

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

By Thomas M. Pechnik

I wish to address just a few issues raised in the comments that have been filed in the matter of

BLOCKING OF CALLER ID INFORMATION

There seems to be general agreement on both sides of the issue that telemarketers should not be permitted to block caller ID information or otherwise disguise the origin of solicitation calls. There is, however, some disagreement as to what telephone number should be indicated in the Caller ID information. It must be remembered that the caller ID information is in no way related to the existing identification requirements contained in the TCPA. That requires identification of the entity on whose behalf the call is made. Thus, the actual origin of the call would seem to be the logical information to be conveyed through the caller ID information. If it happens that the calls are being made in-house, then so much the better. If it happens to be a third party caller, I see no problem with requiring that the actual phone number initiating the call, or any of the bank of numbers used for the purpose of making these outgoing calls be provided. But, it should be imperative that the number provided must be traceable by an average telephone customer, or if called, must be connectible to a live person to handle inquiries or complaints. The name provided on the caller ID display could be that of the calling entity or of the entity actually placing the call.

INDUSTRY'S RIGHT TO FREE SPEECH

Most of the comments by businesses or business organizations or trade groups ask the commission to balance the public's right to privacy with the industry's right to free speech. Unfortunately for the industry, no balancing need be done. All the appellate courts that have heard the issue have decided that there is no first amendment right that is violated by the provisions of the TCPA. Courts do, however recognize the right of citizen's to enjoy and control their own privacy. Further, it is not the Commission's province to strike a balance between the two competing sides. Congress has that chore. They have spoken and have given the Commission the task of developing a scheme of regulations that obey their mandate as spelled out in the code. If there is a constitutional challenge that must be met, it is the Congress's actions and not the Commission's that is under attack.

Several commentators discuss the issue of an acceptable rate of 5% for abandonment of telemarketing calls. Some propose that a prerecorded message be left when a call is attempted but no live telemarketer is available to take the call. Both suggestions fail a cursory look at the legality under the current state of the law.

ABANDONED CALLS

The Direct Marketing Association (DMA) suggests an abandonment rate of as close to 0 as possible but not to exceed 5% over the period of a month.

Several problems exist with this suggestion: First of all, any abandoned call violates the present regulations. The Commission has pointed out in its "Consumer Alert: Silence at the Other End of the Line" that a hang-up call does not permit a citizen the opportunity to request to be placed on the company's Do-Not-Call list nor to ask for a copy of the Do-Not-Call list maintenance policy. Further, hang-up calls do not contain the requisite identification required under the regulations. The DMA states that they feel that their 5% abandonment rate is an acceptable balance between the consumer's rights and the economic efficiency of the telemarketing entity. No balance need be made because the telemarketer has no right to be permitted to engage in an unlawful practice in the sake of its efficiency. The DMA provides no statistics at all for its proposal. Other commentators have simply said that they agree with the DMA's proposal. I have actual statistics to back up my assertion that only an abandonment rate of 0 is acceptable. In a sample of 1 consumer, I, personally, am very disturbed every time I get an abandoned call and do not wish to receive more. Other commentators have also, independently, asserted that only a 0 abandonment rate is acceptable. I am sure they can provide similar statistics to back up their assertions. My experience has been that I get approximately 2 - 3 hang-up calls per week out of approximately 10 telemarketing calls per week.

This is a far cry from the DMA's proposal and several of the commentators' assertions that their abandonment rates are "reasonable". And this does not include the calls received when I am not at home and no message is left on my answering machine. I note that the American Telemarketing Association estimates that approximately 65% of the telemarketing calls placed do not reach the consumer. These calls are either not answered, reach an answering machine, are busy, or are abandoned calls or hang-ups. In most cases the calls are in violation of the TCPA identification requirements. Any commentator who reports statistics or experience to "confirm" the cost effectiveness of predictive dialers has essentially admitted to making unlawful calls.

It should be pointed out that any abandoned call is a conscious decision on the part of the initiator to ring a consumer's phone, cause him or her to answer the phone, and intentionally to disconnect. Since no operator was available at the time the call was initiated, even though the purpose of the call was to perform a solicitation, the actual result of the call is harassment. Further, since no live operator was available at the time there could have been no opportunity, lawfully, to comply with the TCPA identification requirements.

DEMAND FOR DNC MAINTENANCE POLICIES

The DMA prides itself that its 1,500 members are legitimate, ethical telemarketing firms. I challenge that assertion. The "Report Card on Compliance with the Telephone Consumer Protection Act of 1991 by Top Companies in the Telemarketing Industry" reported that most firms did not have a required written DNC maintenance policy. Of those that had a policy, most of the policies did not comply with the TCPA requirements. I hereby challenge the DMA to demand, on my part, from each of its members who engage in telemarketing, a copy of their DNC maintenance policy. The policies should be sent to me at my home address: 9451 State Road, North Royalton, Ohio 44133-1925. I further request a list of the DMA members who engage in telemarketing and their contact information so that I may personally select which companies I wish to include my residential telephone number on their company specific do-not-call lists.

In summary, the existing regulations need only be clarified on several points and strengthened in the area of identification of telemarketers who violate the TCPA.

Respectfully submitted:
Thomas M. Pechnik

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