

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

CC Docket No. 92-90

In the Matter of

The Telephone Consumer
Protection Act of 1991

NOTICE OF PROPOSED RULEMAKING

Comment date: May 26, 1992

Reply date: June 25, 1992

Adopted: April 10, 1992;

Released: April 17, 1992

I. INTRODUCTION.

1. On December 20, 1991 the Telephone Consumer Protection Act of 1991 (TCPA) was enacted, Public Law 102-243. The TCPA amends Title II of the Communications Act of 1934, 47 U.S.C. § 201 *et seq.*, by adding a new section, 47 U.S.C. § 227, which among other things, restricts the use of automatic telephone dialing systems and telephone facsimile machines for telemarketing purposes.¹ The Commission hereby initiates the notice of proposed rulemaking mandated by the statute, proposes implementing regulations, and tentatively defines the contours of statutorily permissible exemptions to the prohibitions of the statute. The Commission seeks comment on its tentative proposals.

II. SUMMARY OF THE LEGISLATION.

2. *Auto dialers.* Section 227 defines automatic telephone dialing systems, also known as auto dialers, as equipment which has the capacity to store or produce telephone numbers to be called using a random or sequential number generator and to dial such numbers.² The section prohibits any person from making any call (other than a call made for emergency purposes or made with the prior consent of the called party) to residences using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party. The Commission is authorized to propose exemptions to this prohibition. Auto dialer calls are also prohibited to: emergency telephone lines, telephone lines of a guest room or patient room of a hospital or similar establishment, telephone numbers assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call. In addition, the use of

an auto-dialer in such a way that two or more lines of a multi-line business are engaged simultaneously is prohibited. The Commission is authorized to adopt implementing regulations.

3. *Facsimile (fax) machines.* The TCPA prohibits the use of any fax machine, computer, or other device to send an unsolicited advertisement to a fax machine.

4. *Telephone Solicitation to Residential Subscribers.* The TCPA provides that the Commission shall initiate a rulemaking proceeding concerning the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object. The Commission shall consider alternatives in protecting such privacy rights.³

5. *Technical Requirements on Equipment.* Section 227(d) prohibits sending any telephone facsimile message unless the message clearly marks, at the top or bottom of each page or on the first page, the date and time it is sent and an identification of the sender, including the telephone number of the sending machine. Any facsimile machine manufactured one year after the date of enactment must clearly mark this identifying information on the message. Similarly, all auto-dialer systems must state clearly at the beginning of the message the identity of the caller including a telephone number or address. In addition, any autodialer-system must release the called party's line within 5 seconds of the time notification is transmitted to the system that the called party has hung up.⁴

6. *Private Right of Action and Affirmative Defenses to Liability.* Section 227(b)(3) authorizes private rights of action in state courts for a violation of the auto dialer or fax prohibitions. Similarly, Section 227 (c)(5) empowers a person who has received more than one telephone call in violation of any rules the Commission adopts regarding residential telephone subscribers' privacy rights under the TCPA, to bring in an appropriate state court an action to enjoin the practice, to receive money damages, or both. In addition, a complaint may be filed at the Commission based on a violation of Section 227 of the Communications Act of 1934, 47 U.S.C. § 227, or the regulations adopted thereunder.

III. DISCUSSION

A. INTRODUCTION.

7. In this proceeding the Commission proposes general implementing regulations, exemptions to the applicability of the statute's prohibited uses, and technical requirements applicable to auto-dialers and facsimile machines. The full text of the rules as proposed by this notice is found in Appendix B. In addition, this rulemaking proceeding addresses issues regarding the protection of residential privacy rights from unsolicited advertising over the telephone network, generally. We shall address each of these subject areas in turn.

¹ The full text of the TCPA is provided at Appendix A.

² 47 U.S.C. § 227 (a)(1).

³ See *infra* paras. 22-34.

⁴ 47 U.S.C. § 227(d)(1)-(3).

B. PROHIBITED USES OF AUTO DIALERS.

8. *Implementing Regulations.* The general prohibition rules as proposed in Appendix B, section 64.1100, follow closely the language of the TCPA. Auto dialer calls are prohibited to: residential telephone lines without the consent of the called party, emergency telephone lines, the telephone line of a guest room of a health care facility, a paging service or other specialized mobile radio service, and any service for which the called party is charged for the call. Use of a facsimile machine to send an unsolicited advertisement is also prohibited. The Commission seeks comment on these proposed rules. The Commission also seeks comment on whether auto dialers have the technical capacity to avoid calling prohibited telephone numbers.

C. EXCEPTIONS TO PROHIBITED USES OF AUTO DIALERS.

9. The overall intent of Section 227 is to protect consumers from unrestricted telemarketing, which can be an intrusive invasion of privacy. TCPA states that individuals' privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices.⁵ It appears that there are many valuable uses to auto dialer messaging that do not necessarily fall within the intended scope of Section 227's prohibitions. For example, it appears that some utilities use auto dialers to deliver recorded messages to customers regarding scheduled maintenance, turn-off reminders, or scheduled power shortages. Thus, Section 227(b)(2)(B) of the TCPA states that the Commission may exempt from the prohibited use of auto dialers:

- (i) calls that are not made for a commercial purpose; and
- (ii) such classes or categories of calls made for commercial purposes as the Commission determines
 - (I) will not adversely affect the privacy rights that this section is intended to protect; and
 - (II) do not include the transmission of any unsolicited advertisement.

In keeping with this authority the Commission proposes below to exempt from liability categories of auto dialer calls that were not intended to be prohibited by the TCPA and do not constitute a risk to public safety or an undue burden upon privacy interests. We recognize that some types of calls may fall into more than one exemption category. The exemption categories proposed are meant to be descriptive of current applications and also to encompass future similar services. Although the Commission

proposes to exempt certain kinds of calls from the statutory prohibitions of the TCPA, the other statutory provisions of the TCPA establishing technical and procedural requirements (e.g., § 227(d)(3)) do apply to the exempted categories. The Commission also seeks comment on whether exceptions to the autodialer prohibitions may lead to abuse.

10. *Non-commercial calls.* Auto dialers may sometimes be used to deliver non-commercial messages. The Commission tentatively finds that it is not the intent of the TCPA to prohibit or restrict such non-telemarketing uses of auto dialers. The TCPA expressly contemplates that the Commission would consider such an exemption.⁶ The Commission proposes to exempt from the TCPA such non-commercial uses for auto dialers as: calls by civic institutions, local, state, or federal governments, political campaigns and other non-commercial institutions.⁷ Such communications, whether or not from a tax-exempt organization, generally seek to advise the public of matters of civic concern, political contributions or elections, or other matters of public interest, which fall outside of the types of commercial telemarketing activity the TCPA seeks to regulate. The Commission seeks comment and analysis regarding the proposed exception.

11. *Commercial calls that do not transmit an advertisement.* The Commission proposes to exempt from the prohibitions of Section 227 commercial messages that do not include the transmission of any unsolicited advertisement.⁸ Some messages, albeit commercial in nature, do not seek to sell a product or service and do not tread heavily upon privacy concerns. In keeping with the intent of Section 227 and in accordance with the authority expressed in the TCPA, the Commission proposes to exempt by rule from the prohibitions of the statute commercial calls that do not include the transmission of any unsolicited advertisement. For example, a large business may wish to use an auto dialer to advise its employees of a late opening time due to weather; or a nationwide organization may wish to remind members of an upcoming meeting or change in schedule. It appears that auto dialer messages are also being used by catalogue or delivery companies to confirm the arrival, shipment or delivery date of a product to a customer. Such informational calls do not offer a product or service to the called party and are an efficient method to communicate a message to a large number of people. The Commission seeks comment on this proposed exemption.

12. *Calls by tax exempt nonprofit organizations.* The TCPA primarily seeks to protect subscribers from unrestricted commercial telemarketing activities.⁹ Tax exempt nonprofit organizations by definition are not seeking to make a profit on the sale of goods to the called party in a way that the TCPA was attempting to restrict. Tax and other federal and state laws often provide nonprofit organizations more advantageous treatment than

⁵ TCPA, Finding number (9).

⁶ 47 U.S.C. § 227 (b)(2)(B)(i).

⁷ See Appendix B § 64.1100(c)(1).

⁸ *Id.* at § 64.1100 (c)(2).

⁹ See TCPA, Finding number (13):

While the evidence presented to the Congress indicates that automated or prerecorded calls are a nuisance and an invasion of privacy, regardless of the type of call, the Federal Communications Commission should have the

flexibility to design different rules for those types of automated or prerecorded calls that it finds are not considered a nuisance or invasion of privacy, or for *noncommercial* calls, consistent with the free speech protections embodied in the First Amendment of the Constitution. (emphasis added).

commercial interests, and we believe it appropriate to reflect this public policy in our initial implementing rules. Moreover, the TCPA includes an exception to the definition of "telephone solicitation" for live operator calls by a tax exempt nonprofit organization.¹⁰ The TCPA does not specify whether such an exemption applies to auto dialer calls. Therefore, the Commission proposes an exemption from liability for auto dialer calls by tax exempt nonprofit institutions.¹¹

13. *Calls to Former or Existing Clientele*. If a party already has chosen to do business with a particular caller, a contact by that caller to offer additional products or services is not as intrusive as a call from a business with whom the called party has no relationship. It appears that complaints are most often generated by auto dialer calls that are "cold contacts" to the called party. However, it is unclear under the TCPA whether a prior or existing business relationship with the called party authorizes an auto dialer call to that party. The TCPA includes an exception to the definition of telephone solicitations for calls to any person with whom the caller has an established business relationship.¹² The auto dialer prohibitions in the TCPA do not incorporate the term "telephone solicitation". Instead, the auto dialer prohibitions refer to the "use of an artificial or prerecorded voice to deliver a message".¹³

14. The Commission tentatively concludes that the privacy rights the TCPA intends to protect are not adversely affected where the called party has or had a voluntary business relationship with the caller. Therefore, the Commission proposes an exemption to liability for calls placed by a caller, or on behalf of a caller, to its clientele.¹⁴ The Commission notes that the legislative history of this section reflects various interpretations of the scope of this exemption and the definition of "business relationship". The Commission seeks comment on whether this exemption should encompass prior, current, or both prior and current customers of a business. How should "prior" and "current" be distinguished? We also seek comment on the definition of what qualifies as a "business relationship". Although a business relationship may sometimes exist without the exchange of consideration between the parties, we initially note that a business relationship requires a voluntary two way communication between the client and the business. Thus, we tentatively reject any interpretation of the term "business relationship" which would be based solely on a prior solicitation from the caller to a prospective customer. The Commission seeks comment on this exemption.

15. It appears that some businesses are using auto dialers to improve the efficiency of their debt collection practices. In such applications the auto dialer either delivers a payment reminder to the customer or, frequently, the auto dialer dials up customers and immediately delivers answered calls to a live collection representative. The latter use is generally termed a predictive dialer; predictive dialers sometimes deliver a recorded message to a small percentage of called parties when all live operators are busy. The use of auto dialers in debt collection increases the efficiency of the collector who no longer has to deal with

unanswered calls, and is beneficial to the called party by making them aware of the company's inquiry. To the extent such practices comply with all other state or federal debt collection laws, it appears that this is a non-telemarketing use of auto dialers not intended to be prohibited by the TCPA. Although debt collection calls do not offer products or services, they are indeed commercial in nature and do not fall under the proposed exemption for non-commercial calls. Some companies have suggested there is a need for an exemption from liability for debt collection calls.

16. In all debt collection circumstances, a prior or existing business relationship took place between the caller and the called party or the calling party is acting in an agency capacity for the creditor. We tentatively conclude that a debt collection call, that otherwise complies with all applicable collection statutes, is a commercial call that does not adversely affect the privacy concerns the TCPA seeks to protect. It does not convey an advertisement or solicitation and is not a "cold contact" to a potential customer base. Such calls also fall under our proposed exemption for commercial calls that do not offer a product or service and do not adversely affect privacy concerns. In addition, where a company contracts with another company for debt collection services, the collection company acts on behalf of the company holding the debt. Under such circumstances the collection company becomes a party to the relationship between the company holding the debt and the called party and the "business relationship" exemption would apply to allow an auto dialer call to former or current clientele. Thus, a separate express exemption for debt collection calls is not necessary. We seek comment on this interpretation.

17. *Emergency auto dialer calls*. The TCPA expressly exempts from the category of prohibited calls, "call[s] made for emergency purposes."¹⁵ It is necessary to discuss the scope of such a limitation and how the term "emergency" should be interpreted. The legislative history of the TCPA indicates a congressional intent to interpret the term "emergency" broadly rather than narrowly. During the house floor debate on the final version of S. 1462, later the TCPA, Congressman Markey, a sponsor of the legislation and Chairman of the House Telecommunications and Finance Subcommittee, stated that:

The term "emergency purposes" is also intended to include any automated telephone call that notifies consumers of impending or current power outages, whether these outages are for scheduled maintenance, unscheduled outages caused by storms, or power interruptions for load management programs.¹⁶

In keeping with the legislative history and the intent of the TCPA, the Commission proposes to interpret "emergency" to include situations in which it is in the public interest to convey information to consumers concerning health or safety, whether or not the event was anticipated or could have been anticipated. We seek comment on this interpretation of the term "emergency purposes".

¹⁰ 47 U.S.C. § 227 (a)(3).

¹¹ See Appendix B § 64.1100(c)(4).

¹² 47 U.S.C. § 227 (a)(3).

¹³ 47 U.S.C. § 227 (b)(1)(B).

¹⁴ See Appendix B § 64.1100(c)(3).

¹⁵ 47 U.S.C. § 227 (b)(1)(A).

¹⁶ Congressional Record, November 26, 1991, H 11310.

D. AUTO DIALER SOLICITATIONS TO BUSINESSES.

18. The TCPA expressly prohibits unconsented to auto dialer calls to residences, subject to the exemptions to be adopted by the Commission. Regarding auto dialer calls to businesses the TCPA states that:

[T]he Commission shall consider prescribing regulations to allow businesses to avoid receiving calls made using an artificial or prerecorded voice to which they have not given their prior express consent.¹⁷

19. This matter must be analyzed in the context of other provisions of the TCPA regarding auto dialer calls to businesses. The TCPA expressly prohibits auto dialer calls:

(i) to any emergency telephone line (including any 911 line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency);

(ii) to the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or

(iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call....¹⁸

The broad prohibitions appear to address all circumstances under which an auto dialer call could compromise health and safety. Thus, further regulation of auto dialer calls in the business setting would not be a question of health and safety, nor even of a charge for the call, but instead an issue of privacy. The privacy interests at stake when a business receives an auto dialer call are different than when such a call is delivered to a residence. The Commission must balance the commercial speech objectives of advertisers with the privacy concerns of businesses. The Commission seeks comment on whether the privacy concerns of businesses are already adequately addressed by the TCPA by providing special protections for health and safety business organizations and by restricting the seizing of multi-party lines.

E. TECHNICAL AND PROCEDURAL STANDARDS.

20. *Facsimile Machines.* The new Section 227(d) states that it shall be unlawful to use a computer or other electronic device to send any message via a telephone facsimile machine unless such person clearly marks, in a margin at the top or bottom of each transmitted page of the message or on the first page of the transmission, the

date and time it is sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual.¹⁹ This requirement applies across the board to all facsimile messages regardless of the content of the text. The TCPA mandates the Commission to revise the regulations setting technical and procedural standards for telephone facsimile machines to require that any such machine which is manufactured after one year after the date of enactment of this section clearly marks, in a margin at the top or bottom of each transmitted page or on the first page of each transmission, the date and time sent, an identification of the business, other entity, or individual sending the message, and the telephone number of the sending machine or of such business, other entity, or individual. As mandated by the statute, we propose to amend Part 68 of the Commission's rules to incorporate this requirement.²⁰

21. *Artificial or Prerecorded Voice Systems.* The Commission also is mandated to prescribe technical and procedural standards for systems that are used to transmit any artificial or prerecorded voice message via telephone.²¹ The statute mandates that the standards shall require that:

(A) all artificial or prerecorded telephone messages (i) shall, at the beginning of the message, state clearly the identity of the business, individual, or other entity initiating the call, and (ii) shall, during or after the message, state clearly the telephone number or address of such business, other entity, or individual; and

(B) any such system will automatically release the called party's line within 5 seconds of the time notification is transmitted to the system that the called party has hung up, to allow the called party's line to be used to make or receive other calls.

Accordingly, we propose to amend Part 64 of the Commission's rules to incorporate these requirements.²² We seek comment on these proposed rules.²³

F. TELEPHONE SOLICITATION TO RESIDENTIAL SUBSCRIBERS.

1. Introduction.

22. The TCPA states that the Commission shall initiate a rulemaking proceeding concerning the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object. This proceeding encompasses live operator, auto dialer and any other call for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services. Specific regulatory options are set forth in subsection (2)

message, state clearly the identity of the entity initiating the call, the Fair Debt Collection Practices Act prohibits a collector from identifying his or her employer. See 15 U.S.C. § 1692c. The extent to which a message improperly identifies the caller under the Fair Debt Collection Practices Act is a question best addressed by the agency charged with administering that act -- the Federal Trade Commission. However, our tentative reading of the Fair Debt Collection Act indicates that debt collectors should be able to draft identification messages that comply with both statutes.

¹⁷ 47 U.S.C. § 227 (b)(2)(A).

¹⁸ 47 U.S.C. § 227 (b)(1)(A)(i), (ii), and (iii).

¹⁹ 47 U.S.C. § 227(d).

²⁰ See Appendix B proposed amendments to 47 C.F.R. Parts 64 and 68.

²¹ 47 U.S.C. § 227(d)(3).

²² See Appendix B proposed amendments to 47 C.F.R. Part 64.

²³ Some interested parties in the debt collection industry have indicated that while the TCPA requires that all artificial or prerecorded telephone messages shall, at the beginning of the

below. We ask for comment on these and other alternatives. The TCPA expressly states that telephone solicitation does not include a call or message:

(A) to any person with that person's prior express invitation or permission. (B) to any person with whom the caller has an established business relationship, or (C) by a tax exempt nonprofit organization.²⁴

23. The Commission last considered this issue in 1980.²⁵ At that time the Commission noted that since it appeared that only about three percent of all unsolicited telephone calls are interstate, regulatory action would very likely affect only a small proportion of all unsolicited calls. The Commission concluded that under these circumstances, Commission regulation would not appear to be warranted. We now revisit the issue of solicitation under the guidelines of the TCPA. The Commission seeks comment concerning the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations, whether local or interstate. The Commission also seeks comment on whether there is a need for additional Commission authority to further restrict telephone solicitations, including those calls exempted under 47 U.S.C. § 227 (a)(3). The Commission notes that the bulk of telephone solicitation complaints received by the FCC are in the auto dialer area. The Commission seeks comment on whether it is in the public interest to recognize the inherent difference in the nuisance factor of auto dialer calls as opposed to live solicitations.

24. In this regard we note that unsolicited sales calls generated \$435,000,000,000 in sales in 1990 -- a more than four-fold increase since 1984.²⁶ Thus, many consumers find such contacts beneficial and actually purchase the goods and services offered. The Commission tentatively concludes that it is not in the public interest to eliminate this option for consumers. In 1991 the Commission received a total of 757 complaints regarding unsolicited telephone calls placed to telephone subscribers by automatic dialers. During that time period the Commission received only 74 complaints generated by live solicitations. Some of the complaints against auto dialers were directed not at the content of the message, but at the problem of line seizure, where the auto dialer did not release the called party's line for several seconds after the called party had hung up. The Commission's rules and the TCPA address the line seizure problem and require the auto dialer to release the line within 5 seconds of the time notification is transmitted to the system that the called party has hung up, to allow the called party's line to be used to make or receive other calls.

25. The legislative history of the TCPA also reflects the premise that auto dialer generated calls are more intrusive to the privacy concerns of the called party than live solicitations. For example, Chairman Markey notes that:

[T]oday in America more than 300, 000 solicitors make more than 19 million calls every day, while some 75,000 stockbrokers make 1.5 billion telemarketing calls a year. Automatic dialing machines, on the other hand, have the capacity to call 20 million Americans during the course of a single day, with each individual machine delivering a prerecorded message to 1,000 homes.

In addition, automatic dialing machines place calls randomly, meaning they sometimes call unlisted numbers, or numbers of hospitals, police and fire stations, causing public safety problems.²⁷

Similarly, Congressman Rinaldo noted that:

This bill also requires the F.C.C. to restrict only those categories of artificial or prerecorded voice calls which are made for commercial purposes and will affect the privacy rights that the bill intends to protect.^{28 29}

[P]It is clear that automated telephone calls that deliver an artificial or prerecorded voice message are more of a nuisance and a greater invasion of privacy than calls placed by "live" persons. These automated calls cannot interact with the customer except in preprogrammed ways, do not allow the caller to feel the frustration of the called party, [footnote omitted] fill an answering machine tape or a voice recording service, [footnote omitted] and do not disconnect the line even after the customer hangs up the telephone. [footnote omitted]. For all these reasons, it is legitimate and consistent with the Constitution to impose greater restriction on automated calls than on calls placed by "live persons."³⁰

26. In addition to the fact that auto dialer calls generate the bulk of consumer telemarketing complaints, the majority of complaints filed at the Commission alleging fraud or deceptive practices also include the use of an auto dialer or recorded message. In these cases the consumer is concerned that the caller attempted to perpetrate a fraud or the company sold an unsatisfactory product. The Commission refers such complainants to the appropriate state or federal authorities charged with oversight of such matters, such as the Federal Trade Commission. The Commission also notes that the TCPA does not preempt state laws regulating telephone solicitation and that consumers may turn to other appropriate authorities where fraud or other commercial abuse is suspected. In light of these apparent differences between live and auto dialer solicitations, we seek comment on what distinctions we should make between these kinds of solicitations. The Commission also seeks comment on whether regulation of live solicitation may be necessary to protect residential subscribers' privacy rights.

²⁴ 47 U.S.C. § 227 (a)(3).

²⁵ See *In the Matter of Unsolicited Telephone Calls CC Docket 78-100*, 77 FCC 2d 1023 (1980).

²⁶ TCPA, Sec. 2.

²⁷ Congressional Record, November 26, 1991, H 11310.

²⁸ *Id.* at H 11311.

²⁹ In addition, the Report of the Senate Committee on Commerce, Science, and Transportation on the Senate Bill which preceded the TCPA expressly states that:

³⁰ Senate Report 102 178, to accompany Bill S. 1462, September 19, 1991.

2. Regulatory Alternatives Available to Restrict Telephone Solicitation.

27. *Methods Available to Address Telephone Solicitation.* The TCPA states that the Commission shall compare and evaluate alternative methods and procedures (including the use of electronic databases, telephone network technologies, special directory markings, industry-based or company-specific "do not call" systems, and any other alternatives, individually or in combination) for their effectiveness in protecting such privacy rights, and in terms of their cost and other advantages and disadvantages.³¹ The Commission has identified five potential mechanisms to restrict live operator telephone solicitation to subscribers: national or regional databases of persons who object to receiving solicitations, network technologies that enable called parties to avoid calls from certain numbers, company generated "do not call me" lists, special directory markings, and time of day restrictions. We will address each in turn; we seek comment on these alternatives as well as proposals for additional methodologies. Comments should include an analysis of the costs and benefits to be derived from particular alternatives and should describe the technologies involved. The Commission also seeks comment on whether different methods and procedures may apply for local telephone solicitations, and for groups such as small businesses, or holders of second class mail permits.

28. *Databases.* The TCPA states that the Commission may require the establishment and operation of a single national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations, and to make that compiled list and parts thereof available for purchase.³² The TCPA prohibits charging residential telephone subscribers for being on such a database, and authorizes the FCC to investigate how such a database would operate and under what terms. It appears that the state of Florida has gained some experience in administering a state-wide do not call system. We understand that under the Florida system subscribers pay ten dollars annually to the state consumer protection agency to be included in a do not call list. Telemarketers operating in Florida must utilize the list to screen out calls to objecting residents. The list is updated quarterly, and telemarketers are charged approximately four hundred dollars quarterly for access to a floppy disc or two hundred and fifty dollars for a paper edition. Although many advocates of a national database cite to the Florida experience as evidence of the viability of a national database, we note significant differences that make it difficult to draw from the Florida experience on a national level. The TCPA expressly prohibits charging for participation in the database, and although Florida is charging ten dollars for participation, presumably the costs of establishing and maintaining a national database are far greater. We also note that given the overall regulatory framework of the TCPA, consumer response to a national database may not be satisfied by what such a database would be able to deliver. For example, if a database were updated quarterly or semi-annually, consumers signing up for the database might continue to be called for 3 to 6 months before actually being entered onto the system. In addition, even

after the subscriber is on the database, consumers may continue to receive all calls exempted by the TCPA. For example, subscribers on the database would continue to receive calls from charitable institutions such as police benevolent associations, booster clubs, colleges and universities, state and local governments, election campaigns and pollsters. Commenters should also address the issue of the privacy concerns of consumers on a database list when such a list is maintained and accessible widely by private entities. Thus, the cost of such a database must be weighed against actual benefits to be derived. Commenters are asked to provide a rigorous analysis of costs and benefits of the national database alternative, including:

1. A complete description and analysis of the system being considered, including technology, equipment and software.
2. A description of the entity or entities interested in and available to establish and operate such a system.
3. Sources of capital investment for the system and analysis of cost recovery mechanisms for the investments under consideration.
4. Cost of access to the system, and method of access to the system (software or hard copy; by license, purchase or other alternative).
5. Frequency of updating the system, including an analysis of the responsible entity to update, the method to be utilized and the informational and educational requirements to the public.

29. Any analysis should reflect that the Commission tentatively finds that any database would not be a government sponsored institution and would not receive federal funds or a federal contract for its establishment, operation, or maintenance. In signing this legislation, the President noted that: "I also understand that the Act [TCPA] gives the Commission flexibility to adapt its rules to changing market conditions. I fully expect that the Commission will use these authorities to ensure that the requirements of the Act are met at the least possible cost to the economy."³³ In these times of fiscal restraint, the Commission does not believe that it is in the public interest to pass on to taxpayers the cost of a national database system.

30. *Network technologies.* Some entities have described network technologies that could be utilized to allow callers to screen out telephone solicitations. Presumably, under such a system all telemarketers would be assigned to the same telephone prefix. Subscribers would then be able to block calls from that prefix. It is not clear whether current network technologies could support such a system, especially on interstate calls that are preceded by an area code. Certainly, the called party would have to be served by a central office equipped with the capability to recognize and block the special prefix. In addition, telemarketers would have to be switched over into that prefix. Given that telemarketers can range from multi-billion dollar businesses to a myriad of smaller concerns across the country, it is not clear whether the telephone numbering plan could support such a prefix. The Commission seeks comment on this alternative, including a rigorous cost and

³¹ 47 U.S.C. § 227(c).

³² 47 U.S.C. § 227(c)(3).

³³ TCPA Statement by the President, December 20, 1991.

benefit analysis. The Commission also seeks comment on any other network technologies or applications that could address the issue of screening out telemarketing calls.

31. *Special Directory Markings.* This type of regulatory approach would require carriers to collect information from subscribers regarding whether they wish not to receive telephone solicitations. Those subscribers who express a desire not to receive such calls can be identified by a special mark in their directory listing. Telemarketers would be required to screen their marketing lists against these directory markings. It is not clear how such a system would be applied to national telemarketers. The Commission requests comments on this alternative, again including rigorous cost and benefit analysis.

32. *Industry-based or Company Specific Do Not Call Lists.* This alternative is a type of self-policing mechanism on a company or industry-wide level. Some companies have been maintaining lists of customers or prospective customers who have expressed a desire not to be contacted. Usually the company has become aware of the subscriber's wishes through a prior telemarketing contact during which the subscriber asked not to be contacted in the future. Companies indicate a desire to avoid expending time and investment in contacting subscribers who do not wish to be contacted. The company might keep a record of the called party's wishes and not call that party for at least several years. To date, these records appear to have been maintained by companies in hard copy form by marking a local directory listing or other telemarketing list. Some companies have begun to develop database do not call lists in order to screen other marketing lists prior to use. The issue is whether to mandate maintaining such records on a federal level. Under such a regulatory framework, companies would be required to establish, operate and maintain do not call lists. If a complaint is received regarding the telemarketing practices of a company, the company would be required to produce evidence of compliance with this requirement. The Commission seeks comment on this alternative, including analysis of whether the system should be considered on a company specific or industry-wide basis. Comments should reflect the sometimes proprietary nature of a company's marketing list and any anticompetitive consequences that open access to such information could occasion. Commenters should also address the costs and benefits associated with the "do not call list" alternative.

33. *Time of Day Restrictions.* Some complaints regarding telemarketing practices have indicated consumer frustration at having been contacted at an inconvenient time of day. State and local governments have sometimes enacted time of day limits during which telemarketers may contact consumers. Local ordinances have sometimes implemented such a regulatory approach to door-to-door live solicitation. At the federal level, time of day restrictions have been incorporated into the Fair Debt Collection Act, 15 U.S.C. § 1602 *et seq.*. Creditors subject to that act may only contact debtors by telephone between the hours of 9 a.m. to 9:00 p.m. It appears that time of day restrictions place minimal constraints on telemarketers who indicate voluntary compliance with such time restrictions as a matter of good business etiquette. However, it is questionable whether such restrictions are effective or necessary in the telemarketing field. While creditors may sometimes wish to contact debtors who are difficult to locate by telephoning at odd hours, it appears that telephone solicitation calls take place during regular business hours or the early

evening hours. Advertisers have no particular incentive to contact consumers at extremely odd hours; therefore, it is unlikely that time restrictions similar to the Fair Debt Collection Act would curb much solicitation. It could, however, eliminate those few instances of abuse. In analyzing this alternative, commenters should note that any time restrictions more restrictive than a 9:00 a.m. to 9:00 p.m. system would likely be overly burdensome on legitimate business activities, difficult to monitor and offer little, if any, additional benefits. The Commission seeks comment on this alternative. The Commission further seeks comment on existing state or local systems and on whether it is necessary to implement time restrictions on a federal level. The Commission requests commenters to analyze interstate and local calls separately, recognizing that the TCPA expressly does not preempt state laws in this area.

IV. CONCLUSION.

34. The Commission has attempted to balance the privacy concerns which the TCPA seeks to protect and the continued viability of beneficial and useful business services. The Commission has also given weight to the commercial speech rights of advertisers. In striking this balance, the Commission recognizes the need to achieve the goals of the TCPA at minimal costs to taxpayers and no cost to residential telephone subscribers. The Commission proposes implementing regulations that facilitate enforcement of the prohibitions of the TCPA against unsolicited advertising that may jeopardize health and safety and intrude on the privacy rights of telephone subscribers. The Commission also proposes to adopt exemptions to liability that protect the viability of beneficial services that were not intended to be curtailed by the goals of the TCPA. Keeping in mind this careful balancing of interests and costs, commenters are invited to present their views, including alternative proposals.

V. OTHER MATTERS.

35. This is a nonrestricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. See generally, 47 C.F.R. §§ 1.1202, 1.1203 and 1.1206.

36. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. The IRFA, on which written public comments are requested, is set forth in Appendix C. Those comments must be filed in accordance with the same filing deadlines as comments on the Notice of Proposed Rulemaking, but they must have a separate and distinct heading which designates them as responses to the Initial Regulatory Flexibility Analysis.

37. The Secretary shall send a copy of this Notice of Proposed Rulemaking, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. 5 U.S.C. § 601 *et seq.* (1981).

38. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before May 26, 1992 and reply comments on or before June 25, 1992. To file formally in this

proceeding, you must file an original and five copies of all comments, reply comments, and supporting documents. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to the Office of the Secretary, Federal Communications Commission, 1919 M St. N.W., Washington, D.C. 20554.

VI. ORDERING CLAUSES.

39. Accordingly, IT IS ORDERED THAT pursuant to Sections 1, 2, 3, 4, 201205, and 227 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 153, 154, 201-205, and 227; and 5 U.S.C. § 553, NOTICE OF PROPOSED RULEMAKING is hereby provided as indicated above.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

PUBLIC LAW 102-243

APPENDIX A
 e Hundred Second Congress of the United States of America

AT THE FIRST SESSION

*Begun and held at the City of Washington on Thursday, the third day of January,
 one thousand nine hundred and ninety-one*

An Act

To amend the Communications Act of 1934 to prohibit certain practices involving the use of telephone equipment.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Telephone Consumer Protection Act of 1991".

SEC. 2. FINDINGS.

The Congress finds that:

(1) The use of the telephone to market goods and services to the home and other businesses is now pervasive due to the increased use of cost-effective telemarketing techniques.

(2) Over 30,000 businesses actively telemarket goods and services to business and residential customers.

(3) More than 300,000 solicitors call more than 18,000,000 Americans every day.

(4) Total United States sales generated through telemarketing amounted to \$435,000,000,000 in 1990, a more than four-fold increase since 1984.

(5) Unrestricted telemarketing, however, can be an intrusive invasion of privacy and, when an emergency or medical assistance telephone line is seized, a risk to public safety.

(6) Many consumers are outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers.

(7) Over half the States now have statutes restricting various uses of the telephone for marketing, but telemarketers can evade their prohibitions through interstate operations; therefore, Federal law is needed to control residential telemarketing practices.

(8) The Constitution does not prohibit restrictions on commercial telemarketing solicitations.

(9) Individuals' privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices.

(10) Evidence compiled by the Congress indicates that residential telephone subscribers consider automated or prerecorded telephone calls, regardless of the content or the initiator of the message, to be a nuisance and an invasion of privacy.

(11) Technologies that might allow consumers to avoid receiving such calls are not universally available, are costly, are unlikely to be enforced, or place an inordinate burden on the consumer.

(12) Banning such automated or prerecorded telephone calls to the home, except when the receiving party consents to receiving the call or when such calls are necessary in an emergency

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situation affecting the health and safety of the consumer, is the only effective means of protecting telephone consumers from this nuisance and privacy invasion.

(13) While the evidence presented to the Congress indicates that automated or prerecorded calls are a nuisance and an invasion of privacy, regardless of the type of call, the Federal Communications Commission should have the flexibility to design different rules for those types of automated or prerecorded calls that it finds are not considered a nuisance or invasion of privacy, or for noncommercial calls, consistent with the free speech protections embodied in the First Amendment of the Constitution.

(14) Businesses also have complained to the Congress and the Federal Communications Commission that automated or prerecorded telephone calls are a nuisance, are an invasion of privacy, and interfere with interstate commerce.

(15) The Federal Communications Commission should consider adopting reasonable restrictions on automated or prerecorded calls to businesses as well as to the home, consistent with the constitutional protections of free speech.

SEC. 3. RESTRICTIONS ON THE USE OF TELEPHONE EQUIPMENT.

(a) AMENDMENT.—Title II of the Communications Act of 1934 (47 U.S.C. 201 et seq.) is amended by adding at the end the following new section:

“SEC. 227. RESTRICTIONS ON THE USE OF TELEPHONE EQUIPMENT.

“(a) DEFINITIONS.—As used in this section—

“(1) The term ‘automatic telephone dialing system’ means equipment which has the capacity—

“(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and

“(B) to dial such numbers.

“(2) The term ‘telephone facsimile machine’ means equipment which has the capacity (A) to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or (B) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.

“(3) The term ‘telephone solicitation’ means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message (A) to any person with that person’s prior express invitation or permission, (B) to any person with whom the caller has an established business relationship, or (C) by a tax exempt nonprofit organization.

“(4) The term ‘unsolicited advertisement’ means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person’s prior express invitation or permission.

“(b) RESTRICTIONS ON THE USE OF AUTOMATED TELEPHONE EQUIPMENT.—

“(1) PROHIBITIONS.—It shall be unlawful for any person within the United States—

“(A) to make any call (other than a call made for emergency purposes or made with the prior express consent of

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the called party) using any automatic telephone dialing system or an artificial or prerecorded voice—

“(i) to any emergency telephone line (including any ‘911’ line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency);

“(ii) to the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or

“(iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call;

“(B) to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the Commission under paragraph (2)(B);

“(C) to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine; or

“(D) to use an automatic telephone dialing system in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.

“(2) REGULATIONS; EXEMPTIONS AND OTHER PROVISIONS.—The Commission shall prescribe regulations to implement the requirements of this subsection. In implementing the requirements of this subsection, the Commission—

“(A) shall consider prescribing regulations to allow businesses to avoid receiving calls made using an artificial or prerecorded voice to which they have not given their prior express consent; and

“(B) may, by rule or order, exempt from the requirements of paragraph (1)(B) of this subsection, subject to such conditions as the Commission may prescribe—

“(i) calls that are not made for a commercial purpose; and

“(ii) such classes or categories of calls made for commercial purposes as the Commission determines—

“(I) will not adversely affect the privacy rights that this section is intended to protect; and

“(II) do not include the transmission of any unsolicited advertisement.

“(3) PRIVATE RIGHT OF ACTION.—A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State—

“(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,

“(B) an action to recover for actual monetary loss from such a violation, or to receive \$500 in damages for each such violation, whichever is greater, or

“(C) both such actions.

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If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

“(c) PROTECTION OF SUBSCRIBER PRIVACY RIGHTS.—

“(1) RULEMAKING PROCEEDING REQUIRED.—Within 120 days after the date of enactment of this section, the Commission shall initiate a rulemaking proceeding concerning the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object. The proceeding shall—

“(A) compare and evaluate alternative methods and procedures (including the use of electronic databases, telephone network technologies, special directory markings, industry-based or company-specific 'do not call' systems, and any other alternatives, individually or in combination) for their effectiveness in protecting such privacy rights, and in terms of their cost and other advantages and disadvantages;

“(B) evaluate the categories of public and private entities that would have the capacity to establish and administer such methods and procedures;

“(C) consider whether different methods and procedures may apply for local telephone solicitations, such as local telephone solicitations of small businesses or holders of second class mail permits;

“(D) consider whether there is a need for additional Commission authority to further restrict telephone solicitations, including those calls exempted under subsection (a)(3) of this section, and, if such a finding is made and supported by the record, propose specific restrictions to the Congress; and

“(E) develop proposed regulations to implement the methods and procedures that the Commission determines are most effective and efficient to accomplish the purposes of this section.

“(2) REGULATIONS.—Not later than 9 months after the date of enactment of this section, the Commission shall conclude the rulemaking proceeding initiated under paragraph (1) and shall prescribe regulations to implement methods and procedures for protecting the privacy rights described in such paragraph in an efficient, effective, and economic manner and without the imposition of any additional charge to telephone subscribers.

“(3) USE OF DATABASE PERMITTED.—The regulations required by paragraph (2) may require the establishment and operation of a single national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations, and to make that compiled list and parts thereof available for purchase. If the Commission determines to require such a database, such regulations shall—

“(A) specify a method by which the Commission will select an entity to administer such database;

“(B) require each common carrier providing telephone exchange service, in accordance with regulations prescribed by the Commission, to inform subscribers for telephone exchange service of the opportunity to provide notification.

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in accordance with regulations established under this paragraph, that such subscriber objects to receiving telephone solicitations;

“(C) specify the methods by which each telephone subscriber shall be informed, by the common carrier that provides local exchange service to that subscriber, of (i) the subscriber's right to give or revoke a notification of an objection under subparagraph (A), and (ii) the methods by which such right may be exercised by the subscriber;

“(D) specify the methods by which such objections shall be collected and added to the database;

“(E) prohibit any residential subscriber from being charged for giving or revoking such notification or for being included in a database compiled under this section;

“(F) prohibit any person from making or transmitting a telephone solicitation to the telephone number of any subscriber included in such database;

“(G) specify (i) the methods by which any person desiring to make or transmit telephone solicitations will obtain access to the database, by area code or local exchange prefix, as required to avoid calling the telephone numbers of subscribers included in such database; and (ii) the costs to be recovered from such persons;

“(H) specify the methods for recovering, from persons accessing such database, the costs involved in identifying, collecting, updating, disseminating, and selling, and other activities relating to, the operations of the database that are incurred by the entities carrying out those activities;

“(I) specify the frequency with which such database will be updated and specify the method by which such updating will take effect for purposes of compliance with the regulations prescribed under this subsection;

“(J) be designed to enable States to use the database mechanism selected by the Commission for purposes of administering or enforcing State law;

“(K) prohibit the use of such database for any purpose other than compliance with the requirements of this section and any such State law and specify methods for protection of the privacy rights of persons whose numbers are included in such database; and

“(L) require each common carrier providing services to any person for the purpose of making telephone solicitations to notify such person of the requirements of this section and the regulations thereunder.

“(4) **CONSIDERATIONS REQUIRED FOR USE OF DATABASE METHOD**—If the Commission determines to require the database mechanism described in paragraph (3), the Commission shall—

“(A) in developing procedures for gaining access to the database, consider the different needs of telemarketers conducting business on a national, regional, State, or local level;

“(B) develop a fee schedule or price structure for recouping the cost of such database that recognizes such differences and—

“(i) reflect the relative costs of providing a national, regional, State, or local list of phone numbers of

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subscribers who object to receiving telephone solicitations;

“(ii) reflect the relative costs of providing such lists on paper or electronic media; and

“(iii) not place an unreasonable financial burden on small businesses; and

“(C) consider (i) whether the needs of telemarketers operating on a local basis could be met through special markings of area white pages directories, and (ii) if such directories are needed as an adjunct to database lists prepared by area code and local exchange prefix.

“(5) PRIVATE RIGHT OF ACTION.—A person who has received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the regulations prescribed under this subsection may, if otherwise permitted by the laws or rules of court of a State bring in an appropriate court of that State—

“(A) an action based on a violation of the regulations prescribed under this subsection to enjoin such violation,

“(B) an action to recover for actual monetary loss from such a violation, or to receive up to \$500 in damages for each such violation, whichever is greater, or

“(C) both such actions.

It shall be an affirmative defense in any action brought under this paragraph that the defendant has established and implemented, with due care, reasonable practices and procedures to effectively prevent telephone solicitations in violation of the regulations prescribed under this subsection. If the court finds that the defendant willfully or knowingly violated the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

“(6) RELATION TO SUBSECTION (B).—The provisions of this subsection shall not be construed to permit a communication prohibited by subsection (b).

“(d) TECHNICAL AND PROCEDURAL STANDARDS.—

“(1) PROHIBITION.—It shall be unlawful for any person within the United States—

“(A) to initiate any communication using a telephone facsimile machine, or to make any telephone call using any automatic telephone dialing system, that does not comply with the technical and procedural standards prescribed under this subsection, or to use any telephone facsimile machine or automatic telephone dialing system in a manner that does not comply with such standards; or

“(B) to use a computer or other electronic device to send any message via a telephone facsimile machine unless such person clearly marks, in a margin at the top or bottom of each transmitted page of the message or on the first page of the transmission, the date and time it is sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual.

“(2) TELEPHONE FACSIMILE MACHINES.—The Commission shall revise the regulations setting technical and procedural stand-

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ards for telephone facsimile machines to require that any such machine which is manufactured after one year after the date of enactment of this section clearly marks, in a margin at the top or bottom of each transmitted page or on the first page of each transmission, the date and time sent, an identification of the business, other entity, or individual sending the message, and the telephone number of the sending machine or of such business, other entity, or individual.

"(3) **ARTIFICIAL OR PRERECORDED VOICE SYSTEMS.**—The Commission shall prescribe technical and procedural standards for systems that are used to transmit any artificial or prerecorded voice message via telephone. Such standards shall require that—

"(A) all artificial or prerecorded telephone messages (i) shall, at the beginning of the message, state clearly the identity of the business, individual, or other entity initiating the call, and (ii) shall, during or after the message, state clearly the telephone number or address of such business, other entity, or individual; and

"(B) any such system will automatically release the called party's line within 5 seconds of the time notification is transmitted to the system that the called party has hung up, to allow the called party's line to be used to make or receive other calls.

"(e) **EFFECT ON STATE LAW.**—

"(1) **STATE LAW NOT PREEMPTED.**—Except for the standards prescribed under subsection (d) 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.

"(2) **STATE USE OF DATABASES.**—If, pursuant to subsection (c)(3), 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.

"(f) **ACTIONS BY STATES.**—

"(1) **AUTHORITY OF STATES.**—Whenever the attorney general of a State or an official or agency designated by a State, has reason to believe that any person has engaged or is engaging in a pattern or practice of telephone calls or other transmissions to residents of that State in violation of this section or the regulations prescribed under this section, the State may bring a civil action on behalf of its residents to enjoin such calls, an action to recover for actual monetary loss or receive \$500 in damages for each violation, or both such actions. If the court finds the defendant willfully or knowingly violated such regulations, the court may, in its discretion, increase the amount of the award to

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an amount equal to not more than 3 times the amount available under the preceding sentence.

"(2) **EXCLUSIVE JURISDICTION OF FEDERAL COURTS.**—The district courts of the United States, the United States courts of any territory, and the District Court of the United States for the District of Columbia shall have exclusive jurisdiction over all civil actions brought under this subsection. Upon proper application, such courts shall also have jurisdiction to issue writs of mandamus, or orders affording like relief, commanding the defendant to comply with the provisions of this section or regulations prescribed under this section, including the requirement that the defendant take such action as is necessary to remove the danger of such violation. Upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond.

"(3) **RIGHTS OF COMMISSION.**—The State shall serve prior written notice of any such civil action upon the Commission and provide the Commission with a copy of its complaint, except in any case where such prior notice is not feasible, in which case the State shall serve such notice immediately upon instituting such action. The Commission shall have the right (A) to intervene in the action, (B) upon so intervening, to be heard on all matters arising therein, and (C) to file petitions for appeal.

"(4) **VENUE; SERVICE OF PROCESS.**—Any civil action brought under this subsection in a district court of the United States may be brought in the district wherein the defendant is found or is an inhabitant or transacts business or wherein the violation occurred or is occurring, and process in such cases may be served in any district in which the defendant is an inhabitant or where the defendant may be found.

"(5) **INVESTIGATORY POWERS.**—For purposes of bringing any civil action under this subsection, nothing in this section shall prevent the attorney general of a State, or an official or agency designated by a State, from exercising the powers conferred on the attorney general or such official by the laws of such State to conduct investigations or to administer oaths or affirmations or to compel the attendance of witnesses or the production of documentary and other evidence.

"(6) **EFFECT ON STATE COURT PROCEEDINGS.**—Nothing contained in this subsection shall be construed to prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any general civil or criminal statute of such State.

"(7) **LIMITATION.**—Whenever the Commission has instituted a civil action for violation of regulations prescribed under this section, no State may, during the pendency of such action instituted by the Commission, subsequently institute a civil action against any defendant named in the Commission's complaint for any violation as alleged in the Commission's complaint.

"(8) **DEFINITION.**—As used in this subsection, the term 'attorney general' means the chief legal officer of a State."

(b) **CONFORMING AMENDMENT.**—Section 2(b) of the Communications Act of 1934 (47 U.S.C. 152(b)) is amended by striking "Except as provided" and all that follows through "and subject to the provisions" and inserting "Except as provided in sections 223 through 227, inclusive, and subject to the provisions"

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(c) DEADLINE FOR REGULATIONS; EFFECTIVE DATE.—

(1) REGULATIONS.—The Federal Communications Commission shall prescribe regulations to implement the amendments made by this section not later than 9 months after the date of enactment of this Act.

(2) EFFECTIVE DATE.—The requirements of section 228 of the Communications Act of 1934 (as added by this section), other than the authority to prescribe regulations, shall take effect one year after the date of enactment of this Act.

SEC. 4. AM RADIO SERVICE.

Section 331 of the Communications Act of 1934 is amended—

(1) in the heading of such section, by inserting "AND AM RADIO STATIONS" after "TELEVISION STATIONS";

(2) by inserting "(a) VERY HIGH FREQUENCY STATIONS.—" after "Sec. 331."; and

(3) by adding at the end the following new subsection:

"(b) AM RADIO STATIONS.—It shall be the policy of the Commission, in any case in which the licensee of an existing AM daytime-only station located in a community with a population of more than 100,000 persons that lacks a local full-time aural station licensed to that community and that is located within a Class I station primary service area notifies the Commission that such licensee seeks to provide full-time service, to ensure that such a licensee is able to place a principal community contour signal over its entire community of license 24 hours a day, if technically feasible. The Commission shall report to the appropriate committees of Congress within 30 days after the date of enactment of this Act on how it intends to meet this policy goal."

Speaker of the House of Representatives.

*Vice President of the United States and
President of the Senate.*

APPENDIX B

PROPOSED RULES

(Title 47 of the Code of Federal Regulations, parts 64 and 68, are proposed to be amended as follows:

1. The title of part 64 is revised to read as follows:

PART 64 -- MISCELLANEOUS RULES RELATING TO COMMON CARRIERS AND TELEMARKETERS

2. The table of contents for part 64 is amended by adding subpart K to read as follows:

Subpart K - Prerecorded or Artificial Messages

64.1100 Delivery restrictions.

3. The authority citation for subpart K is added to part 64 to read as follows:

Authority: 47 U.S.C. 151-154, 201, 205, 227, 403.

4. Subpart K is added to part 64 to read as follows:

Subpart K - Prerecorded or Artificial Messages

§ 64.1100 Delivery restrictions.

(a) No person may

(1) Initiate any telephone call (other than a call made for emergency purposes or made with the prior express consent of the called party) using an automatic telephone dialing system or an artificial or prerecorded voice.

(i) To any emergency telephone line, including any 911 line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency;

(ii) To the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or

(iii) To any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or any service for which the called party is charged for the call;

(2) Initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by § 64.1100(c);

(3) Use a telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine;

(4) Use an automatic telephone dialing system in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.

(b) For the purpose of § 64.1100(a), the term "emergency purposes" means calls made necessary in any situation affecting the health and safety of consumers.

(c) The term "telephone call" in § 64.1100(a)(2) shall not include a call or message by, or on behalf of, a caller:

(1) that is not made for a commercial purpose.

(2) that is made for a commercial purpose but does not include the transmission of any unsolicited advertisement.

(3) to any person with whom the caller has had a prior or current business relationship at the time the call is made, or

(4) by a tax exempt nonprofit organization.

(d) Automatic Dialing Devices; identification of the caller. All artificial or prerecorded telephone messages shall:

(1) At the beginning of the message, state clearly the identity of the business, individual, or other entity initiating the call, and

(2) During or after the message, state clearly the telephone number or address of such business, other entity, or individual.

5. The authority citation for subpart D of part 68 is revised to read as follows:

Authority: 47 U.S.C. 154, 155, 227, 303, 403.

6. Section 68.318(c) is amended by adding paragraphs (c)(3) and (c)(4) to read as follows:

§ 68.318 Additional limitations.

* * * * *

(c) * * *

(3) Line Seizure by Automatic Dialing Devices. Automatic dialing devices which deliver a recorded message to the called party must release the called party's telephone line within 5 seconds of the time notification is transmitted to the system that the called party has hung up, to allow the called party's line to be used to make or receive other calls.

(4) Facsimile machines: identification of the sender of the message. It shall be unlawful for any person within the United States to use a computer or other electronic device to send any message via a telephone facsimile machine unless such message clearly contains, in a margin at the top or bottom of each transmitted page or on the first page of the transmission, the date and time it is sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual. Facsimile machines manufactured on and after December 21, 1992 must clearly mark such identifying information on each transmitted message.

APPENDIX C

INITIAL REGULATORY FLEXIBILITY ANALYSIS

Reasons for Action:

This rulemaking proceeding is initiated to obtain comment on proposed rules and regulations to implement the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 (TCPA).

Objectives:

The Commission seeks to implement the TCPA and define exemptions to liability under the TCPA.

Legal Basis:

The proposed action is authorized under Sections 1, 4, 201-205, and 227 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154, 201-205, and 227.

Reporting, Recordkeeping and other Compliance Requirements:

This Notice of Proposed Rulemaking proposes rules to implement the TCPA and seeks comment on regulatory mechanisms to balance individuals' privacy rights, public safety interests, and commercial freedoms of speech and trade in a way that protects the privacy of individuals and permits legitimate telemarketing practices.

Federal Rules which Overlap, Duplicate or Conflict with these Rules:

None.

Description, Potential Impact, and Number of Small Entities Involved:

Proposed rules in this proceeding could affect the telemarketing practices of numerous businesses, including small entities. After evaluating the comments and reply comments in this proceeding, the Commission will examine further the impact of any rule changes on small entities, and will set forth its finding in the final Regulatory Flexibility Analysis.

Any Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives:

The Notice of Proposed Rulemaking solicits comments on any significant alternatives minimizing the impact on small entities consistent with the stated objectives.