". This "principle" is just not found in the four corners of the law nor the regulation.

49 - 67. As indicated previously, I do not favor establishing a national do not call list. I have many concerns over the utility of such a list under the existing statutory environment. I have included my comments concerning establishment of a national do not call list at the end of this filing.

In addition to the above enumerated responses to the NPRM, I have some additional comments that should be addressed by the Commission.

The terms "willful" and "knowing" should be defined for application to the statute. The Commission has indicated that the definition of "willful" in 312 (f) is applicable to the TCPA. However, this should be made clear under 64.1200. Many courts apply other definitions to the term. The term "knowing" is not defined in 312. The Commission has stated that "knowing" is the same as "willful". Since both terms are used in the statute, normal construction rules would indicate that knowing must encompass additional factors, otherwise Congress would not have used both terms. The Commission should enumerate exactly what additional factors "knowing" includes.

The Commission should make it clear that the proper forum for private

actions for violation of the TCPA is in the State Courts. The preferred venue is in Small Claims Court, though the party bringing an action for TCPA violations may choose a proper venue under local court rules. Only specific legislation opting out of litigation under the TCPA in State courts can change this. And then, some form of resolution must be made available for aggrieved parties. Several State and Federal Courts have specifically ruled that private TCPA actions must be brought in the State Court system. The Commission should make it clear that this is the intent of Congress and that the Commission concurs.

The existing regulations at 64.1220 (e) (2) (iii) provides for restriction on sharing or forwarding do-not-call requests which is detrimental to both the consumer's and the telemarketing company's interests. The regulation presumes that the entity on whose behalf the calls are to be made will supply call lists to a telemarketing firm that it may hire. Often, the telemarketing firm under hire uses its own calling lists. The regulations restrict the contracting entity from providing his DNC list to the telemarketing firm to use to "wash" the calling list that it may be using. In the interest of the consumer, allowing, or even requiring, the contracting entity to provide his DNC list, in the form of telephone numbers only, helps accomplish the end desired by the consumer as well as limiting possible exposure of the contracting firm from violation of restriction in (e) (2) (iii).

Finally, the Commission should clarify exactly what the requirements of a conforming do-not-call policy are. As pointed out earlier, most companies that have contacted me do not have any form of written policy at all. On the rare occasions when I receive a reply to my demand for a copy of their "written do-not-call maintenance policy" it is usually in the form of a short note that states that my number has been removed from the company's calling list. When a purported policy is included, it is usually unsigned and undated. Further, it does not comply with all of the requirements under 64,1200 (e) (2) (i) - (vi). In spite of the Commission's advice that a summary of a company's do-not-call policy is adequate to fulfill the requirements, the Commission should adopt the stance it spells out in its own regulations -- that a copy of the actual policy must be provided. Further, the Commission should require that the policy meet all of the requirements in the regulations. These should be made somewhat more clearer than the present wording. The policy should be required to be dated and signed by an appropriate officer of the company. A guideline as to how soon a requested copy of the policy must be supplied upon demand should also be provided.

COMMENTS ON THE ESTABLISHMENT AND USE OF A NATIONAL DATABASE

Thomas M. Pechnik

I oppose the establishment of a new database by the Commission of a national do-not-call list. My reasons are explained below.

First, under the existing TCPA statutes a national list would serve no purpose. If a national list were established, there is only a false promise that including one's name on the list would result in fewer telemarketing calls. The private right of action in 47 USC 227 (c) (5) requires the receipt of more than one telephone call within any 12-month period in violation of certain TCPA provisions. Whether one's name is on a national do not call list or not doesn't affect that requirement. At best, having

one's name on the list only adds additional violations to the calls that are in violation. Presumably, it would add violations under 47 CFR 64.1200 (e) (2) (vi) for failing to honor the do not call request and possibly under (e) (2) (iii) for failure to record the do not call request.

The private right of action under 227 (b) (3) would remain unchanged since the first call in violation is actionable. Again, at best, there would be additional violations for failing to honor and failing to record. The Commission should not adopt a national do not call list without further Congressional direction.

This is not the result that the public expects and hopes for if a national list is established. Statutory changes are necessary. The public would be very disappointed to learn that nothing has really changed upon the adoption of the national list.

The present scheme of company specific do-not-call lists has been a dismal failure for several reasons. The public's ignorance of its use. General disregard for the provisions of the TCPA on the part of the telemarketing industry. The inability to identify the specific companies abusing or ignoring the TCPA. Lack of enforcement of the TCPA private rights of action on the part of the public and rights of action by State and Federal agencies. Confusion over the actual provisions in the TCPA. Confusion of the TCPA with the Federal Trade Commission's Telemarketing Sales Rule. Confusion over the role of State laws regulation telemarketing. Lack of uniformity in State and local courts in TCPA actions. And unfamiliarity of the TCPA in State and local courts. All of these problems will continue to exist if a national do-not-call list is established.

Complicated rules to determine exactly which entities would be and when they would be required to abide by the rules would need to be crafted. All of the concerns about the existing system would remain. Exactly whom does it apply to? Who is exempted by the very nature of his existence or by the nature of their use of the telephone? Does it apply to the entity placing the call, or the entity on whose behalf the call is made, or both? What types of calls are exempt - non-commercial, those without ads or solicitations, market survey calls, political polling calls? How are charitable organizations affected? What about calls "on behalf" of a charitable organization which are also designed to benefit a for-profit company? How about calls for charitable organizations placed on its behalf by for-profit telemarketing firms? All of these concerns would have to be addressed.

Any exceptions based on an existing business relationship would be a major concern. First of all, rules concerning an EBR under the present scheme need to be resolved. Then, if a national do-not call list is enacted, the relationship between an EBR and one's telephone number being added to the list would need to be explored. If an EBR exists and the subscriber later adds his number to the national list, does this action negate the EBR? If a person has his number on the national list and then establishes a business relationship, does that establish an EBR exception absent specific permission to place telemarketing calls? What if the person later re-applies to the list? All of these permutations would need to be examined to properly administer a national list.

If a national do not call list were to be established by the Commission, it must not preempt any State law that imposes more restrictive intrastate

requirements or regulations. This requirement is contained in the TCPA at 47 U.S.C 227 (e). Further, State laws and regulations designed to protect its citizens against unwanted telephone calls or which restrict entities under its control from making unwanted calls should not be preempted even for interstate calls initiated from, or received within the State's territory.

Of course, the Commission should work with the Federal Trade Commission in deciding issues concerning do not call lists. By the very nature of the two Commissions' authorities over specific entities, a combined and consolidated list would seem to be an impossibility. I urge the Commission to continue to work with the FTC in developing that Commission's approach to a national list, but for the reasons stated above and more, to not develop a national do not call list under the TCPA.

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