

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of:	)	
	)	
CONSUMER BANKERS ASSOCIATION	)	CG Docket No. 02-278
	)	
Petition for Expedited Declaratory Ruling with	)	
Respect to Certain Provisions of the Indiana	)	
Revised Statutes and Indiana Administrative Code	)	

**STATE OF INDIANA'S COMMENTS IN OPPOSITION  
TO THE CONSUMER BANKERS ASSOCIATION'S  
PETITION FOR DECLARATORY RULING**

STEVE CARTER  
Attorney General of Indiana  
Thomas M. Fisher  
Deputy Attorney General

Office of the Attorney General of Indiana  
Indiana Government Center South, 5<sup>th</sup> Floor  
302 West Washington Street  
Indianapolis, Indiana 46204  
Telephone: (317) 232-6201  
Telecopier: (317) 232-7979

**TABLE OF CONTENTS**

SUBMISSION OF COMMENTS .....	1
INTRODUCTORY STATEMENT .....	1
SUMMARY OF ARGUMENT .....	2
ARGUMENT .....	4
I.    The Federal Communications Act Of 1934 Does Not Preempt State Consumer Protection Laws Regulating Interstate Telephone Calls .....	4
A.    FCA Preemption Cases Relate Only to the Regulation of Telephone Facilities and Service, Not to Consumer Protection Against Unfair or Deceptive Interstate Calls .....	5
B.    The Rationale For the FCA is Not Frustrated by State Laws, Including Do-Not-Call Laws, That Apply to Interstate Calls.....	9
II.   Particularly Because Under the FCA States Retain Jurisdiction to Regulate Abusive Interstate Telephone Calls, The TCPA Cannot be Understood to Preempt or Authorize Preemption of State Do-Not-Call Laws.....	11
A.    The Commission’s July 3, 2003, Report and Order Misunderstood State Consumer Protection Enforcement Relating to Telephone Calls, And the Proper Understanding of That Role Undermines the Rationale of Preemption Arguments.....	11
B.    Court Doctrine, the TCPA and Other Federal Laws Foreclose Preemption.....	13
1.    Federal Doctrine Mandates a Presumption Against Preemption .....	13
2.    The Text and History of the TCPA Preclude Preemption .....	14
3.    Other Federal Enactments and Legislative History Demonstrate That Congress Intended Not to Preempt Any Applications of State Do-Not-Call Laws .....	18

III. Preempting Indiana’s Telephone Privacy Law Would Unjustifiably Curtail Important Regulatory Experimentation Concerning a Relatively New Consumer Issue and Frustrate the Settled Privacy Expectations of Indiana Citizens .....	19
CONCLUSION.....	25

## **SUBMISSION OF COMMENTS**

Subject to and without waiving either its motion to dismiss filed January 24, 2005, or its immunity from suit in this federal forum, the State of Indiana, by its Attorney General, respectfully submits these comments in opposition to the Consumer Bankers Association's Petition For Declaratory Ruling, filed November 19, 2004.

## **INTRODUCTORY STATEMENT**

Indiana has one of the most comprehensive and effective do-not-call laws in the nation. Our law protects over 59% of Indiana's residential phone numbers from unwanted telemarketing calls, and it has achieved a very high level of success. *See* Ind. Util. Reg. Comm'n 2004 Tel. Report to the Regulatory Flexibility Comm. of the Ind. Gen. Assembly 5 (2004) (hereinafter Tel. Report). According to a scientific survey commissioned shortly after Indiana's law became enforceable, telemarketing calls on average declined from 12.1 per week to 1.9 per week for registered telephone subscribers, a decline of over 80%. (*See attached* Exhibit A, Tom W. Smith, Nat'l Opinion Research Ctr., University of Chicago, An Analysis of the Indiana Telephone Privacy Survey Table 1 (2002)). Furthermore, 97.8% of Hoosiers on the list surveyed reported that they receive "less" or "much less" telemarketing calls now, with 86.6% of them reporting "much less." *Id.* at Table 2. As a result, over the past three years Indiana's citizens have come to expect a high level of residential privacy, and they have a particularly low tolerance for telemarketing calls of any sort.

One of the key reasons Indiana's do-not-call law is so effective is that the General Assembly has kept statutory exemptions to a minimum. In particular, while the Commission's do-not-call rule and the do-not-call laws of other states permit businesses to telemarket to registered telephone subscribers with whom they have a prior or existing business relationship

(or a so-called “EBR exemption”), Indiana’s Telephone Privacy Act provides no such exemption. *See* Ind. Code § 24-4.7 *et seq.* Instead, Indiana’s law prohibits sales calls to existing customers unless the telephone subscriber expressly consents in advance. This common-sense rule both provides consumers with the ability to permit calls from selected businesses and also protects them from unwittingly yielding their residential privacy to an infinite number of businesses and their affiliates with every purchase or product inquiry.

While the CBA and other telephone solicitors wish for the FCC’s comparatively porous do-not-call rules to allow them to disturb consumers more often with unwanted calls, their arguments for preemption have no basis in the law and would lead to bad result for the citizens of Indiana and the nation as a whole. National telephone privacy policy, which is a function not only of the Telephone Consumer Protection Act of 1991 but also the Federal Communications Act of 1934 and other federal statutes, does not itself preempt, and does not authorize the FCC to preempt, application of state telephone privacy laws to interstate calls. And regardless, Indiana should be permitted to maintain tougher telephone privacy laws in order to protect more completely the residential privacy that its citizens value so highly. As with all the best state regulatory experiments, Indiana’s law does not interfere with any federal programs or put the citizens of any other state at risk of overregulation. In fact, Indiana’s program provides individual citizens with the proper tools to find just the right balance between privacy and market access without affecting the rights of other citizens. The Commission should not interfere with Indiana’s bold effort to empower its citizens in this way.

### **SUMMARY OF ARGUMENT**

State laws are entitled to a presumption that they have not been preempted by federal law, and a federal agency may not preempt state law if it has no authority to do so. No such authority

exists here. With respect to national telemarketing policy, Congress has expressed its intent to permit a cooperative state-federal regulatory scheme through a series of enactments going back to the Federal Communications Act of 1934. Through the FCA, Congress largely allocated to the federal government the responsibility for regulating the provision of interstate telecommunications services, but it did not purport to interfere with the application of state consumer protection regulations to interstate telephone calls. Cases applying the FCA support this view, as do comments from the Commission itself concerning the FCA. This proper understanding of the FCA undermines the legal theories advanced by the Commission and others for preemption under the Telephone Consumer Protection Act of 1991, arguments that generally presume the inability of states to apply their consumer protection laws to interstate calls under the FCA.

The text and history of the TCPA also demonstrate that Congress did not contemplate preemption of any state telemarketing regulations regardless of whatever telemarketing rules the FCC might ultimately promulgate. The plain text of TCPA section 227(e)(1)(D) expressly states that the TCPA does not preempt state laws “which prohibit[] . . . the making of telephone solicitations,” and Congress in fact *discarded* proposed TCPA language that would have expressly preempted state telephone privacy laws as applied to interstate calls. Perhaps equally as conclusive, the TCPA expressly speaks of what a state must do “*in its regulation of telephone solicitations*” after the Commission promulgates a do-not-call rule, requiring *only* that a state in that circumstance include the federal list (designed “for purposes of administering or enforcing state law,” 47 U.S.C. § 227(c)(3)(J)) that relates to that state. 47 U.S.C. § 227(e)(2) (emphasis added). Furthermore, the Do-Not-Call-Implementation Act of 2003, which requires an FCC report concerning the FCC’s coordination with the states, implies that states will continue to

enforce their own laws. Pub. L. No. 108-10. Even congressional debates concerning the Federal Trade Commission's do-not-call authority make it clear that Congress did not intend for stronger state laws to be preempted by either federal do-not-call program. Under these circumstances, the Commission cannot reasonably infer the authority to preempt Indiana's law.

Preempting Indiana's more stringent telephone privacy law would be bad consumer policy. The citizens of Indiana value their residential privacy very highly, and they are bothered every bit as much by unwanted calls from businesses they have patronized in the past as they are by calls from other businesses. Fortunately, our federalist structure permits Indiana to provide its citizens with more protections in this regard without interfering with the application of less stringent regulations in other states. This arrangement promotes and protects individual liberty, and it is a routine part of corporate life in America to comply with more than one type of business regulation. Because telephone numbers are assigned geographically (by area code), compliance is not particularly onerous here. In fact, telemarketers have adjusted to Indiana's law over the past three years, and over those same three years Indiana's citizens have come to expect that telemarketers simply will not bother them. A preemptive EBR exemption would frustrate these settled expectations in Indiana more than in other states, and for no good reason. The Commission should side with individual liberty and privacy and permit Indiana to continue unfettered with its own highly successful telephone privacy experiment.

## **ARGUMENT**

### **I. The Federal Communications Act Of 1934 Does Not Preempt State Consumer Protection Laws Regulating Interstate Telephone Calls**

Though the CBA's petition does not expressly raise this point, the argument that the TCPA either preempts state do-not-call laws as applied to interstate calls or authorizes the FCC to preempt such applications generally proceeds from the erroneous assumption that state

regulation of interstate calls in this manner is already problematic under the Federal Communications Act of 1934 (FCA). In fact, when the FCC was initially considering the adoption of a do-not-call registry, businesses that engage in telemarketing made exactly this argument. (*See* In re Rules and Regulations Implementing Telephone Consumer Protection Act of 1991, Further Notice of Proposed Rulemaking, comments of Intuit Inc. at 3 (Ct. Docket No. 02-278) (filed with the FCC May 3, 2003); WorldCom Reply Comments at 27 (Ct. Docket No. 02-278) (filed with the FCC Jan. 31, 2003)). However, as the Indiana Attorney General observed then, the authority for this proposition is notably thin, and indeed there is no basis for concluding that the FCA preempts all state laws from applying to interstate telephone calls. Reply Comments and Recommendations of the Attorney General of Indiana at 4-5 (Ct. Docket No. 02-278) (filed with the FCC May 9, 2003). Because of the implications this point has for the CBA's preemption demand under the TCPA, it is important to briefly review these issues.

**A. FCA Preemption Cases Relate Only to the Regulation of Telephone Facilities and Service, Not to Consumer Protection Against Unfair or Deceptive Interstate Calls**

Case law shows that the preemptive impact of the FCA relates to the regulation of interstate telephone *facilities and service*. *See Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 746 F.2d 1492, 1498-99 (D.C. Cir. 1984) ("*NARUC*"); *North Carolina Utils. Comm'n v. FCC*, 537 F.2d 787, 791-94 (4<sup>th</sup> Cir. 1976) ("*NCUC*"); *Ivy Broad. Co. v. AT&T*, 391 F.2d 486, 491 (2d Cir. 1968).

In *NARUC*, for example, the court upheld the FCC's regulation of WATS facilities that were used as part of an interstate network, even though the facility itself was intrastate. 746 F.2d at 1499. The court ruled that "purely intrastate *facilities and services* used to complete even a single interstate call may become subject to FCC regulation to the extent of their interstate use."

*Id.* at 1498 (emphasis added). It stressed that “[t]he Communications Act thus explicitly creates FCC jurisdiction over all ‘facilities’ and ‘services’ used at any point in completing an interstate telephone call.” *Id.* at 1499. The focus of the case was on who could regulate the *facility* and *service* of a WATS network, not on who could protect consumers’ residential privacy from unwanted interstate calls. Do-not-call laws do not regulate facilities and services; they regulate unwanted calls.

Similarly, *NCUC* merely ruled that only the FCC, and not a state regulatory body, could regulate “the interconnection of customer-provided equipment to the customer’s individual subscriber station and line . . . .” 537 F.2d at 790. As in *NARUC*, the only type of regulation at stake had to do with communications facilities and interconnections—the physical means for providing interstate calls. And the *NCUC* court was plainly concerned only with the FCC’s “plenary jurisdiction over the rendition of interstate and foreign communication services that the Act has conferred upon it.” *Id.* at 793. Again, do-not-call laws have nothing to do with the “rendition” of interstate telephone service. They have to do only with stopping unwanted calls, no matter where they originate.

*Ivy Broadcasting* merely ruled that putative state law claims for negligence and breach of contract in the provision of interstate telephone service actually stated federal common law claims that preempted the state claims. 391 F.2d at 490-91. The court stated its holding very narrowly: “questions concerning the duties, charges, and liabilities of telegraph or telephone companies with respect to interstate communications service are to be governed solely by federal law . . . .” 391 F.2d at 491.

Notably, if *Ivy Broadcasting* is understood to have found complete preemption based on federal common law, that position has now been rejected by the Second Circuit itself. *See*

*Marcus v. AT&T Corp.*, 138 F.3d 46, 54 (2d Cir. 1998) (“we believe that federal common law does not completely preempt state law claims in the area of interstate telecommunications”). Other courts have also ignored or rejected *Ivy Broadcasting* because it did not account for the savings clause provided in 47 U.S.C. § 414 (providing that “[n]othing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies”). See, e.g., *Cellular Dynamics, Inc. v. MCI Telecomms. Corp.*, No. 94-C-3126, 1995 WL 221758, \*3 (N.D. Ill. April 12, 1995) (stating that “[c]ourts to address this issue since *Ivy* have generally held that Congress’ decision to include a savings clause in the Act evidences its desire to preserve those state court claims for breaches of independent duties that neither conflict with specific provisions of the Act, nor interfere with its regulatory scheme,” and collecting cases); *Coop. Communications, Inc.*, 867 F. Supp. at 1516 (holding that section 414 preserves “state law causes of action, such as interference with contract or unfair competition”).

However, in light of *AT&T Co. v. Central Office Telephone, Inc.*, 524 U.S. 214, 224-25 (1998) (holding that state claims addressing services addressed in tariffs are preempted under the filed-rate doctrine), *Ivy Broadcasting* may best be understood as a filed-rate doctrine case. And in the current de-tariffed regulatory environment, the FCA’s preemption of state law claims by virtue of the filed-rate doctrine ceases to exist. Significantly, in the process of ordering de-tariffing, the FCC (in its Order on Reconsideration, 12 FCC Rcd. 15,014, 15,057 (¶ 77) (1997)), stated that “the Communications Act does not govern other issues, such as contract formation and breach of contract, that arise in a de-tariffing environment. . . . [C]onsumers may have remedies *under state consumer protection laws* as to issues regarding the legal relationship between the carrier and customer in a de-tariffed regime.” In re Policy and Rules Concerning the

Interstate, Interexchange Marketplace, CC Docket No. 96-61, Order on Reconsideration, 12 FCC Rcd. at 15,057 (¶ 77) (emphasis added).

Thus, as the FCC's own comments make clear, neither *Ivy Broadcasting* nor any other authorities stand for the proposition that the FCA preempts all state law claims that may affect interstate calls. *See also In re Petitions of Sprint PCS and AT&T Corp.*, FCC 02-203, 17 FCC Rcd. 13,192, 13,198 n. 39 (FCC July 3, 2002).<sup>1</sup> Among the state laws that are not preempted are, for example, laws that forbid telephone harassment as well as unfair, deceptive, or fraudulent sales pitches by way of interstate telephone calls. Indeed, one court has suggested that, even if a state may not increase a common carrier's regulatory burden by requiring it to report the interstate obscene calls of its customers, the state could prosecute the common carrier if the carrier itself was the source of the interstate obscene calls. *Sprint Corp. v. Evans*, 818 F. Supp. 1447, 1458 (M.D. Ala. 1993). "In that situation," the court observed, "the common carrier would be acting as the information provider rather than solely as a common carrier." *Id.* That is the model of do-not-call laws: those who violate them are not acting as common carriers, so there is no basis for inferring FCA preemption.

---

<sup>1</sup> Notably, at least two circuits appear to be in conflict over whether the FCA preempts a state law unconscionability challenge to an arbitration clause in a telecommunications services agreement. Contrast *Ting v. AT&T*, 319 F.3d 1126 (9<sup>th</sup> Cir. 2003), *cert. denied*, 540 U.S. 811 (concluding that such preemption does not exist) with *Boomer v. AT&T Corp.*, 309 F.3d 404 (7<sup>th</sup> Cir. 2002) (concluding that such preemption exists). But any such preemption is specific conflict preemption and has no bearing here. Indeed, the Seventh Circuit in *Boomer* acknowledged that "under the new detariffed regime federal law no longer completely preempts state law." *Boomer*, 309 F.3d at 424. Thus, there is no complete preemption even for purposes of law affecting the terms and conditions of telecommunications services, which, again, is a species of law wholly distinct from do-not-call laws. Do-not-call laws are even less subject to field preemption arguments because they do not affect the provision of telecommunications services.

**B. The Rationale For the FCA is Not Frustrated by State Laws, Including Do-Not-Call Laws, That Apply to Interstate Calls**

When considering whether the FCA preempts a particular state law cause of action, courts have consistently observed that the reason to be concerned with such preemption is to prevent state laws from interfering with the FCA’s goal of providing a uniform, efficient telecommunication services. *Ivy Broadcasting* observed that the reason for its holding was that “[o]ne of the stated purposes of the Communications Act was to make available to the people of the United States a rapid, efficient, nationwide communications service with adequate facilities at reasonable prices.” *Ivy Broadcasting*, 391 F.2d at 490 (citing 47 U.S.C. § 151). *See also, e.g., NARUC*, 746 F.2d at 1499 (“As we have said before, Congress did not intend to allow ‘inconsistent state regulations [to] frustrate [its] goal of developing a ‘unified national communications service.’” (quoting *California v. FCC*, 567 F.2d 84, 86 (D.C. Cir. 1977))); *NCUC*, 537 F.2d at 791 (citing 47 U.S.C. § 151 as providing the express purpose of the Commission and thus the context for preemption analysis); *Cellular Dynamics, Inc.*, 1995 WL 221758, \*3 (“[T]he Communications Act is primarily concerned with the quality, price, and availability of the underlying service.”); *Coop. Communications*, 867 F. Supp. at 1516 (“In enacting the Communications Act, it is manifest that Congress intended to occupy the field of telecommunications, in order to make available to all people of the United States a rapid, efficient, reasonably-priced communications service, governed by one uniform regulatory scheme.”). *Cf. Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 370 (1986) (“To this degree, § 151 may be read as lending some support to respondents’ position that state regulation which frustrates the ability of the FCC to perform its statutory function of ensuring efficient, nationwide phone service may be impliedly barred by the Act.”) (emphasis added).

State do-not-call laws in no way threaten interference with Congress' goal of providing a rapid, efficient, reasonably priced national telecommunications service, even when applied to interstate calls. Do-not-call laws merely protect residential privacy from unwanted telemarketing calls. They do not regulate the provision of telephone service, the physical facilities of telephone service, or the price of telephone service, but instead permit residential telephone subscribers to hang virtual "no solicitation" or "do not trespass" signs on their phones in order to preserve their peace, and accordingly are not subject to FCA preemption. *See Indiana Bell Tel. Co. v. Ward*, No. IP 02-170-C H/K, 2002 WL 32067296, \*7 (S.D. Ind. Dec. 6, 2002) ("Because resolution of the fraud claims before the court will not affect federal regulation of telecommunications carriers, plaintiffs' claims are not preempted by the FCA."). To infer FCA preemption of state do-not-call laws would be like inferring that federal vehicle safety requirements preempt state negligent driving laws as applied to accidents caused by cars driven over state lines. Both types of laws address misuse of a lawful, otherwise-regulated instrument resulting in injury and cause no interference with the goals of the federal regulations. There is no basis for inferring preemption of either. *Cf. Ashley v. Southwestern Bell Tel. Co.*, 410 F. Supp. 1389, 1393 (W.D. Tex. 1976) ("Specifically, state tort law of invasion of privacy was not preempted by the federal law scheme, and no attempt was made to impose uniformity in this area of state law.").

Moreover, states have long enforced general consumer protection laws against interstate callers, and no one could plausibly say that this matrix of laws has disrupted the policies of the FCA. *See, e.g., People ex rel. Spitzer v. Telehublink Corp.*, 756 N.Y.S.2d 285 (N.Y. App. Div. 2003) (reviewing New York state law action against a Delaware corporation that sold a discount benefits package to customers throughout the United States by telephone calls from Montreal); *Commonwealth v. Events Int'l, Inc.*, 585 A.2d 1146, 1148, 1151 (Pa. Commw. Ct. 1991)

(ordering defendants to answer Pennsylvania Attorney General state consumer fraud action alleging that company telephoned Pennsylvania consumers from Florida to solicit fraudulent contributions). In its July 3, 2003, Report and Order, in fact, the Commission recognized that, with respect to consumer protection laws generally, “[t]he record . . . indicates that states have historically enforced their own state statutes within, as well as across state lines.” In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order, 18 FCC Rcd. 14014, 14062 ¶ 78 (2003).

If the FCA were understood to preempt state laws as applied to interstate telephone calls, it could mean preemption not just for do-not-call laws, but also other consumer protection and deceptive trade practice laws, and even of obscene call prohibitions (see, e.g., Ind. Code § 35-45-2-2). Suppose, for example that a caller in Ohio telephoned an Indiana resident every fifteen seconds for purposes of obscene harassment. There can be no question that Indiana could prosecute the caller, and there can further be no question that telephone harassment is exactly the abuse that the Indiana Telephone Privacy Act addresses. History clearly shows that where a state’s citizens are the victims of unfair, deceptive, intrusive and abusive practices, the state’s power to protect those citizens does not stop at the state line.

## **II. Particularly Because Under the FCA States Retain Jurisdiction to Regulate Abusive Interstate Telephone Calls, The TCPA Cannot be Understood to Preempt or Authorize Preemption of State Do-Not-Call Laws**

### **A. The Commission’s July 3, 2003, Report and Order Misunderstood State Consumer Protection Enforcement Relating to Telephone Calls, And the Proper Understanding of That Role Undermines the Rationale of Preemption Arguments**

As noted above, the Commission, in its July 3, 2003, Report and Order, initially observed that “[t]he record . . . indicates that states have historically enforced their own state statutes within, as well as across, state lines.” Report and Order, ¶ 78 (footnote omitted). However,

when discussing the possibility of preemption, the Commission erroneously stated that “We recognize that states traditionally have had jurisdiction over only intrastate calls, while the Commission has had jurisdiction over interstate calls.” *Id.* at ¶ 83 (footnote omitted). The Commission cited only two cases for this proposition, *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986), and *Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133 (1930). Both of those cases, however, had only to do with laws regulating the provision of telephone service, not with laws regulating abusive telephone calls. It is not clear why the Commission, having recognized the obvious notion that states do not ignore interstate telephone predators of any stripe, later repaired to the fiction that, wherever the telephone is involved, all regulations must be viewed the same in terms of the division of state and federal power pursuant to the FCA.

This fundamental misunderstanding of the FCA, in turn, has misinformed the Commission’s further acceptance, fundamental to the entire preemption issue, that “Congress enacted section 227 and amended section 2(b) to give the Commission jurisdiction over both interstate and intrastate telemarketing calls” because of the “concern that states lack jurisdiction over interstate calls.” Report and Order, ¶ 83 (footnote omitted). The Commission has proceeded based on that erroneous assumption, to be sure, only because the same notion appears in the legislative history of the TCPA and to some extent in the findings section of the TCPA itself. S. Rep. No. 102-178, at 3 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1970; *see also id.* at 5, 1973 (“Federal action is necessary because States do not have jurisdiction to protect their citizens against those who . . . place interstate telephone calls.”); 137 Cong. Rec. S16205 (daily ed. Nov. 7, 1991) (statement of Sen. Hollings) (“State law does not, and cannot, regulate interstate calls.”); TCPA, Pub. L. No. 102-243 § 2(7) (finding that “[o]ver half the States now

have statutes restricting various uses of the telephone for marketing, but telemarketers can evade their prohibitions through interstate operation.”).

But, as has been demonstrated, these observations were wrong when they were made and, because the TCPA itself nowhere expressly preempts state jurisdiction over the content of interstate telephone calls, are wrong now. The TCPA’s finding that “telemarketers can evade [state] prohibitions through interstate operation” is at best ambiguous and likely refers to enforcement difficulties rather than preemption difficulties. TCPA, Pub. L. No. 102-243 § 2(7). But even if it mistakenly referred to preemption difficulties, that TCPA statement could not itself create preemption that did not otherwise exist in the FCA. Ultimately, then, states *do* have jurisdiction to regulate abusive interstate calls—jurisdiction they have exercised continuously since 1934 without any serious claims of preemption. As such, the TCPA cannot be understood to preempt state do-not-call laws—or to authorize preemption of state do-not-call laws—as part of a national telecommunications regulatory scheme that restrains interstate police activity by states.

## **B. Court Doctrine, the TCPA and Other Federal Laws Foreclose Preemption**

### **1. Federal Doctrine Mandates a Presumption Against Preemption**

The FCC may preempt state law only where congressional has provided the authority for it to do so. *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986). “[A]n agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it.” *Id.* Agency preemption must be a “reasonable accommodation of conflicting policies *that were committed to the agency’s care* by the statute. . . .” *United States v. Shimer*, 367 U.S. 374, 383 (1961) (emphasis added); *see also Fidelity Fed. Sav. and Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 153-54 (1982).

States enjoy a “presumption” that “the historic police powers of the States [a]re not to be superseded by [a] [f]ederal [a]ct unless that was the clear and manifest purpose of Congress.” *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *accord, e.g., Hillsborough Co., Fla. v. Automated Med. Labs. Inc.*, 471 U.S. 707, 714 (1985). In all preemption cases, particularly those in which Congress has “legislated . . . in a field which the States have traditionally occupied,” courts start with the assumption that the federal act does not supersede the historic police powers of the states unless that was the clear and manifest purpose of Congress. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quoting *Rice*, 331 U.S. at 1152). “[T]he purpose of Congress is the ultimate touchstone in every pre-emption case.” *Id.* (internal citation omitted). As underscored by several state attorneys general at the do-not-call rulemaking stage, consumer protection is an area within the states’ traditional police powers that may be superseded only upon the clearest showing of congressional intent to do so. Comments and Recommendations of the Attorneys General, In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, at 8-10 (CG Docket No. 02-278) (filed with the FCC on Dec. 9, 2002).

## 2. The Text and History of the TCPA Preclude Preemption

The language of the TCPA itself shows that there was no “clear and manifest” purpose to preempt state laws. Not only is there no explicit language in the TCPA stating that it preempts any state law in the field of telephone solicitations, the TCPA expressly does not preempt “any state law . . . which prohibits . . . the making of telephone solicitations.” 47 U.S.C. § 227(e)(1)(D). In full this statute provides as follows:

(e) Effect on State law

(1) State law not preempted

Except for the standards prescribed under subsection (d) of this section and subject to paragraph (2) of this subsection, **nothing in this section or in the regulations prescribed under this section shall preempt any State law** that imposes more restrictive intrastate requirements or regulations on, **or which prohibits--**

- (A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;
- (B) the use of automatic telephone dialing systems;
- (C) the use of artificial or prerecorded voice messages; or
- (D) the making of telephone solicitations.**

47 U.S.C. § 227 (e) (emphasis added).

Courts have already understood this provision to expressly disclaim preemption of *all* state laws “which prohibit[] . . . the making of telephone solicitations.” 47 U.S.C. § 227(e)(1)(D) (emphasis added). In *International Science & Technology Institute, Inc. v. Inacom Communications, Inc.*, 106 F.3d 1146, 1153 (4<sup>th</sup> Cir. 1997), for example, the court rejected, based on § 227(e), the theory that TCPA preemption could support the inference that federal courts have concurrent jurisdiction over private actions under the TCPA:

In any event, International Science’s preemption argument must be rejected at its beginning because Congress stated that state law is not preempted by the TCPA. See 47 U.S.C. § 227(e) (“nothing in this section . . . shall preempt any State law that imposes more restrictive intrastate requirements . . . *or* which prohibits’ certain enumerated practices (emphasis added)).

*Id.* at 1153. It is particularly significant that the Fourth Circuit added the emphasis to the word “or” in the statute, underscoring that it understood that disjunction to mean something, *i.e.* that “intrastate” does not modify “prohibits.” This reading of the statute enabled the court to arrive at the broad conclusion that “state law is not preempted by the TCPA.” See *id.* See also *Nicholson v. Hooters of Augusta, Inc.*, 136 F.3d 1287, 1289 (11<sup>th</sup> Cir. 1998), *opinion modified en banc*, 140 F.3d 898 (11<sup>th</sup> Cir. 1998) (relying on *International Science*).

Similarly, in *Van Bergen v. Minnesota*, 59 F.3d 1541 (8<sup>th</sup> Cir. 1995), the court held that the TCPA did not preempt a Minnesota statute regulating the use of automatic telephone dialing-announcing devices, even though that statute “is ‘virtually identical’ to the TCPA.” *Id.* at 1548 (citing *Lysaght v. State of N.J.*, 837 F. Supp. 646, 648 (D.N.J. 1993)). The court could not, from the language and structure of the TCPA, infer any congressional intent for the TCPA to preempt state law, observing that with section 227(e), “the [TCPA] includes a preemption provision expressly *not* preempting certain state laws.” *Van Bergen*, 59 F.3d at 1548. *See also State v. Minimum Rate Pricing, Inc.*, No. C1-97-008435, 1998 WL 428810 at \*4-5 (Minn. Dist. Ct. Apr. 13, 1998) (“TCPA does not preempt state laws which may be more restrictive to telemarketers than is the federal law.”).

The Commission itself has acknowledged the validity of reading the TCPA to disclaim preemption of any state laws prohibiting telephone solicitations. *See* 68 Fed. Reg. at 44,155 ¶ 60. And this reading is supported by the fact that earlier, unenacted versions of the TCPA contained a provision specifically preempting “any provisions of State law concerning interstate communications that are inconsistent with the interstate communications provisions of this section.” 137 Cong. Rec. S16201 (daily ed. Nov. 7, 1991). Congress deleted this express preemption provision from the final version of the TCPA. Such a pre-enactment deletion “strongly militates against a judgment that Congress intended a result that it expressly declined to enact.” *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974); *accord, e.g., Chickasaw Nation v. United States*, 534 U.S. 84, 93 (2001) (“We ordinarily will not assume that Congress intended ‘to enact statutory language that it has earlier discarded in favor of other language.’” (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 443 (1987))).

Moreover, another provision of the TCPA expressly acknowledges that states will continue to “regulat[e] . . . telephone solicitations,” even once a federal do-not-call system was established:

If . . . the Commission requires the establishment of a single national database of telephone numbers of subscribers who object to receiving telephone solicitations, a State or local authority may not, *in its regulation of telephone solicitations*, require the use of any database, list, or listing system that does not include the part of such single national database that relates to such State.

47 U.S.C. § 227(e)(2) (emphasis added). This provision makes clear that Congress contemplated three critical points with respect to the regulatory scheme for telephone solicitations: *first*, that states have regulated and would continue to regulate telephone solicitations; *second*, that in regulating telephone solicitations, states would use a telephone subscriber database or list system; and *third*, that the *only* requirement of states in furtherance of such continued regulations is that their lists must include (but need not be limited to) the national database as to that state.

It is as well established in this context as any other that the imposition of express statutory requirements supports the inference that Congress intended no others. *See, e.g., Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992) (“Such reasoning is a familiar variant of the familiar principle of *expressio unius est exclusio alterius*: Congress’ enactment of a provision defining the pre-emptive reach of a statute implied that matters beyond that reach are not pre-empted.”). Here, the TCPA requires state lists to include the national database as to that state, but it goes no further. It leaves unaffected all other dimensions of state do-not-call regulations, as Congress confirmed when it required that any FCC database “*shall . . . be designed to enable States to use the [Commission’s database] . . . for purposes of administering or enforcing State law.*” 47 U.S.C. § 227I(3)(J) (emphasis added). It would thus contradict the TCPA’s express language and amount to an unreasonable reading of the TCPA to infer that

Congress intended to preempt, or provided the authority for the Commission to preempt, the interstate application of state do-not-call laws.

3. Other Federal Enactments and Legislative History Demonstrate That Congress Intended Not to Preempt Any Applications of State Do-Not-Call Laws

The TCPA is not the only source for guidance concerning Congress' national telephone privacy policy. The Do-Not-Call Implementation Act, Pub. L. No. 108-10 ("DNCIA"), which became effective March 11, 2003, confirms both that the TCPA does not preempt state telephone privacy laws and that the FCC is not empowered to preempt those laws. The DNCIA specifically requires the FCC, once it promulgates its own do-not-call rules, to provide Congress with "an analysis of the progress of coordinating the operation and enforcement of the 'do-not-call' registry with similar registries established and maintained by the various States." *Id.* at § 4(b)(5). If the TCPA preempted state registries or do-not-call laws, or if the FCC was to preempt those laws and registries, there would have been no reason for Congress to enact a law requiring an analysis of state registry enforcement *after* the FCC's own rule was in force.

Next, the Congressional debates concerning the FTC's authority to establish a do-not-call list shed yet more light on the limits of the overall national do-not-call policy. Two days after a federal district court determined that Congress had not delegated authority to the FTC to establish a national do-not-call list (*see U.S. Security v. FTC*, 282 F. Supp. 2d 1285, 1291 (W.D. Okla. 2003)), both the House and Senate voted to validate the FTC's exercise of that authority. *See A Bill To Ratify the Authority of the Federal Trade Commission to Establish a Do-Not-Call Registry*, H.R. 3161, 108<sup>th</sup> Cong. (2003) (enacted). The debate over that enactment provided Members of Congress the opportunity to express their understanding of the proper interplay

between the state and federal do-not-call programs generally. Indiana Representative Steve Buyer stated as follows on the Congressional Record:

It is my understanding that Congress has no intention of preempting State laws that provide protections greater than those provided by our Federal ‘do not call’ program. Furthermore, I also understand that Congress has no intention of permitting the *FCC* or *FTC* to preempt, by regulation or otherwise, State statutes that provide greater protections than the Federal ‘Do Not Call’ program provides.

149 Cong. Rec. H8918 (daily ed. Sept. 25, 2003) (statement of Rep. Buyer) (emphasis added).

Furthermore, he said Congress “does not intend to interfere with statutes, like Indiana’s, that tighten” loopholes in the federal program. *Id.* “[E]fforts like Indiana’s that inspired the federal ‘do not call’ program demonstrate the critical role that states can play in achieving creative solutions to serious problems. Such efforts should not be discouraged.” *Id.*

\* \* \* \*

The historical ability of states to apply consumer protection and other laws to offenses occasioned by interstate telephone calls, the text of the TCPA, court rulings, and even recent congressional commentary confirm Indiana’s position: Congress has commanded a national policy—binding upon the *FCC*—that allows states to continue enforcing their own do-not-call laws against interstate callers without being preempted by federal telephone privacy regulations.

### **III. Preempting Indiana’s Telephone Privacy Law Would Unjustifiably Curtail Important Regulatory Experimentation Concerning a Relatively New Consumer Issue and Frustrate the Settled Privacy Expectations of Indiana Citizens**

As noted, Indiana apparently has the only do-not-call law in the nation that does not contain an EBR exemption of any sort. For the past three years, registered Indiana telephone subscribers have experienced a dramatic decrease in unwanted telemarketing calls. A 2002 survey showed that nearly 98% of Indiana’s registered telephone subscribers have reported receiving “much less” (86.6%) or “less” (11.2%) telephone solicitations as a result of the Indiana

law, with the average number of calls dropping by 10.2 per week for each registered number. (Exhibit A at Table 1, 2). Because of the Indiana law's extraordinary success, over 1.6 million Indiana registered telephone subscribers, representing approximately 3.65 million Indiana citizens, or over 59% of the state's entire population<sup>2</sup>, have taken advantage of the Indiana Act's protections. *See* Tel. Report.

This data shows not just that Indiana has a highly effective law in terms of protecting residential privacy, but also that Indiana citizens may value their residential privacy more than the nation's citizens as a whole. In a country as large and diverse as the United States, such variance in preferences and values is hardly surprising. What is extraordinary about the United States, however, is that our system of government is designed to accommodate such regional differences and not to confine all citizens to a single regulatory regime, particularly with respect to business regulation. The citizens of some states prefer a high degree of consumer protection, others prefer a more *laissez-faire* approach. As a result, businesses seeking national markets must routinely contend with varying degrees of regulation from state to state.

To take but a few examples, sweepstakes promoters must follow the various laws of numerous states that govern disclosure, winners lists, pre-contest filings and even the use of certain words, among other things. *See* Julie S. James, *Regulating the Sweepstakes Industry: Are Consumers Close to Winning?*, 41 Santa Clara L. Rev. 581, 595-96 (2001). The franchising of businesses nationwide is governed by federal law and a patchwork of state laws regarding franchising and business opportunities. *See* 16 C.F.R. 436; Mitchell J. Kassoff, *Complex of Federal and State Laws Regulates Franchise Operations as Their Popularity Grows*, N.Y. St. B. A. J., Feb. 2001, at 48 (*available at* <http://www.lawyerment.com.my/library/publ/>

---

<sup>2</sup> Based on 2003 U.S. Census Bureau Population Estimates.

biz/review/d\_6.shtml). Businesses that operate health facilities, such as nursing facilities, on a nationwide basis must adhere to diverse state regulations governing nursing facility operations and the licensure requirements for the administrators who manage the facilities. *See, e.g.,* Center for Health Workforce Studies, *A Legal Practice Environment Index for Nursing Home Administrators in the Fifty States* (2004) (available at [www.achca.org/news.asp?news\\_id=22](http://www.achca.org/news.asp?news_id=22)). Mail-order pharmacies operating across state lines must also adhere to each state's registration or licensure requirements. (*Compare* N.H. Rev. Stat. Ann. § 318:37 *with* Ind. Code ch. 25-26-18). Finally, in the course of doing business, mortgage lenders and brokers must follow assorted state disclosure requirements for advertisements and fees. *See* Therese G. Franzen, *Doing Mortgage Business on the Web –Same Rules, Different Venue*, 55 Consumer Fin. Q. Rep. 245, 246 (2001). Given the ease with which phone numbers may be sorted by area code and state, telemarketers deserve no special sympathy just because they can call prior customers registered for do-not-call lists in 49 states, but not in Indiana.

Particularly with respect to such a relatively new consumer problem as the privacy invasion caused by telemarketing, it is important for the citizens of each state to retain a great deal of regulatory autonomy. Through multi-jurisdictional experimentation, citizens throughout the nation can learn over time about the effects of different levels of telemarketing regulation. This is exactly what Justice Brandeis contemplated when he lauded state regulatory “experimentation in things social and economic” as one of the “happy incidents of the federal system.” *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Here, Indiana is a “single courageous state” that has chosen to serve as a laboratory with its more restrictive telephone privacy law—an experiment that it presents “without risk to the rest of the

country.” *Id.* Not only that, but Indiana’s experiment is yielding highly satisfactory results for its citizens.

Furthermore, permitting different regulatory solutions to the same problems across jurisdictions increases the freedom of citizens and businesses alike because it permits them to settle or trade in jurisdictions with the most agreeable regulatory environment. In this way, states, and even localities, compete for citizens and businesses, which competition itself can prevent both too much and too little regulation. *See generally* Michael S. Greve, *Real Federalism, Why it Matters, How it Could Happen* 1-9 (1999). When regulation is monolithic, by contrast, exit rights are lost, inter-jurisdictional competition is cut short and individual freedom wanes. *See id.* In this case, businesses that are vexed by Indiana’s telephone privacy law may focus their telemarketing efforts elsewhere (though given the law’s focus on individual preferences such businesses may still telemarket to many in Indiana), while individuals whose states provide less protection for residential privacy may find the Hoosier state to be the haven they seek.

Emphasis on individual liberty is particularly apt in this situation. Under Indiana’s regulatory scheme, individual citizens can opt for the amount of privacy they prefer. First, they can choose whether even to register for the list—they are not compelled to value residential privacy over access to a greater number of telemarketed goods and services. Second, once they are on the list, citizens can authorize particular businesses to call them, or they can even delist. And if the citizens of Indiana collectively decide that the do-not-call law stifles too much economic activity, they can ask their state representatives to repeal the program.

By contrast, Indiana citizens who may find that the FCC’s do-not-call program and its EBR exemption provides insufficient residential privacy protection would have no practical

alternatives. Consumers enter into so many transactions with so many companies that demanding privacy from individual businesses with whom they have prior relationships would be cost- and time- prohibitive. History proves that residential privacy does not stand a chance when consumers must contact all potential telemarketers. Indiana's citizens understand that the only practical way for the law to enable registered consumers to achieve their own preferred balance between residential privacy and market access is by allowing them to opt into receiving particular telemarketing calls rather than by requiring them to opt out of such calls by contacting every business with whom they might have some sort of relationship. Permitting states such as Indiana to continue with their own telephone privacy regulations thus enables a high degree of individual autonomy in finding the proper balance between privacy and economic opportunity (indeed, the FCC might eventually benefit from Indiana's experience if it wishes to revise its own rules someday). Nationwide preemption, and its accompanying command of one-size-fits-all government, militates against individual liberty in favor of arbitrary national uniformity.

Nor is there any compelling reason to force the balance struck by the FCC upon the entire nation. One main argument advanced by the telemarketers in support of preemption is that without an EBR exemption registered consumers will unwittingly miss telemarketing calls (and opportunities to purchase goods and services) they otherwise would have welcomed from businesses they have patronized in the past. *See* letter from VISA to FCC at 3 (Jan. 31, 2003); Reply Comments of Verizon at 10 (Ct. Docket No. 02-278; 92-90) (filed with the FCC Jan. 31, 2003); WorldCom Reply Comments at 5-6 (Ct. Docket No. 02-278; 92-90) (filed with the FCC Jan. 31, 2003). This argument defies common sense. Consumers register for telephone privacy because they want to avoid the incessant ringing of the telephone caused by businesses dialing for dollars. Whether the telephone call comes from a new business or a business with whom the

consumer has an existing connection, the telephone still rings, the peace is still broken, and the phone must still either be answered or ignored. The sense of exasperation that citizens feel when their residential privacy is disrupted by the “shrill and imperious ring” of the telephone (*Humphrey v. Casino Mktg. Group*, 491 N.W.2d 882, 888-89 (Minn. 1992)) is no less simply because they happen to have interacted with the caller’s business before.

Particularly because they have grown accustomed to the effectiveness of Indiana’s law over the past three years, Indiana citizens would be frustrated and resentful if their privacy were to be cut back by federal preemption. Indiana’s registered telephone subscribers have come to associate the concept of telephone privacy with a successful state government program that has cut back dramatically on the disruptions they suffer at home. While preemption may not matter as much in other states that already have do-not-call laws with EBR exemptions, Indiana citizens will almost certainly notice the difference in dramatic fashion. According to Indiana’s 2002 survey, it would take less than 1.5 calls per registered line per day for Indiana’s citizens to suffer just as much residential disruption as they did before their state law went into effect in 2002. And the nature of residential privacy is such that any upward adjustment in unwanted telemarketing calls that citizens receive—however slight—will be highly noticeable and highly resented.

Thus, while the FCC’s telephone privacy program may provide a net privacy benefit for the rest of the nation, in Indiana it can only hurt. Preemption of Indiana’s well-established telephone privacy program would thus defeat the cause of liberty and individual privacy in a fundamentally unfair way by undoing the reasonable and settled expectations of Indiana’s citizens. Worst of all, it would grant an unjustified and nearly unfettered license to intrude upon the private dwellings of those who have unequivocally expressed a desire to be left alone.

Particularly in Indiana, do-not-call preemption is bad policy. The Commission should forbear and permit Indiana's bold experiment to continue.

### **CONCLUSION**

For the foregoing reasons, the Commission should deny the CBA's Petition For Declaratory Ruling and rule that the TCPA in no way preempts, and in no way authorizes the Commission to preempt, enforcement of the Indiana Telephone Privacy Act where offending telephone calls cross state lines. The Commission should expressly declare that its do-not-call rule and registry do not preempt any similar state laws or registries.

Respectfully submitted,

STEVE CARTER  
Attorney General of Indiana

By: /s/Thomas M. Fisher  
Deputy Attorney General

*Counsel for the State of Indiana*

Office of Indiana Attorney General  
Indiana Government Center South, 5<sup>th</sup> Floor  
302 W. Washington Street  
Indianapolis, IN 46204-2770  
(317) 232-6255  
[tfisher@atg.state.in.us](mailto:tfisher@atg.state.in.us)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **STATE OF INDIANA'S COMMENTS IN OPPOSITION** was filed electronically and served upon all counsel of record listed below, by United States Mail, first-class, postage prepaid, and email on the 2<sup>nd</sup> day of February, 2005:

Charles H. Kennedy  
Morrison & Foerster LLP  
2000 Pennsylvania Avenue, NW  
Washington, DC 20006-1888

[ckennedy@mofo.com](mailto:ckennedy@mofo.com)  
[trollins@mofo.com](mailto:trollins@mofo.com)

*Counsel for Consumer Bankers Association*

/s/ Thomas M. Fisher  
Deputy Attorney General

Office of Indiana Attorney General  
Indiana Government Center South, 5<sup>th</sup> Floor  
302 W. Washington Street  
Indianapolis, IN 46204-2770  
(317) 232-6201

# Exhibit A

An Analysis of the Indiana Telephone Privacy Survey

Tom W. Smith

National Opinion Research Center  
University of Chicago

April 30, 2002

Report Prepared for the Attorney General, State of Indiana

## Introduction

The Office of Attorney General commissioned Walker Information to design and conduct a survey to measure the impact of the Indiana Telephone Privacy Law on the number of telemarketing calls to households in Indiana before and after the law went into effect on January 1, 2002. The Office of Attorney General also hired Tom W. Smith, Director of the General Social Survey, National Opinion Research Center, University of Chicago, and Brian Vargus, Director of the Indiana University Public Opinion Laboratory at Indiana University/Purdue University - Indianapolis, to consult with them and Walker Information on the design of the study and to conduct an analysis of the results.

Under the Telephone Privacy Law, consumers may, at their discretion, register their residential telephone numbers with the Office of Attorney General on a "Do Not Call List." This list is provided to telemarketing firms by the Office of Attorney General for a fee. By law, telemarketers are prohibited from calling any of the phone numbers on the list, unless such calls fall into one of four narrowly drawn exemptions.

## Study Design

To measure the impact on the number of telemarketing calls to Indiana residences, a sample of households on the list was drawn and another sample of households not on the list was selected (described in next section). Both samples were asked about telemarketing calls received before and after January 1, 2002 (when the law went into effect). (For the exact wording of the items in the questionnaire see Appendix: Question Wording.) "On the List" and "Not on List" samples were drawn so that the latter could act as a control to determine whether changes in the "On the List" sample had resulted from their registration on the Telephone Privacy List.

## Sample

The "On the List" sample consisted of 2,000 Indiana households randomly chosen from the 606,234 records that made up the entire Privacy List of those registered with the Office of Attorney General before January 1, 2002.

The "Not on List" sample consisted of 4,000 Indiana households drawn in the following manner. Survey Sampling supplied a sample of Indiana households with name, address, and phone number, representing all Indiana counties. Once this sample was obtained, it was matched to the Attorney General's Privacy List and all phone numbers that appeared on that list were eliminated from the Survey Sampling sample. 4,000 households not appearing on the Privacy List were then selected for the "Not on List" sample.

## Data Collection

Walker Information mailed out the 6,000 cover letters and questionnaires on March 18, 2002. 100 mailings were returned unopened due to incorrect addresses: 91 from the "Not on List" sample and 9 from the "On the List" sample. 2,233 questionnaires were returned by early April with a postmark before April 1, 2002. Later arrivals were excluded because the next wave of Indiana registrants for the Privacy List went into effect on April 1, 2002. There were 1,108 respondents from the "On the List" sample and 1,125 from the "Not on List" sample.

### Analysis of the Representativeness of the Samples

To examine the representativeness of the questionnaires returned from the "On the List" and "Not on List" samples, the returned cases were compared to the original samples according to the representation of area codes and zip code regions. The "Not on List" returned questionnaires showed no statistically significant difference from the original sample in regards to either area code or zip code region. The "On the List" cases did not significantly differ from the original sample on area code, but did show a small, but statistically significant, variation in regards to zip code area.<sup>1</sup> A post-stratification weight was created to balance the returned cases so they represented zip code regions in the original sample.

All analysis was done using both the weighted and unweighted

---

<sup>1</sup>On zip code region the 1,108 "On List" cases differed from the 2,000 cases in original sample at the .017 level. The proportion of cases in the original sample and among the returns for the 14 zip code regions are listed below:

	Original	Returned
Region:		
1	8.7	8.9
2	11.2	11.7
3	15.3	16.1
4	6.2	6.8
5	9.0	8.4
6	6.4	7.5
7	4.3	4.1
8	14.0	12.6
9	6.2	5.1
10	3.7	3.8
11	1.2	0.9
12	3.8	4.6
13	4.7	4.3
14	5.5	5.3

data. No meaningful differences appeared between the weighted and unweighted numbers and the findings based on the weighted and unweighted data were equivalent. Weighted data are reported below.

### Data Analysis

To cross-validate results two measures of changes in the number of telemarketing calls were utilized. The first method asked people how many telemarketing calls they received per week before January 1, 2002 and how many were received per week after January 1, 2002. By comparing these two figures, changes in the level of telemarketing calls could be ascertained. The second method asked people whether the number of calls they received after January 1, 2002 was much less, less, the same, more, or much more than the number they received previously.

Table 1 shows the number of telemarketing calls received per week both before and after January 1st, 2002 and the changes in these levels. Before January 1, 2002 the "Not on List" cases and "On the List" cases did not differ significantly in the number of calls received (respectively 11.4 and 12.1, prob.=.145). Both groups reported a statistically significant decline in telemarketing calls after January 1, 2001 to respectively 7.7 and 1.9 calls per week. The decline in calls for the "On the List" cases (-10.4) was significantly greater than the decline for "Not on List" cases (-3.8; prob.=.0000). Likewise, for the "On the List" cases the post- January 1, 2002 level was only 17% of the pre-January 1, 2002 level, while for the "Not on List" sample the level was at 72%. This difference was also significantly different (prob.=.0000). These comparisons indicate that being on the list lowered the number of telemarketing calls much more than not being on the list.

Table 2 shows the changes in the reported level of telemarketing calls according to the second method. 87% of those from the "On the List" sample indicated the number of calls is much less and 11% that it is less for 98% reporting a decline. 2% said that the number was the same and less than 1% said it had increased. Among those from the "Not on List" sample 26% reported that the level of telemarketing calls was much less and 27.5% that it was less for a total of 54% indicating fewer calls. 40% indicated no change and 6% an increase in telemarketing calls. The decline in reported calls among the "On the List" cases was significantly lower than among the "Not on List" cases, indicating that being on the Privacy List contributed to a much greater drop in telemarketing calls.

Table 3 extends the analysis presented in Tables 2 and 3 by looking at changes in telemarketing calls by reported list status. There are four categories: cases from the "Not on List" sample who reported being registered and those indicating that were not registered and cases from the "On the List" sample who reported being registered and those indicating that they were not registered. Consistent with earlier results, Table 3 shows that

the changes in the level and number of telemarketing calls were significantly greater among those "On the List" than among those "Not on List".

Table 4 examines whether the changes in telemarketing calls might be explained by an increase in the use of phone technologies to reduce telemarketing calls. It shows whether households had Privacy Manager, Caller ID, or Voice Mail/Answering machines and whether these devices were obtained before or after January 1, 2002. For the "Not on List" cases, 5% have Privacy Manager and 4% had it before January 1, 2002 and 1% obtained it since then; 36% have caller ID and 34% had it before January 1, 2002, and 2% obtained it afterwards; and 68.5% have voice mail or answering machines and 66.5% had it before January 1, 2002 and 2% obtained it since then. For the "On the List" cases, 3% have Privacy Manager and a little over 2% since before January 1, 2002 and less than 1% thereafter; 38% have caller ID with a little over 36% having obtained it before January 1, 2002 and a little over 1% afterwards; and 75% have voice mail/answering machines with 74% having it before January 1, 2002 and 1% obtaining it since then. These figures indicate that the large drop in telemarketing calls can not be explained by the increased use of anti-telemarketing technologies since their increased use since January 1, 2002 was very modest and since the level of use was about the same for both the "On the List" and "Not on List" cases. Privacy Manager was slightly higher for "Not on List" cases (5% vs. 3%), but caller ID and voice mail/answering machines were both a little higher for the "On the List" cases (respectively 38% vs. 36% and 75% vs. 68.5%).

#### Conclusion

The Indiana Telephone Privacy Survey indicates that there was a substantial decline in the number of telemarketing calls after January 1, 2002. The decline was significantly greater among households on the Telephone Privacy List compared to households not registered on that list. This indicates that being on the list led to fewer telemarketing calls. An analysis of telephone technologies that might be used to reduce telemarketing calls indicated that their use does not explain the decline in telemarketing calls nor the much larger decline for the "On the List" cases than for the "Not on List" cases.

Table 1

Changes in Number of Telemarketing Calls Before and After  
January 1, 2002 (Qs 2 and 3)

	Not on List	Samples	On List	Prob.
Mean Number of Calls Before 1/1/2002	11.4		12.1	.145
Mean Number of Calls After 1/1/2002	7.7		1.9	.0000
Change in Mean Number of Calls from Before to After	-3.8	-10.4		.0000
Calls After as % of Calls Before	72.2%		16.9%	.0000

Table 2

Changes in Level of Telemarketing Calls  
 Since January 1, 2002 (Q. 4)

	Not on List	Samples	On List
Much Less	26.3%		86.6%
Less	27.5		11.2
Sub-total Much Less+less	53.8		97.8
Same	40.2		2.0
More	4.0		0.2
Much More	2.0		0.0
Prob.		.0000	

Missing Values Excluded.

Table 3

Changes in Number and Level of Telemarketing Calls  
 Since January 1, 2002 (Qs. 2, 3, 4) by Reported List Status

	Not on List Sample		On List Sample	
	Not Registered	Registered	Not Registered	Registered
Mean Number of Calls Before 1/1/2002	10.3	13.3	--- <sup>a</sup>	12.2*
Mean Number of Calls After 1/1/2002	8.4	6.7	---	1.9*
Change in Mean Number of Calls from Before to After	-2.0	-6.7	---	-10.5*
Calls After as % of Calls Before	86.0%	49.7%	---	16.2%*
Much Less	12.6%	48.4%	---	87.7%*
Less	26.4	29.2	---	10.5
Same	53.0	19.7	---	1.7
More	4.9	2.5	---	0.2
Much More	3.1	0.2	---	0.0

<sup>a</sup>Too few observations (29) to report statistics.

\*=probability equals .0000

Table 4

Use of Phone Technologies

	Not on List	Samples	On List
Privacy Manager			
No	66.3%		70.4%
Yes, Before 1/1/2002	4.0		2.3
Yes, After 1/1/2002	1.2		0.4
Not Indicated	28.4	26.9	
Caller ID			
No	47.1%		48.5%
Yes, Before 1/1/2002	33.9		36.4
Yes, After 1/1/2002	2.0		1.2
Not Indicated	17.0	14.0	
Voice Mail/Answering Machine			
No	21.2%		17.4%
Yes, Before 1/1/2002	66.5		73.8
Yes, After 1/1/2002	2.0		1.1
Not Indicated	10.3	7.7	

"Not indicated" means that the cases did not indicate whether or not they had the technology. Such responses are common when people are unfamiliar with a product or service.

Appendix: Question Wordings

1. Indiana recently adopted a program where residents can request to be placed on a Telephone Privacy List (commonly called the "Do Not Call" list), which requires telemarketers not to call people on the List to sell products and services. The Law went into effect on January 1, 2002. Have you registered to be on the Do Not Call List?

2. **Before** January 1, 2002, approximately how many calls per week did you receive at your home that were selling products or services or requesting donations?

3. **After** January 1, 2002, approximately how many calls per week have you received at your home that were selling products or services or requesting donations?

4. Since the Do Not Call List went into effect on January 1, 2002, the number of telemarketing calls that you are now receiving per week is (select one):

Much Less/Less/The Same/More/Much More

5. Do you have any of the following on your household telephone?

	No	Yes, Purchased <b>Before</b> January 1, 2002	Yes, Purchased <b>After</b> January 1, 2002
Privacy Manager	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Caller ID	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Voice Mail/Answering Machine	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>