



December 9, 2002

Ms. Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Room TW-A325
Washington, DC 20554

VIA ELECTRONIC DELIVERY

Dear Ms. Dortch:

This comment letter is submitted on behalf of the Consumer Bankers Association (“CBA”)¹ in response to the Notice of Proposed Rulemaking (“Proposal” or “FCC Proposal”) published by the Federal Communications Commission (“FCC”) regarding the rules and regulations implementing the Telephone Consumer Protection Act (“TCPA”) of 1991 (“TCPA Rule”). CBA appreciates the opportunity to provide its comments on the Proposal.

In General

CBA generally believes that the TCPA Rule has been effective in preventing residential telephone subscribers from receiving unwanted telephone solicitations. Much of this success relates to the requirement in the TCPA Rule for each telemarketer to maintain a list of consumers who do not wish to be called by that telemarketer for marketing purposes (“Company List”). This approach allows consumers to determine on a selective basis who may telemarket to them by permitting them to limit those telemarketing calls they do not find useful while permitting telemarketing calls from companies they believe may provide beneficial offers. The approach also clearly demonstrates the effective implementation of the opt-out system of privacy protection for consumers. While CBA generally supports the Company List approach and believe these lists have been effective to date, we are concerned that the growing number of states enacting do-not-call legislation may make it both difficult and costly for financial institutions to comply without a national standard.

¹ The Consumer Bankers Association is the recognized voice on retail banking issues in the nation’s capital. Member institutions are the leaders in consumer financial services, including auto finance, home equity lending, card products, education loans, small business services, community development, investments, deposits and delivery.

CBA was founded in 1919 and provides leadership, education, research and federal representation on retail banking issues such as privacy, fair lending, and consumer protection legislation/regulation. CBA members include most of the nation’s largest bank holding companies as well as regional and super community banks that collectively hold two-thirds of the industry’s total assets.

Although the TCPA Rule has generally proven effective, we understand the FCC's desire to reevaluate the TCPA Rule in light of changing technologies and practices. Indeed, CBA believes that minor modifications can be made to the Company List requirements to improve the effectiveness of the TCPA Rule. However, we are unaware of any changing technologies or practices that warrant making significant modifications to the TCPA Rule.

Most CBA members, however, would find a nationwide do-not-call-list ("National List", or "do-not-call" list) to be effective provided it included a preemption of all state lists as well as an exemption for existing customer relationships. The creation of a National List raises many difficult issues, which we discuss below, that must be resolved by the FCC. First and foremost, any federal do-not-call list must preempt state laws. We believe it is critical that companies be subject only to a single compliance standard with respect to telemarketing "do-not-call" lists. As more and more states enact their own laws creating individual state do-not-call lists, navigating the patchwork of differing state laws becomes difficult and extremely costly. That said, CBA's members do not want to call consumers who do not wish to be called and would support the collection of this information on a single list provided that list preempted the many state lists and included an exception for companies to call their own customers. We also believe that, given the inherent "all or nothing" nature of a National List, whereby the consumer cannot selectively limit telemarketing calls but are given the opportunity only to limit all telemarketing calls, companies should be permitted to contact their own customers regardless of whether they have placed themselves on a National List.

We also note that the substance of the FCC's Proposal overlaps, to a certain extent, with proposed amendments to the Federal Trade Commission's ("FTC") Telemarketing Sales Rule ("TSR") ("FTC Proposal"). As a general matter, we believe that the FCC and FTC should coordinate their efforts, to the extent possible, in order to develop consistent regulations governing telemarketing practices. Although consistency between the TSR and the TCPA Rule is important, coordination between the FTC and the FCC should not be the overriding goal if the FTC is intent on amending the TSR in a manner similar to the FTC Proposal.² It is our hope that, should the FTC decide to amend the TSR, and the FCC decide to amend the TCPA Rule, the two agencies will work together to develop telemarketing regulations that continue to protect consumers while not unduly limiting legitimate telemarketing practices.

In light of the significant issues raised in connection with the creation of a National List and other portions of the Proposal, we urge the FCC to proceed with caution if it chooses to amend the TCPA Rule. Should the FCC decide that significant amendments to the TCPA Rule are necessary, we request that the FCC issue the proposed modifications as a revised proposal for public comment, especially if the FCC intends to create a National List. The following sets forth CBA's specific comments on the Proposal.

Company Lists

By enacting the TCPA, Congress directed the FCC to "initiate a rulemaking proceeding concerning the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object." In response to this directive, the FCC adopted the

² CBA has serious concerns with the FTC Proposal, and has submitted detailed comments to the FTC explaining those concerns and providing constructive suggestions as to how the FTC Proposal could be improved.

TCPA Rule which, among other things, requires a telemarketer to maintain a list of consumers who have informed the telemarketer that they no longer wish to receive telemarketing calls from that telemarketer. The FCC has requested comment on the overall effectiveness of Company Lists in providing consumers a reasonable means to curb unwanted telephone solicitations.

CBA believes that Company Lists have been effective in meeting the important objective of protecting residential telephone subscribers' privacy rights. The Company List approach is precisely tailored to this congressional directive by allowing consumers to discern between those telemarketers who may provide goods or services which may be of interest to consumers and those to which they object—and then permitting them to request that the telemarketers to whom they object not to call them again.

Furthermore, the Company List mechanism adequately balances the interests of those consumers who benefit from products offered through telemarketing, and the companies that wish to provide such offers, against those consumers who do not wish to receive calls from certain telemarketers. According to the Direct Marketing Association (“DMA”), telemarketing generated over half a *trillion* dollars in sales in the past year. This figure clearly illustrates that a large number of consumers purchase a significant amount of goods and services through telemarketing. The TCPA Rule protects the interests of those who purchase goods or services through telemarketing by allowing them to receive those calls they may find beneficial. The TCPA Rule also protects the interests of those consumers who do not wish to receive calls from certain telemarketers by providing them a simple method to prevent telemarketers from calling them in the future.

However, as we have stated previously, a nationwide “do not call” list that preempts state laws may also be effective.

Receiving and Honoring a Consumer's Request to Be Placed on the Company List

As currently drafted, the TCPA Rule requires a person or entity making a telephone solicitation to record requests from consumers not to receive future telemarketing calls from such person or entity. We believe this is the most appropriate method for a consumer to register his or her request with a telemarketer. In this regard, the consumer's choice is made directly with the entity making the call and the consumer's request can be handled efficiently.

The Proposal indicates that the FCC may consider alternative methods for allowing consumers to place themselves on a Company List, such as using the Internet or mail to submit a proactive request to be placed on a Company List. Many of CBA's Members already provide consumers with the opportunity to make a proactive request to be placed on the Member's Company List. In fact, some include such an option as part of their privacy policy.

CBA supports the concept of allowing consumers to place themselves on a Company List before receiving a telemarketing call. However, if the FCC intends to require companies to accept such requests, it is critical that the requirement be structured in such a manner as to reduce inappropriate compliance burdens and consumer confusion. For example, a company that does not telemarket should not be required to accept proactive consumer requests to be placed on the

Company List.³ Furthermore, if a company were required to accept proactive requests, the company should be permitted to designate how such requests must be registered in order to be made effective (*e.g.* at a certain address, phone number and/or web site). This should include the determination of a reasonable amount of processing while the consumer's request is processed and implemented.

We urge the FCC to reject any requirement for a company to respond to a consumer's request to be placed on a Company List. This burden would be extremely costly to companies and provide no corresponding benefit to consumers. Once making a request to a telemarketer to be placed on a Company List, consumers have obvious reason to believe that their request will be implemented. If it is not, there are several remedies available, including state enforcement and private rights of action against the telemarketer, depending on the circumstances. CBA is unaware of what problem may be solved by requiring companies to respond to a consumer's request, and therefore we do not believe the cost to the industry can be justified.

The FCC has inquired as to whether consumers may continue to receive calls for some period of time after asking to be placed on a Company List. It is possible that a consumer could receive a telemarketing call between the time the consumer requests to be placed on a Company List and the time the request is implemented. Although such calls are not frequent, the most likely scenario involves a telemarketer calling the consumer after the consumer has "opted out" while using a list of prospects that was compiled prior to the consumer's opt out. In fact, it is unavoidable that there will be a delay before the consumer's request can be implemented fully. In essence, a Company List is no different from a National List in this regard—each are outdated to a certain extent the day after they are compiled and a short and reasonable "lag time" or processing must be expected before a request to be included in either of the Lists can be fully effective.

The FCC has also requested comment with respect to impediments consumers may face with respect to placing themselves on a Company List. For example, the FCC has asked whether telemarketers hang up on consumers before they can assert their do-not-call choice. Legitimate telemarketers do not engage in this practice. However, there may be bad actors who do, and such bad actors will continue to seek ways to violate the TCPA Rule regardless of its requirements.⁴ It is our hope that the FCC is able to continue its efforts to crack down on those who willfully violate the TCPA Rule in such a manner. We also note that consumers may be able to circumvent such tactics if they are permitted to request to be placed on a Company List proactively.

The Proposal also indicates a desire for comment on whether consumers with hearing and speech difficulties are unable to convey a request not to be called by telemarketers. Although it is not difficult to imagine how such disabilities may make it difficult to convey a request, we have not been made aware of widespread problems in this regard. Should the FCC determine that it must address this issue, we would look forward to working with the FCC as to how to do so most effectively. We note that allowing a consumer to proactively add themselves to a

³ A company should not be precluded from telemarketing in the future simply because it has not created a Company List. Rather, the company would create a Company List once it engages in its first telemarketing campaign.

⁴ Unscrupulous telemarketers could also abuse a National List, if one were to be created, by calling individuals on such a list.

Company List may mitigate some, if not all, of the difficulties that disabled individuals may face with respect to placing themselves on a Company List.

Established Business Relationship

The FCC has interpreted the TCPA and the TCPA Rule to prohibit a company from making a telephone solicitation to a consumer with whom it has an established business relationship if the consumer has requested to be placed on that company's Company List. We ask that the FCC reconsider this interpretation.

As a practical matter, CBA does not believe that a change in the FCC's interpretation of the established business relationship exclusion in the TCPA would result in widespread calls to consumers who would rather not receive them. We urge the FCC to keep in mind that a company's first priority is to protect its relationship with its customers. It is likely that many companies will honor their consumers' requests not to be called as a matter of good business practice. However, there may be instances when a consumer would be pleased to receive a telemarketing call from a company with which he or she has a relationship, despite his or her general desire not to receive such calls from others. For example, a bank may realize that it can save one of its consumers thousands of dollars due to a new product. Or a telephone company may be able to inform its consumer that it has a calling plan that is tailored more appropriately to the consumer's calling habits. We believe the FCC should permit companies to contact their own customers, and trust the companies to make sound business decisions.

The TCPA directs the FCC to initiate a rulemaking concerning the need to protect consumers' privacy rights to avoid receiving "telephone solicitations" to which they object. The TCPA excludes from the definition of "telephone solicitation" a call "to any person with whom the caller has an established business relationship." Therefore, as a matter of clear congressional intent, CBA respectfully submits that neither the TCPA nor the TCPA Rule should apply to a call made to a consumer with whom the caller has an established business relationship.

National List

The Proposal invites comment as to whether the FCC should establish a National List. CBA recognizes that some percentage of consumers do not wish to receive telemarketing calls, and CBA strongly supports the right of those consumers to exercise that choice. While most of CBA's members believe that the company lists provide adequate consumer protections to those who do not wish to receive telemarketing calls, many members also believe that the implementation of a national list will simplify the process for businesses and consumers provided it includes a preemption of all state lists and an exemption for existing customer relationships.

The FCC's Previous Rejection of a National List

In 1992 the FCC believed that Company Lists, as opposed to a National List, were the most appropriate tools to allowing consumers to prevent unwanted telemarketing calls. Although the FCC originally considered a National List in an effort to implement the TCPA, it ultimately rejected such an approach. The FCC noted that the creation and maintenance of a National List would be costly, and that such costs could ultimately be passed on to the consumer.

Furthermore, the FCC recognized that it would be difficult to maintain a National List in a reasonably accurate form since nearly 20% of all telephone numbers change in a given year. CBA respectfully suggests that the reasons for the FCC's rejection of a National List in 1992 remain valid today. However, since a number of states have enacted "do not call" legislation with different requirements, a national list may be more timely

In its Proposal, the FCC has asked for estimates of the cost of establishing and maintaining a National List. It is difficult to provide such an estimate without knowing how the National List would operate. For example, the cost could fluctuate based on how consumers place themselves on the National List (*e.g.* by telephone, mail, and/or Internet), how often the National List is updated, and how the FCC intends to respond to consumer inquiries. The number of requests to be placed on the National List would also affect the cost of the National List. Although a cost cannot be calculated at this point with respect to a National List as discussed in the FCC's Proposal, it may be worth noting that many of the commenters responding to a similar request from the FTC believed that the National List as proposed by the FTC, which would provide consumers with the ability to register through use of a toll-free number, would cost significantly more than the \$5 million estimate provided by the FTC.

The costs of a National List would go well beyond those incurred to establish and maintain the National List. For example, it is likely that the amount of goods and services purchased through telemarketing would decrease significantly if a National List were implemented. Many consumers who would ordinarily purchase a product or service offered through telemarketing may never receive such calls since they would be forced to choose between either blocking all telemarketing calls or none. It is reasonable to assume that many companies may pass the costs of lost sales (and the costs of the National List if telemarketers are forced to pay for it) on to consumers. In effect, those who purchase goods and services through telemarketing would be subsidizing the costs of allowing others to place themselves on a National List.

Properly Crafting a National List

Although the same reasons which led to the FCC's rejection of a National List in 1992 are valid today, most CBA members could support the concept of a National List *if it were properly crafted*. For example, a National List must provide telemarketers with a single standard with which they must comply. If the National List did not replace similar lists in the various states, it would only complicate the do-not-call process. Telemarketers are already subject to at least two federal do-not-call requirements (*i.e.* the TCPA Rule and the TSR) and must comply with numerous state laws, some of which establish state-by-state do-not-call lists. Many telemarketers also voluntarily participate in industry-sponsored do-not-call lists. This means that telemarketers already are required to examine multiple databases, with different information and inconsistent formats, just to determine whether a marketing call may be placed to an individual. If the FCC decides to establish a National List, CBA strongly urges the FCC to ensure that the National List sets a single standard for telemarketers across the country.

In order to avoid inappropriate consequences for legitimate businesses, any National List must also contain an exemption allowing businesses to contact their existing customers. Such an exemption would be necessary in order to mitigate the adverse effects of the "all or nothing"

approach inherent in a National List. By adding themselves to a National List, consumers would prevent *all* telemarketers from contacting them. However, we believe that if a consumer obtains products or services from a company, it is reasonable to believe the consumer would not object to hearing about other offers the company may provide. Furthermore, it is also reasonable to assume that a company will strive to prioritize its customers' preferences in order to maintain positive business relationships, and will therefore tailor its telemarketing program accordingly.

Recovering Costs

In light of the TCPA's prohibition on charging consumers a fee to be included on a National List, the FCC has asked how it should recover the costs associated with a National List. CBA suggests that if the FCC determines that a National List would serve the public interest, then it should be funded in a manner that reflects such a finding. Therefore, it would be most appropriate to fund a National List through general tax revenues. If neither Congress nor the FCC believes that they can justify recovering the cost of a National List from general tax revenues, then CBA respectfully submits that the National List may not have sufficient public benefits to justify its creation.

Should the FCC establish a National List with the intent of recovering costs from telemarketers who access the National List, we believe the user fees should be determined in a fair manner. However, until the details of a National List are known, such as who must obtain access and how often, CBA believes it is premature to speculate on how best to achieve this goal. Therefore, if a National List is to be funded by the industry, we urge the FCC to seek additional comment on how to recover the costs of a National List once its details are known.

Predictive Dialers

As Autodialers

A predictive dialer is a program that dials consumers' telephone numbers in a predetermined manner and at a predetermined time such that a telemarketer will likely be available at the same time the consumer answers the phone. The program is designed to predict when a telemarketer will be available to take the next call, maximizing the efficiency of the telemarketing program.

The Proposal seeks comment as to whether a predictive dialer is an "automatic telephone dialing system," or "autodialer," for purposes of the TCPA and TCPA Rule. An autodialer is defined in the TCPA and TCPA Rule as 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. Under the TCPA Rule, an autodialer may not be used to initiate a telephone call, with limited exceptions, to any emergency telephone line, the telephone line of any hospital guest room, or any telephone number assigned to a cellular telephone service or any service for which the called party is charged for the call.

CBA does not believe that a predictive dialer meets the definition of an autodialer, nor do we believe there is reason to classify predictive dialers as such. A predictive dialer does not meet the definition of an autodialer because a predictive dialer generally does not store or generate telephone numbers to be called using a random or sequential number generator. Rather,

the primary function of a predictive dialer is to call a given set of telephone numbers in a manner that maximizes the efficiency of telemarketers. Furthermore, the TCPA Rule seeks to prevent an autodialer from randomly calling an emergency line, hospital room, or a telephone for which the called party is charged for the call. Predictive dialers are generally used to dial numbers the telemarketer *intends* to call, not those randomly generated which may include hospital rooms, etc. CBA is unaware of significant problems associated with the use of predictive dialers in connection with calling these types of restricted telephone numbers, and therefore urges the FCC to refrain from classifying a predictive dialer as an autodialer.

Maximum Settings/Caller ID

CBA understands that a telemarketer can misuse a predictive dialer, resulting in an unnecessary number of consumers hearing “dead air” or being disconnected. While the misuse of predictive dialers can result in consumer frustration, we do not believe the FCC should hold the industry to a standard that does not allow for the reasonable use of predictive dialers. If the FCC determines that limiting the number of abandoned calls as a result of predictive dialers is necessary, we urge the FCC to study current industry practices to determine an appropriate rate of abandoned calls. Such a rate should be flexible enough to allow businesses to use predictive dialers in a responsible and meaningful way, while also preventing irresponsible use of predictive dialers. We believe the DMA’s recommended maximum abandonment rate of 5% of answered calls per day in any campaign may provide the FCC a useful guidepost.

As an alternative to setting a maximum abandonment rate, the Proposal seeks comment on whether requiring telemarketers who use predictive dialers to also transmit caller identification information is a feasible option. The FCC states that consumers would then be able to identify the number of the calling entity and arguably be better able to hold telemarketers accountable for their practices. We believe the most appropriate method to mitigate the problems associated with abandoned calls is to regulate the number of abandoned calls permitted. However, if the FCC intends to pursue a different approach, we do not believe that requiring telemarketers who use predictive dialers to transmit caller ID information would be feasible or appropriate. For example, many telemarketers do not necessarily use telephone services that are capable of transmitting caller ID information. We do not believe it would be appropriate for the TCPA Rule to be amended in a manner that is not technology neutral, requiring telemarketers to use only certain types of telephone service providers. Furthermore, such a “remedy” would be limited because it would benefit only those consumers who subscribe to caller ID services.

Answering Machine Detection

Some telemarketers make use of answering machine detection technology (“AMD”). If used in conjunction with an autodialer or a predictive dialer, AMD can help prevent a call answered by an answering machine from being transferred to a telemarketer. For example, an AMD may transfer a call to a telemarketer only if it detects noise and then silence, such as when a person says “hello,” but not transfer calls that are answered by continuous noise, such as when an answering machine answers the call. This process greatly improves the efficiency of telemarketers but may result in the consumer hearing a short period of silence as the call is connected to a telemarketer.

We do not believe that consumers are frustrated with the use of AMD, which results in only a slight pause (if any) before a telemarketer takes the line. To the extent consumers may be frustrated by “dead air,” CBA believes that such frustration is a result of a small number of telemarketers abusing the use of a predictive dialer and abandoning too many calls. In light of the efficiencies created by not connecting telemarketers to answering machines, we do not believe that restrictions on the use of AMD would be appropriate. To restrict or eliminate the use of AMD would only increase the cost of telemarketing with no corresponding benefit provided to consumers.

Wireless Telephones

The FCC seeks comment on the extent to which telemarketing to wireless telephone consumers exists today and whether revisions to the TCPA are necessary to reflect consumers’ growing dependence on wireless phones. CBA’s Members generally do not “target” wireless telephone numbers for telemarketing calls. In fact, it is inherently difficult to distinguish between wireless and wireline phone numbers. However, if a consumer has listed his or her wireless telephone number as the number at which that person would like to be called, it is possible that the consumer could receive a telemarketing call on the wireless telephone.

The FCC has asked whether wireless numbers, or a subset thereof, should be considered “residential telephone numbers” under the TCPA Rule, thereby making calls to wireless numbers subject to the time of day restrictions and the Company List requirement. We do not believe that such a classification is appropriate or necessary. A wireless phone provides many consumers the flexibility to use their telephones for a variety of purposes. For example, a consumer may use a wireless phone during the day for business purposes and use it during the evening and on weekends for personal reasons. It would not be possible to classify such numbers appropriately as strictly “residential” or not. Furthermore, we urge the FCC to keep in mind the context in which many telemarketers obtain a wireless phone number. Telemarketers generally call a wireless phone number because the consumer has listed it as his or her primary phone number. For this reason, and since telemarketers cannot generally distinguish between a wireless and a wireline number, telemarketers generally assume that such numbers are “residential telephone numbers” and treat them accordingly, *i.e.* telemarketers generally call the number only between 8 a.m. and 9 p.m. and apply the Company List requirements to it.

We also note that the use of wireless telephones continues to evolve. Therefore, the FCC should use caution when reviewing proposed amendments to the TCPA Rule that would address wireless telephones. Since wireless numbers are generally not targeted, and since they usually receive protections as though they were “residential telephone numbers,” CBA does not believe that significant benefits can be obtained by amending the TCPA Rule to address wireless telephone issues. On the other hand, since the wireless telephone marketplace has not yet reached maturity, there is a risk that the FCC could stifle the evolution of mobile commerce (also referred to as “m-commerce”) or other benefits if it made premature amendments to the TCPA Rule covering wireless telephones.

Private Right of Action

The TCPA provides that an individual may file suit in state court if he or she has received more than one telephone call in any 12-month period by or on behalf of the same telemarketer in violation of the TCPA Rule. The Proposal indicates that the FCC has received inquiries about a consumer's right to file suit against a telemarketer that has made a single phone call to that consumer in violation of the TCPA. The FCC has asked whether it should clarify whether a suit may be filed after a single violation.

CBA does not believe that a clarification of this point is necessary. The TCPA states that a "person who has received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of" the TCPA Rule may file suit if otherwise permitted by the laws or rules of court of a state. CBA believes this language does not need clarification.

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Once again, CBA appreciates the opportunity to comment on the Proposal. If you have any questions concerning our comments, or if we may otherwise be of assistance in connection with this issue, please do not hesitate to contact me (msullivan@cbanet.org, 703-276-3873) or Courtney Clelan (cclelan@cbanet.org, 703-276-3883).

Very truly yours,



Marcia Z. Sullivan
Director, Government Affairs