

December 9, 2002

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**BY HAND**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
Office of the Secretary  
c/o Vistronix, Inc.  
236 Massachusetts Avenue, N.E.  
Suite 110  
Washington, DC 20002

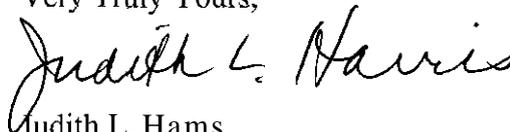
**RE: Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,  
CG Docket No. 02-278**

Dear Ms. Dortch:

On behalf of Vector Marketing Corporation, and in accordance with Sections 1.49 and 1.419 of the Commission's Rules, 47 C.F.R. §§1.49 and 1.419, we are pleased to submit the attached comments in the above-captioned proceeding.

Should you have questions regarding the enclosed, or require further information, please to not hesitate to contact the undersigned.

Very Truly Yours,



Judith L. Hams  
James P. Schulz

cc: K. Dane Snowden  
Margaret Egler  
Michelle Walters  
Erica McMahon  
Richard Smith

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List ABCDE

1301 K Street, N.W. Delaware  
Suite 1100- East Tower New Jersey  
Washington, D.C. 20005-3373 New York  
202.414.9200 Pennsylvania  
Fax 202.4 14.9299 United Kingdom  
Virginia  
Washington, DC

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**Before the  
Federal Communications Commission  
Washington, DC 20554**

**DEC - 9 2002**

**FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY**

In the Matter of )

Rules and Regulations Implementing the )  
Telephone Consumer Protection Act of 1991 )

CG Docket No. 02-278

**Comments of Vector Marketing Corporation**

Erick Laine  
John Whelpley  
VECTOR MARKETING CORPORATION  
1116 East State Street  
Olean, NY 14760  
(716) 373-6141

Judith L. Harris  
James P. Schulz  
REED SMITH, LLP  
1301 K Street, NW  
Suite 1100 – East Tower  
Washington, DC 20005  
(202) 414-9200

Attorneys for Vector Marketing Corporation

## SUMMARY

Vector Marketing Corporation (“Vector”) is a direct selling company that conducts its sales during face-to-face presentations. Vector’s sales representatives use their telephones only to set up face-to-face appointments. Although Vector’s representatives’ limited use of their telephones is not part of the problem that the Commission is seeking to address, the rules promulgated in this proceeding could cause substantial harm to Vector’s ability to attract and retain the young men and women who make up Vector’s sales force.

In its Comments, Vector urges the Commission to create an exemption in its rules for entities that make a *de minimus* number of sales-related calls in the normal course of their business activities for the sole purpose of setting up face-to-face appointments with potential customers.

Vector argues that rules that do not contain such an exemption likely would not survive intermediate scrutiny under First Amendment precedents for restrictions on commercial speech because, absent such an exemption, such rules would not be narrowly tailored to meet the Commission’s stated objectives. On the other hand, Vector will show that the creation of such an exemption would assist the Commission in its effort to balance the advantages of a national do-not-call list against the disadvantages of such a list, particularly with respect to the effect that such a list can have on local and small businesses.

Relatedly, Vector points out that any public awareness campaign regarding a national do-not-call list should include information on the kinds of calls or callers specifically exempted from the Commission’s do-not-call requirements in order to avoid causing confusion and increased irritation among consumers.

Vector also urges that if the Federal Trade Commission (“FTC”) adopts rules pertaining to a national do-not-call list that include the FTC’s current face-to-face exemption, then, as an alternative to the *de minimus* exemption that Vector recommends, the Commission should use its authority under the TCPA *only* to extend such rules as the FTC may adopt to those entities that are not subject to the FTC’s jurisdiction, rather than promulgate a separate set of rules that could conflict with the FTC’s rules.

Finally, Vector urges the Commission to take steps to ensure that entities in compliance with, or exempted from, any rules regarding a national list that the FCC may adopt will not become, or remain, subject to a conflicting patchwork of 50 or more sets of state regulations on the same subject.

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**Before the  
Federal Communications Commission  
Washington, DC 20554**

In the Matter of	)	
Rules and Regulations Implementing the	)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991	)	
	)	
	)	

**Comments of Vector Marketing Corporation**

Vector Marketing Corporation (“Vector”), by its attorneys, hereby submits its comments in the above-captioned proceeding.<sup>1</sup> Vector is a wholly owned subsidiary of the Alcas Corporation (“Alcas”) and is the North American marketer of Cutco Cutlery (“Cutco”), also a subsidiary of Alcas and a manufacturer of fine cutlery products. Cutco’s knives and other products are found in over 10 million households nationwide, and the company’s manufacturing facilities employ over 700 union workers.

Vector markets Cutco products through direct, in-person sales, as more fully described below. Vector has a significant interest in the outcome of this proceeding because Vector’s independent sales associates, the preponderance of whom are college-age students, often use their own telephones to set up their in-person appointments. Therefore, Vector’s ability to conduct its business may be seriously and adversely affected by the proposed revision of the

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<sup>1</sup> See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Notice of Proposed Rulemaking and Memorandum Opinion and Order, CG Dkt. No. 02-278; CC Dkt. No. 92-90, FCC 02-250, ¶ 11, rel. Sep. 18,2002 (hereinafter “NPRM”).

rules of the Federal Communications Commission (“FCC” or “Commission”) that were promulgated under the Telephone Consumer Protection Act of 1991 (“TCPA”).’

As a direct selling company: Vector’s sales representatives’ limited use of their telephones is simply not part of the problem that the Commission is seeking to address. Nevertheless, because the Commission has broad authority under the TCPA to regulate the use of telephones in connection with sales activities, the rules promulgated in this proceeding could cause substantial harm to Vector’s ability to attract and retain the young men and women who sell Cutco products, primarily to their friends and family.

Therefore, in the pages that follow, Vector will ask the Commission to create an exemption in its rules for entities that make a *de minimus* number of sales-related calls in the normal course of their business activities for the sole purpose of setting up face-to-face appointments with potential customers. Vector will argue that rules that do not contain such an exemption likely would not survive intermediate scrutiny under First Amendment precedents for restrictions on commercial speech. On the other hand, Vector will show that the creation of such an exemption would assist the Commission in its effort to balance the advantages of a national do-not-call list against the disadvantages of such a list, particularly with respect to the effect that such a list can have on local and small businesses. Relatedly, Vector will point out that any public awareness campaign regarding a national do-not-call list should include information on

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<sup>2</sup> Telephone and Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991), *codified at* 47 U.S.C. § 227.

<sup>3</sup> Vector is a member of the Direct Selling Association (“DSA”), which represents more than 150 companies that sell their products directly to consumers through face-to-face meetings. The DSA’s members include such notable names as Avon Products, Inc., Mary Kay Inc., Shaklee Corporation and World Book, Inc.

the kinds of calls or callers specifically exempted from the Commission's do-not-call requirements.

Vector will also urge that if the Federal Trade Commission ("FTC") adopts rules pertaining to a national do-not-call list, as the FTC has proposed, then, as an alternative to the *de minimus* exemption that Vector recommends, the Commission should use its authority under the TCPA *only* to extend such rules as the FTC may adopt to those entities that are not subject to the FTC's jurisdiction, rather than promulgate a separate set of rules that could conflict with the FTC's rules, but would nevertheless be applicable to entities subject to both the FTC's and the FCC's jurisdiction. Vector's position in this regard assumes that the FTC will extend to any new obligations with respect to a national do-not-call list its current exemption for face-to-face sales.

Finally, Vector will urge the Commission to take steps to ensure that entities in compliance with, or exempted from, any rules regarding a national list that the FCC may adopt will not become, or remain, subject to a conflicting patchwork of 50 or more sets of state regulations on the same subject.

### **BACKGROUND**

Vector has been marketing Cutco products in basically the same fashion for over five decades. Vector's highly successful and unobtrusive marketing methods pre-date the technological developments and explosive growth of high-volume telemarketers and telemarketing practices that have swept across the nation in recent years, and which are at the heart of the instant proceeding. Vector recruits and trains thousands of college-age students every year, most of whom work only during the summer (and at other times when their schools

are not in session): to sell Cutco products through “direct selling” (as opposed to telemarketing) – *i.e.*, through one-on-one sales presentations that are made *in the home* only to the student’s relatives, friends and to others who are specifically referred to the students by their relatives and friends. Appointments for these in-home presentations are usually made by the students using their personal telephones.’

For many of these students, the training and experience that comes with this in-the-home, one-on-one selling approach represents the student’s first encounter with the real-world job market, and imparts invaluable business and entrepreneurial skills that last a lifetime.<sup>6</sup> In fact, Vector teaches its sales course for academic credit through various professors at a number of colleges and universities (including Purdue, Illinois State, and schools in Kentucky and California) that have incorporated Vector’s sales training materials into their business curricula.’

Because the students who are selling Cutco cutlery through Vector generally use their telephones to schedule their in-person sales presentations, Vector is familiar with the TCPA and the Commission’s rules promulgated thereunder. Vector applauds the Commission’s

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<sup>4</sup> See Kerin, et al., *STRATEGIC MARKETING PROBLEMS*, Cases and comments, 9<sup>th</sup> ed., 538-549 (2000); *see also* Albaum, et al., *INTERNATIONAL MARKETING AND EXPORT MANAGEMENT*, 4<sup>th</sup> ed., 265-267 (Case Study 6.1) (attached hereto as “Exhibit 1”).

<sup>5</sup> Thus, Vector’s independent sales representatives do not make “cold calls”: they telephone only relatives, friends or persons to whom they have been personally referred or with whom they share an existing interpersonal relationship (*e.g.*, a co-worker, classmate, neighbor or fellow member of a community, social or religious organization).

<sup>6</sup> See Vector Marketing Corporation, Vector ‘Skills for Life’ Success Stories (attached hereto as “Exhibit 2”).

<sup>7</sup> See Letter from Michael R. Williams, Ph.D., Director, Professional Sales Institute, College of Business, Illinois State University to Michael Muriel, Division Manager, Chicago Division, Vector Marketing, Jul. 16, 2002 (attached hereto as “Exhibit 3”).

decision to revisit its TCPA rules in light of the quickly proliferating “technologies of intrusion”<sup>8</sup> that are available to telemarketers today. Vector agrees with the Commission’s position that these technologies and emerging telemarketing practices warrant a fresh look at the TCPA rules. Vector especially appreciates the concern the Commission has shown for protecting the rights of those who regularly rely on the use of their telephones in the pursuit of legitimate business interests, but who do not engage in the kinds of high-volume calling or other intrusive practices that the Commission is seeking to curtail.

## **DISCUSSION**

As an initial matter, Vector strenuously objects to the adoption of any do-not-call rules, whether promulgated by the FCC, the FTC, or the states, that would impair the ability of those who sell useful and high quality items through unobtrusive, time-tested, direct selling methods to continue to pursue legitimate sales opportunities without complying with expensive, overly burdensome, and/or wholly inappropriate rules that could well put them out of business.

### **I. Direct Sellers Like Vector Are Not Part Of The Problem And Must Not Be Treated Like Those Who Are The Problem.**

Vector strongly believes that any do-not-call rules that ultimately may be adopted must contain an adequate exemption and/or safe harbor to protect the legitimate interests of users of the telephone network who are not part of the problem. A college student who, using his or her own name, employs a telephone to make an innocuous call that is short in duration to a friend or family member – not to make “cold calls” – to ask if he or she might go to the called person’s

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<sup>8</sup> Oral remarks of FCC Commissioner Michael J. Copps, FCC Open Meeting, September 12, 2002.

home to demonstrate quality kitchenware simply is not in the same class of caller as an anonymous, untraceable individual who, along with a team of perhaps a hundred or more predatory co-workers, spends an eight-hour day at a telemarketing call center, armed with perpetual calling tools such as autodialers, predictive dialers, answering machine detectors and caller-ID blockers, continuously and anonymously launching thousands of unwanted calls into the homes of American consumers.

In this regard, Vector notes the Commission's estimate that "telemarketers may attempt as many as 104 million calls to consumers and businesses every day." By contrast, a successful direct selling company like Vector, whose sales representatives use their telephones to set appointments (a necessary and fundamental day-to-day activity of many businesses) in order to serve approximately 1.1 million customers per year," will only generate approximately 4 million calls nationwide *for* the entire year, or less than 11,000 calls per day.

Moreover, telemarketers have "close rates" (the ratio of calls made to sales made) of approximately 1%-3% for untargeted calling campaigns (close rates for targeted campaigns run somewhat higher)." By contrast, direct sellers like Vector, for whom a "successful" call is

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<sup>9</sup> NPRM at ¶ 7 (emphasis added).

<sup>10</sup> Vector has average annual sales of \$250 million, with average sales per customer of \$227.

<sup>11</sup> See *Copley Chicago Newspapers Increases Circulation With Targeted Telemarketing*, article by Shari Molk, marketing coordinator for ASTECH Intermedia, an international marketing technology and consulting company specializing in the publishing industry, found at <http://www.astech-intermedia.com/40/1/fvp4.htm>, visited on 10/25/02 (noting that the results of a targeted telemarketing campaign increased the newspaper company's close rate to 7.2% from the normal close rate of 2%. See *also* Levey, Richard H., *Milwaukee Journal Sentinel Increases Mail Budget, Direct*, Apr. 1, 2002 (online magazine for direct marketing executives), noting that a targeted telemarketing campaign coupled with direct mail increased the close rate to more than 13% from a random-dialing close rate of 2%-3%, found at

Continued on following page

one that results in an appointment, rather than a sale, have a corresponding “close rate” of more than 50%. Even if the close rate for Vector is calculated on the basis of total calls made per sale (rather than per appointment), that rate is nearly 30% (3.6 calls per sale, or a 27.7% close rate) and is still substantially higher than typical close rates for the telemarketing industry.<sup>12</sup> This factor alone is a key indication that the kinds of calls direct sellers make are far less objectionable than typical telemarketing calls.

Further, telemarketers use their telephones to conduct their entire sales presentations and thus tie up the consumers’ phone, invade their personal privacy, and take up their time as the telemarketers attempt to make their initial pitch and engage the caller in a structured question and answer session designed to lead to an over-the-phone sale. Direct sellers, by contrast, are “on and off” the phone quickly, saving the sales pitch, product discussions, demonstrations and consummation of the potential sale for the in-home presentation.

Thus, the nature, number and duration *of* the calls made by individuals working for direct selling companies like Vector in order to set up appointments distinguish those calls from the kinds of objectionable “nuisance” calls that the Commission is seeking to address. This view is further supported by the results of a recent two-part Vector/Cutco customer satisfaction

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[http://www.directmag.com/ar/marketin.qmilwaukee\\_journal\\_sentinel](http://www.directmag.com/ar/marketin.qmilwaukee_journal_sentinel), visited 10/25/02. *See also* Dial America Marketing, Inc., “Consumer Communications Success Stories: Nonsubscriber Acquisition Project for Cable Company,” found at [http://www.dialamerica.com/ConsumerCommunications/ConsumerCom\\_SuccessStories.htm](http://www.dialamerica.com/ConsumerCommunications/ConsumerCom_SuccessStories.htm), visited 10/25/02 (telemarketing service provider’s testimonial stating that a cable operator who used the provider’s services considered the 5% close rate obtained by the service provider through a targeted call campaign to be “extremely attractive”).

survey of 1,400 customers who purchased Cutco products between September 2 and October 10, 2002. Part I of that survey dealt specifically with the customers' level of satisfaction with the initial telephone call they had received from an independent Vector sales rep to set up the in-home presentation. Customers were specifically asked to rate their overall satisfaction with that phone call on a scale of 1 to 7 (with 1 being the lowest rating and 7 being the highest).

The survey garnered a relatively high (30%) response rate, and the results showed a very positive customer experience with the initial call: 93.2% of the respondents rated their overall satisfaction with the call positively at 5, 6 or 7 (10% rated their overall satisfaction with the call with a 5, 21.8% gave it a 6, and a remarkable 61.4% – nearly two-thirds of all respondents – rated the call at 7).<sup>13</sup>

The above facts clearly indicate that calls made by Vector's independent sales representatives – and the calls of other similarly situated direct sellers – simply are not **part** of the problem that the Commission is seeking to address.

**II. The Commission Should Provide An Exemption Or Safe Harbor For De Minimis Calling To Set Appointments, Or Adopt An Exemption Similar To The FTC'S "Face-to-Face" Exemption.**

Given the clear distinction between the nature of calls made by telemarketers and those made by direct sellers, any rules that may be adopted that are intended to address the very real problems associated with excessive telephone solicitations should identify clearly and

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<sup>12</sup> Each Vector representative makes approximately 1.9 telephone calls for each sales appointment made, and generally makes two in-home presentations for each completed sale.

<sup>13</sup> The survey and an analysis of the raw data it produced are attached as "Exhibit 4."

unambiguously the class of callers to whom the rules pertain and, similarly, should exempt from the rules such class or classes of callers who are not part of the problem – *i.e.*, who are not engaged in anonymous, high-volume telemarketing, but who use their telephones briefly, and solely, to make appointments in support of direct sales that are conducted and completed through face-to-face meetings with potential customers. A set of rules that recognizes the difference between high-volume telemarketing and the *de minimus* call volumes necessary to set up face-to-face appointments can address the problems associated with the former without sweeping away decades of direct-selling traditions and legitimate commercial speech practices – not to mention thousands of jobs – associated with the latter.

Vector urges the Commission to create an exemption or “safe harbor” in any rules it may adopt for those whose use of the telephone is merely an incidental, albeit necessary, component of their jobs as independent sales representatives for direct-selling companies and/or who average fewer than a fixed number of calls per day.<sup>14</sup> For example, such a safe harbor might exempt from the Commission’s rules “any caller who uses a telephone, other than a telephone located at a telemarketing call center, for the sole purpose of making an appointment for a face-to-face meeting, and who does not make more than 20 such calls in a single day.” Such a safe harbor would not apply to calls made by home-based telemarketers who use their own phones to conduct over-the-phone (as opposed to face-to-face) sales presentations or to make any other kind of high volume calls on behalf of telemarketers. Alternatively, the FCC might adopt an exemption similar to the “face-to-face” exemption currently contained in the FTC’s Telemarketing Sale Rule, which exempts “[t]elephone calls in which the sale of goods or

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<sup>14</sup> Vector notes that its own sales force averages fewer than 8 calls per representative per day during its season of peak activity (summer).

services is not completed, and payment or authorization of payment is not required, until after a face-to-face sales presentation by the seller.”<sup>15</sup>

**III. Failure To Provide An Appropriate Exemption For Direct Sellers And Others Who Make A *De Minimus* Number Of Calls To Set Appointments Would Render National Do-Not-Call Rules Unconstitutional Under The *Central Hudson* Standard.**

The Commission has asked whether creation of a national do-not-call list and imposition of associated obligations would satisfy the standard for determining, under the First Amendment, the constitutionality of restrictions on commercial speech that was articulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,<sup>16</sup> “including the requirement that the regulation be narrowly tailored to ensure that it is no more extensive than necessary to serve the governmental interest.”

As the Commission has noted, *Central Hudson* sets out a four-part test to determine whether restrictions on commercial speech can survive “intermediate scrutiny.”\* The four-part test asks first whether the speech in question is illegal or misleading, in which case the government may freely regulate it. If the speech is not illegal or misleading, the government must show, under *Central Hudson*’s second prong, a substantial interest in regulating the speech.

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<sup>15</sup> 16 C.F.R. 310.6(c).

<sup>16</sup> *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980) (hereinafter *Central Hudson*).

<sup>17</sup> NPRM at ¶ 50, quoting *Central Hudson* at 565-66.

<sup>18</sup> *Id.* at ¶ 12, citing *Central Hudson* at 564-65. “Intermediate scrutiny” refers to the level of judicial scrutiny that will be applied to a regulation that restricts free speech in cases where the speech that the government seeks to restrict is entitled to some protection, but less than full protection, under the First Amendment. See *Central Hudson* at 563, (noting that “[t]he Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression” (internal citations omitted)).

Third, the restriction must directly and materially advance the stated governmental interest; and, fourth, the regulation cannot be more restrictive than necessary to achieve the government's stated interest.

The TCPA, under which the Commission's rules - and any revisions to those rules - are promulgated, was not intended to regulate illegal or misleading activity. Rather, the TCPA was enacted to address consumer outrage over the proliferation of intrusive, nuisance calls from telemarketers and the invasion of residential subscribers' privacy resulting from the growing use of specific technologies and techniques designed to increase many fold the number of calls that telemarketers can make. Thus, to pass constitutional muster under *Central Hudson*, any TCPA regulations adopted by the Commission must be designed to further the stated government interest.<sup>19</sup>

By enacting the TCPA, Congress sought to attack the problem on two fronts: first, by imposing restrictions on the use of specific telephone equipment (autodialers, prerecorded voice messaging systems, and fax machines)<sup>20</sup> and, second, by directing the Commission to conduct a rulemaking proceeding to evaluate various methods and procedures - including the possible use of a national do-not-call list - "to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object."<sup>21</sup> Thus, the government's

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<sup>19</sup> See Section 2 of the TCPA ("Findings"), which notes the growing number of telemarketing calls (findings 1 - 4), notes the intrusive, privacy-invading and "nuisance" nature of such calls, as well as consumer outrage over the proliferation of such calls (findings 5 - 6), and cites automated and prerecorded calls as a nuisance and invasion of privacy that must be controlled (findings 9 - 10, 12 - 14).

<sup>20</sup> 47 U.S.C. §227(b)

<sup>21</sup> 47 U.S.C. §227(c).

interest in creating a national do-not-call list and imposing related obligations is to protect consumers' privacy in the face of technologies and techniques that are multiplying the number of nuisance calls being made.

Vector takes no position for purposes of these comments as to whether the stated governmental interest is substantial enough to pass the second prong of the *Central Hudson* test, but will assume for the sake of argument that it will stand up under scrutiny. That said, Vector believes that a requirement of compliance with a national do-not-call registry, as applied to Vector and similarly situated companies, would violate both the third and fourth prongs of the *Central Hudson* test.

First, such a requirement, if applied to companies like Vector, would not directly and materially advance the government's interest. As Vector has shown, the number of calls that Vector's representatives make is *de minimus* relative to the high-volume calling that is carried out by telemarketers, and Vector's reps have not changed their calling patterns so as to increase the number of calls made by individual representatives in over fifty years. Thus, to the extent that the government seeks to curb the excesses brought about by a dramatic increase in the number of calls made to consumers, the contemplated restriction on commercial free speech, as applied to companies like Vector, would not directly or materially advance the government's interest because Vector's reps are not high-volume callers.

As has been previously discussed, Vector's reps and the representatives of other direct selling companies with similar marketing models do not use autodialers, prerecorded voice messaging systems, or fax machines to set up their appointments, but, rather, rely on the use of their telephones to set appointments in the same manner as any other business person uses a telephone for business purposes. Therefore, to the extent the government seeks to address the

“nuisance” and “privacy” factors in unwanted calls, the restriction (as applied to companies like Vector) does not directly and materially advance the government’s interest because Vector’s calls are not random or anonymous, but are placed only to friends, relatives and personal referrals who – by the nature of the relationship between the caller and the called party – do not object to being called, and whose privacy rights are in no way compromised by the call.

Nevertheless, even if we assume that a rule requiring compliance with a national do-not-call list can survive intermediate scrutiny under the third prong of *Central Hudson*, such a rule would have to be narrowly tailored to ensure that it is no more excessive than necessary to achieve the government’s interest, or it cannot stand under the fourth prong. A rule that would require a college student to incur the expense and endure the burden of checking a national database before placing a call to her aunt, her cousin that she hasn’t spoken to in three years but whom her mom recommends she call, her next-door neighbor or the lady three blocks over whom she’s never met but who’s a good friend of her sister simply cannot be expected to stand up under scrutiny, yet that is precisely what a do-not-call list would require, if applied to Vector and other similarly situated direct selling companies.

Vector believes that “narrowly tailored,” in the context of a national do-not-call list, demands an exemption for direct sellers and others who make a *de minimus* number of calls to set up appointments in connection with their work. As discussed above, Vector’s sales representatives and others who would fall within a narrowly tailored exemption simply do not fit the profile of the high-volume telemarketers who have created the nuisance and consumer privacy problems which the government has a legitimate interest in curtailing. Imposing restrictions on these students’ ability to call their family members, friends, neighbors and personally-referred (not “cold-called”) contacts to *make* appointments for in-home visits would

be to impose a rule that is, indeed, “more extensive than is necessary to serve the governmental interest.”

**IV. A De Minimis-Use Exemption Would Aid The Commission In Balancing The Advantages Of A National Do-Not-Call Registry Against Its Disadvantages. Especially For Local and Small Businesses.**

In seeking to balance the advantages of a national do-not-call list against its possible disadvantages, the Commission specifically requested information and comment regarding “the potential costs of establishing and maintaining a national do-not-call database, the burdens on telemarketers of compliance with a national do-not-call database, and whether there should be any distinction on a national, regional, state, or local level or for small businesses.”<sup>22</sup>

As noted above, Vector’s direct sales representatives are primarily college students. Other direct-selling organizations also engage college-level sales representatives, persons who are between jobs, or homemakers seeking to earn extra cash for a specific item, for holiday spending, or simply to make ends meet. Most of these individuals engage in direct selling for short periods of time (*e.g.*, for seasonal or holiday work, or until they find a permanent position). The earnings they derive from direct selling is therefore quite low relative to the rest of the labor market.

Few if any of the individuals engaged in direct selling activities, many of whom work as independent contractors or sole proprietors of home-based businesses, and who are thus perhaps the smallest of “small businesses,” are in a position to be able to afford expensive computers with database-management software, or to afford fees associated with purchasing lists (the average annual cost for state do-not-call lists is approximately \$200). They can hardly be

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<sup>22</sup> NPRM at ¶ 52

expected to be in a position to contribute to the maintenance of a national do-not-call registry. Most if not all of these workers, if faced with the need to comply with burdensome regulations or to shell out fees to a regulatory agency in order to obtain the opportunity to earn a little extra cash and gain some sales experience, would simply forego the opportunity. To impose such burdens on this class of worker, in all likelihood, would wipe out an entire – and legitimate – method of direct, face-to-face selling that pre-dates any of the telemarketing techniques that the Commission is seeking to curb.

Therefore, creating an exemption from any TCPA regulations the Commission may adopt that is reasonably related to the telecommunications needs of these workers would balance the Commission's need to curb the excesses of telemarketers against the disadvantages of imposing national do-not-call rules, and would preserve a vibrant direct selling industry that is rooted in very local – and personal – business contacts.

**V. Any Public Awareness Campaign Associated With A National Do-Not-Call List Must Apprise the Public of Exempted or Excluded Classes of Callers.**

The Commission is also seeking comments on the Congressionally-mandated requirement that common carriers that provide telephone exchange service would have to inform their subscribers of the opportunity to object to telephone solicitations by registering with a national do-not-call list, if the FCC adopts such a list.<sup>23</sup>

Vector would like to point out that any campaign to inform the public about a national do-not-call list, whether mandated or voluntary, must include a clear identification of any entities, types of call, etc., exempted from the rule(s). Otherwise, consumers are likely to experience dramatically increased levels of confusion, frustration and irritation if, after listing

their numbers on a national do-not-call registry in the belief that they will not receive any further calls, they receive legitimate calls from a member of an exempted class of caller (e.g., calls from tax-exempt nonprofits, which are statutorily excluded from the Commission's rules under the TCPA).

**VI. As An Alternative To A *De Minimus* Exemption, The FCC Should Use Its Authority Under The TCPA *Only* To Extend Any Rules Adopted By The FTC To Those Entities Not Covered By The FTC's Jurisdiction.**

The Commission has asked for comments on the options for possible FCC action in light of the FTC's proposal to adopt a nationwide do-not-call list.<sup>24</sup> Specifically, the FCC has asked whether it should use its authority under the TCPA to extend any national do-not-call requirements that may be adopted by the FTC to those entities that fall outside the FTC's jurisdiction.”

Vector believes that, as an alternative to (or in addition to) a *de minimus* exemption, the Commission should use its TCPA authority *only* to extend such rules as the FTC may adopt to entities that are excluded from the FTC's jurisdiction,<sup>26</sup> and refrain from promulgating a separate set of national do-not-call rules of its own.” As noted in the introductory section of these comments, we advocate this alternative approach under the assumption that such rules as the FTC may ultimately adopt with respect to the obligation to comply with a national do-not-call list preserve the face-to-face exemption in the FTC's current rules.

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Continued from previous page

<sup>23</sup> NPRM at ¶ 54.

<sup>24</sup> NPRM at ¶ 49.

<sup>25</sup> *Id.* at ¶ 55.

<sup>26</sup> Namely, banks, common carriers, insurance companies, and other entities specifically enumerated in the Federal Trade Act. See 15 U.S.C. § 45(a)(2).

<sup>27</sup>

Vector suggests that if the FCC were to take such an approach, the Commission would thereby create a complementary regulatory scheme that would not cause confusion or undue burdens for those entities that may otherwise be made subject to the jurisdiction of both agencies and, consequently, would have to comply with two sets of regulations governing the same activity (i.e., the use of telephones in connection with sales and marketing). We note that the FCC has broad authority to exercise jurisdiction over entities other than communications common carriers for purposes of the TCPA under §503(b) of the Communications Act of 1934, as amended (the “Communications Act”), but that the exercise of such authority is discretionary.<sup>28</sup>

**VII. The Commission Should Ensure That Any Entities Which Must Comply With The Requirements Of Any Do-Not-Call List Need Only Comply With One List, And Not Fifty Or More Separate Lists.**

Finally, the Commission has asked what relationship a national do-not-call list should have to state do-not-call lists. In the event the Commission decides to establish a nationwide do-not-call list in conjunction with the FTC.<sup>29</sup>

Vector reiterates its strong objection to any list and accompanying rules that would burden Vector’s sales representatives. Nevertheless, if such a list is established, Vector makes the following recommendations:

Vector takes no position on whether the Commission’s proposed rules should go so far as to preempt state rules with respect to state do-not-call lists, but Vector strongly urges the Commission to take all appropriate steps to ensure that entities that are in full compliance with the Commission’s rules – including entities specifically exempted from, and by, such rules – do

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<sup>28</sup> See 47 U.S.C. §503(b)(3).

<sup>29</sup> NPRM at ¶ 61.

not become subject to a confusing and unworkable patchwork of 50 or more sets of state do-not-call rules.

To this end, Vector supports the Commission's proposal to create a mechanism whereby states may voluntarily "opt-in" to a joint federal/state regulatory scheme. Vector suggests that a central component of such a scheme should be a "one rule" provision by which an entity will be entitled to a presumption of compliance with any participating state's rules, or the federal rules, if that entity can show that it is in compliance with (or meets the requirements for exemption from) any one set (state or federal) of do-not-call rules.

## CONCLUSION

Vector and other similarly situated direct selling companies are not part of the problem that the Commission is attempting to address. Therefore, any rules that the Commission may adopt should reflect the difference between high volume telemarketers and persons who use their telephones to make a *de minimus* number of calls for the sole purpose of setting up face-to-face appointments. A national rule that does not include such an exemption is not likely to survive intermediate scrutiny under *Central Hudson* because it will be far more extensive than necessary to serve the government's interest. On the other hand, a national rule that does include such an exemption will help to balance the advantages of a national rule against its adverse effects on local and small businesses. Any public awareness campaign should also foster public understanding regarding exempt calls and callers.

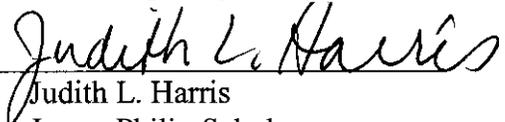
As an alternative to a *de minimus-use* exemption, the Commission should use its TCPA authority only to extend whatever rules the FTC may adopt to those entities that are not

covered by the FTC's jurisdiction, and should refrain from creating a separate set of national do-not-call rules applicable to entities who are subject to both the FTC's and the FCC's jurisdiction.

Finally, the FCC should exercise all appropriate means to ensure that entities who must comply with a national do-not-call list (or are exempted from compliance) are not compelled to comply with 50 or more separate, and conflicting, state regulations as well.

Respectfully submitted,

Vector Marketing Corporation,

By:   
Judith L. Harris  
James Philip Schulz

REED SMITH, LLP  
1301 K Street, NW  
Suite 1100 – East Tower  
Washington, DC 20005  
(202) 414-9234

Its Attorneys

## CERTIFICATE OF SERVICE

I hereby certify that I have this 9<sup>th</sup> day of December 2002, caused copies of the foregoing "Comments of Vector Marketing Corporation" to be served by first class mail, postage prepaid on the following:

Michael K. Powell, Chairman  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

Margaret Egler  
Assistant Bureau Chief  
Consumer And Government Affairs Bureau  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

Kathleen Q. Abernathy, Commissioner  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

K. Michelle Walters  
Chief, Policy Division  
Consumer And Government Affairs Bureau  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

Michael J. Copps, Commissioner  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

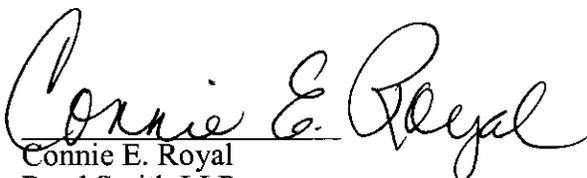
Erica McMahon  
Attorney Advisor  
Consumer And Government Affairs Bureau  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

Kevin J. Martin, Commissioner  
Federal Communications Commission  
445 12<sup>th</sup> Street, N.W.  
Washington, D.C. 20554

Richard Smith  
Attorney Advisor  
Consumer And Government Affairs Bureau  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20054

Jonathan S. Adelstein, Commissioner  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

K. Dane Snowden  
Chief, Consumer And Government Affairs Bureau  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

  
Connie E. Royal  
Reed Smith LLP