

Office of Secretary  
Room 159  
Federal Trade Commission  
600 Pennsylvania Avenue N.W.  
Washington, DC 20580

Date: April 11, 2002  
Subject: Telemarketing Rulemaking - Comment  
FTC File No. R411001

Greetings,

Established in May of 1988, Private Citizen, Inc. (Private Citizen) is a for-profit pro-privacy consumer organization dedicated to limiting the privacy abusive practices of the direct marketing industry, with a concentration in the area of residential (out-bound) telephone solicitation. As president and founder of Private Citizen, I have consistently tracked the industry's growth and impact on the privacy rights of individuals.

Concerning the subject rulemaking, Private Citizen, Inc. joined with the Electronic Privacy Information Center, and others, in presenting comments, dated April 9, 2002, to the Federal Trade Commission. Private Citizen, Inc. now offers the following comments independently, as additions to and/or amplifications of the above mentioned April 9<sup>th</sup> comments.

**A. Scope:**

**3. What are the relative costs and benefits of coverage of calls placed by for-profit telemarketers, but not by non-profit charitable organizations?**

Most, if not the vast majority of calls made with the intent to generate 'donations' are made by for-profit firms on behalf of the 'charity' represented. In such situations the for-profit telemarketing firm keeps a sizable percentage of the funds collected to cover costs, salaries and allow for a profit.

Indeed, profits have become such an enticing aspect of soliciting on behalf of charities, that a number of firms take it upon themselves to create the charities for which they then solicit. There are a number of telemarketing firms that contact a number of fire or police unions in a given metropolitan area, offering to solicit 'contributions' on their behalf. The resulting 'non-profit' organization would then be created with a name reflective of that area. Such 'non-profits' go by names such as 'The West Suburban Police Association of Chicago'. The result is that the elderly, who may assume that a donation may help them get a faster municipal response in the event of a health emergency, feel compelled to donate.

Furthermore, there are innumerable instances where a 'charity' being represented by paid solicitors, receives 20% or less of the amount collected from donors. In *Riley v. National Federation of Blind*, 487 U.S. 781 (1988), the U.S. Supreme Court found it a violation of the free speech rights of paid solicitors, to require them to inform donors or potential donors, what percentage of their donation would likely go to benefit the non-profit organization represented.

Therefore, the only remaining means by which the American public can be protected from telephone solicitors barging into their homes with misleading charitable pitches is to ban the use of paid solicitors altogether.

**D. Abusive Telemarketing Acts or Practices:**

**3. Concerning the cost of transmitting a Caller ID signal that appropriately identifies solicitors:**

An aspect that should be part of the equation is the cost borne by residents in an attempt to limit telephone solicitation calls.

- According to studies sponsored by the American Teleservices Association in early 2001, 39% of consumers subscribe to Caller ID.
- According to a Bell Atlantic survey of residential customers, three out of four customers buy Caller ID to help stop abusive telephone calls. (FCC fn 223)
- According to the Industry Analysis Division of the FCC's Common Carrier Bureau, in November 2000 100,200,000 households had telephones.
- According to a 1999 survey by the Vermont Department of Public Service (cited by the FTC at fn 248), 88% want all telemarketing calls stopped. (Other surveys hold essentially the same: 79% generally regard them as intrusions. "Privacy Concerns and Consumer Choice", Harris-Westin Survey Reports: 1998) For the purpose of this calculation, I shall use 75% as the percentage of the public that consider telemarketing calls to be abusive of their privacy.
- Ameritech/SBC charges a monthly fee of \$5 for Caller ID + \$.95 for 'name display'. Assuming 50% of all resident with Caller ID also have 'name display' and Ameritech/SBC's price is representative of the nationwide cost for Caller ID service, the average household expenditure for Caller ID is \$5.48/month or \$65.70/year

39% of consumers have Caller ID X 75% have Caller ID to stop abusive calls =  
 29.25% of consumers have Caller ID to stop abusive calls  
 29.25% have caller ID to stop abusive calls X 100,200,000 households with telephones =  
 29,308,500 households have Caller ID to stop abusive calls  
 29,308,500 households have Caller ID to stop abusive calls X 75% consider telemarketing to be abusive =  
 21,981,375 households use Caller ID to deal with telemarketers  
 21,981,375 of households that use Caller ID to deal with telemarketers X \$65.70 per year per household =  
**\$1,444,176,338** (1.4 billion) = annual consumer expenditure on Caller ID, to limit junk calls.

Then, add the cost of Privacy Manager / Call Intercept + Phone Butler / Easy Hang-up + answering machines + the Telezapper + Private Citizen membership services and the millions of hours wasted by residents running to the phone to answer junk calls, and the cost that residents pay will be put in some perspective.

**a. What costs would be imposed on solicitors?**

It is my understanding that the transmission of Caller ID through any telephone switch or trunk / T1 line is essentially a software issue. The FCC will be able to study the matter and issue a finding that would be more conclusive than I could offer here.

If a telephone solicitation firm claims their facility is located in an area that uses a switch that cannot transmit Caller ID, it would be a simple matter to have that switch upgraded or move their facility to a location where a switch with the appropriate capacity is available.

Zoning regulations restrict the type of business enterprise that may be conducted in a particular area. The same restriction may be applied to telephone solicitation firms, requiring them to locate where appropriate technology is available.

The industry may complain that those firms which make telephone solicitations on behalf of other firms (Telemarketing Service Agencies [TSA]) would be unable to transmit 'correct' Caller ID data due to the many different firms that they make calls for. This 'difficulty' can be easily overcome.

Since it is the industry's anthem, that they do not want to call those who don't want to be called, the term 'SOLICITATION CALL' can be electronically injected into the solicitor's out-bound Caller ID signal. Thus, residents will be able to determine the nature of the call, and elect to answer or not answer the call.

**6. Concerning the interplay between a national do-not-call list and those of various states:**

A resident should be able to be on as many do-not-call lists as may be available to that resident. State and/or private do-not-call lists (such as the Private Citizen do-not-call Directory) will continue to be necessary in order to limit solicitation calls that may not be covered by the FTC regulations

**9. Concerning express verifiable authorization to receive solicitation calls:**

Any document purporting to grant authorization to make solicitation calls to a residence must be of a

standard, recognizable format. As is the case in many situations, important aspects of a contract may be contained in a lengthy text that is seldom completely reviewed or understood by the signor. For example, a sweepstakes contest may include an express verifiable authorization to allow any organization of its choosing to piggyback on its authorization to solicit the entrant. This authorization may be buried deep within the text of the sweepstakes offer, presented in 3-point type.

Therefore, to fully apprise the resident that he/she may be relinquishing his/her privacy for a 1,000,000:1 chance to win 'prize', the authorization should be in a type face no smaller than the largest type on the signed document. Furthermore, that authorization must be clearly and conspicuously marked as such.

When such authorizations are collateral to other business agreements, such as the extending of credit, the authorization should be on a separate piece of paper, which must be mailed in. Just recently, we have seen how firms have changed their 'privacy policies' in order to allow them to sell their customer's/user's information to other firms. Express verifiable authorization, to be valid, must be made 'knowingly'.

## **11. Concerning abandoned calls:**

There are three variables, set by firms using predictive dialers (PD), that result in what will be seen by the called party, as an abandoned call.

### **1.) THE SETTING OF A PD'S DIALING SPEED.**

PD users (telemarketing firms) set its dialing rate or speed. The dialing rate of a PD is directly related to its abandonment rate (AR).

Telemarketing firms that set a 'high' AR enable its staff to be kept busy with a steady stream of live-answered calls. A higher AR setting reduces a telemarketer's idle time between calls. It also (psychologically) encourages telemarketers to invest less time with reluctant called parties, knowing that another resident is immediately available, at the push of a button.

### **2.) THE PD'S ANSWERING MACHINE DETECTION ALGORITHM.**

Another function of a PD is to identify and react to answering machines. The industry term for this is 'call progress analysis'. This process of detection - disposition of calls to answering machines, takes anywhere from milliseconds to seconds, with that time period generally set by the user.

The less time the algorithm is set to run, the more likely the PD will mistake a 'live-answered' call for an answering machine, causing the PD to hang up on the person, or mistake an answering machine for a person, causing the answering machine to be transferred to a telemarketer.

By setting a longer time, the called party experiences a period of 'dead-air' from the time of answering, to when the PD determines the call to have been answered 'live', and switches it to an available telemarketer. This situation commonly results in the called party hanging up during the dead air; which, as far as the called party is concerned, is an abandoned / hang-up call, since the call is answered but the calling party does not speak within a reasonable time.

Historically, industry trade journals and on-line industry discussion groups commonly mention a resulting '10% error rate' in answering machine detection.

Thus, when a PDer's 'call progress analysis' time is set low, it will mistakenly transfer 5% of calls answered by answering machines, to a telemarketer, and hang up on 5% of calls answered live, mistakenly determining the live answer to be an answering machine. Furthermore, when the 'call progress analysis' time is set high enough minimize such 'mistakes', the called party likely hangs up, considering the silence while the PD's analysis is proceeding, to be a hang-up call.

In other words, an inherent problem with a PD, regardless of its abandonment rate, is that its answering machine detection feature will, by nature, result in calls wherein the called party will answer and hang up believing no one is on the other end of the line. As such, these are virtual hang-up calls.

### **3.) CALL CANCELLATION.**

As well as hanging up on live-answered calls when no telemarketers are available, PD's may also cancel the ringing of a telephone after one, two or three rings when the PD recognizes, after dialing, that no telemarketer is available. As such, call cancellations are virtual hang-up calls.

TO ALLOW ANY LEVEL OF ABANDON CALLS IS TO GRANT SEEMING SAFE HARBOR FOR ILLEGAL CALLS.

Specifically, in the case of 'cold' sales solicitation calls made to residential lines, such calls are governed by the Telephone Consumer Protection Act of 1991 (The TCPA [47 U.S.C §227 and collateral FCC regulation 47 C.F.R. §64.1200]). At 47 U.S.C. §227(c)(2), Congress mandated that the Federal Communications Commission create regulations to implement the statute.

At 47 C.F.R. §64.1200(e)(2)(iv) a portion of that FCC regulation states (as truncated below):

(e) No person or entity shall initiate any telephone solicitation to a residential telephone subscriber:

(2) Unless such person or entity has instituted procedures for maintaining a list of persons who do not wish to receive telephone solicitations made by or on behalf of that person or entity. The procedures instituted must meet the following minimum standards:

(iv) Identification of telephone solicitor - A person or entity making a telephone solicitation must provide the called party with the name of the individual caller, the name of the person or entity on whose behalf the call is being made, and a telephone number or address at which the person or entity may be contacted. ...

The term 'call' as defined by the Glossary of Telecommunication Terms (published by the General Services Information Technology Service Administration - Federal Standard 1037C), as:

"In communications, any demand to set up a connection."

Thus, a PD's demand for dial tone and dialing a number, is a "call"

At 47 C.F.R. §64.1200(f)(3) the regulation defines a 'telephone solicitation' (as truncated below):

(f) As used in this section:

(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:

(i) To any person with that person's prior express invitation or permission;

(ii) To any person with whom the caller has an established business relationship; or

(iii) By or on behalf of a tax-exempt nonprofit organization.

Therefore, generally, a telemarketing sales cold caller, ringing a residential line, must give the called party:

1) the name of the caller, 2) the name of the (principal) firm, and 3) the address or phone number of that firm.

Granting a telemarketer any perceived right to violate federal law, by making telephone solicitation calls, without disclosing information required by the TCPA, is antithetical to good government. Furthermore, making an 'allowance' for such hang-up calls violates the U.S. Constitution's Supremacy Clause. (see article VI, §2). All federal, state, and local officials must take an oath to support the Constitution. This means that state governments and officials cannot take actions or pass laws that interfere with the Constitution, laws passed by Congress, or treaties. The Constitution was interpreted, in 1819, as giving the Supreme Court the power to invalidate any state actions that interfere with the Constitution and the laws and treaties passed pursuant to it. That power is not itself explicitly set out in the Constitution but was declared to exist by the Supreme Court in the decision of *McCulloch v. Maryland*, 17 U.S. 316 (1819)

As for the fact that abandon calls violate §310.4(d); the use of recordings to promptly make required disclosures, would encourage the telephone solicitation industry to further abuse our privacy. If recordings are allowed, PD over-dialing rates may skyrocket. Currently, recorded disclosures for most sales solicitation calls are prohibited by the TCPA at 47 U.S.C. §227(b)(1)(B).

Beyond 'legal' arguments against an AR set above '0', PCI submits that if residents have a right to be left alone anywhere, free of noisome intrusions, that right must exist in our homes, or not at all. The people of this nation are born with that right. The abandonment rate for PD must be set at '0' so that human rights are not diminished by under-regulated capitalism, in our homes.

Although not addressed in the FTC request for comment, some additional issues deserve attention.

a.) The necessity to allow called parties to make an audio recording of solicitation calls:

Whether a call may be recorded with 'single-party-consent' varies by state. Furthermore, since the called party can seldom immediately determine the state a call is made from, it is virtually impossible to know if a call may be lawfully tape-recorded by the call recipient.

There is, and will continue to be, the necessity to monitor a telephone solicitor's compliance with state and federal law and/or regulation. Without the called party's free ability to electronically record a solicitation, any alleged violations will be difficult to determine objectively. It is also important to note that, due to the solicitor's intrusion (most commonly without permission) into a home, the caller has already diminished the privacy of the resident.

For these reasons, I strongly urge the FTC to enable residents to freely record solicitation calls, so far as the FTC's jurisdiction will allow.

b.) Regarding a prohibition on for-profit firms soliciting on behalf of non-profit organizations:

Assuming the FTC will prohibit such solicitation calls, I foresee the ban being sidestepped in the following fashion. A non-profit organization will lease the infrastructure of a for-profit telemarketing firm, rather than 'hire' it. In other words, a minor change in the agreement between the two entities may frustrate the intent of such a prohibition.

c.) Regarding 'Caller ID Solicitation Calls':

Over the past few months, calls have been made throughout the nation from a firm or firms that intend only to transmit Caller ID information and hang up prior to the call being answered. The Caller ID information left includes; "FREE MONEY 214-615-3414" "FREE PAGER 972-739-4288". The clear purpose of these calls is to leave, what are tantamount to, ads on the Caller ID equipment of the called party. Indeed, if the call is answered, there will not be an aural presentation of any sort (neither live nor recorded).

d.) The telemarketing industry is ostensibly blind to the privacy debris it leaves in its wake.

The February 4, 2002 issue of DM News carried an article titled: FTC Mulls Predictive Dialer Ban, Catches Industry by Surprise. In that article, Sandy Pernick, president of S. Pernick & Assoc., a Chicago-based telemarketing consulting firm, was quoted as follows:

"The industry is allowing the public to see this as a nuisance issue, not as a commerce issue," Pernick said.

"I can't believe that getting a call during dinner is as dangerous for the country as losing 3 million jobs."

This hyperbole is an industry attempt to maintain its franchise to annoy. Telemarketers view their failure as, 'allowing' the public to be annoyed by junk-hang-up calls. Perhaps the industry believes it should 'allow' us to thank telemarketers for treating us like Pavlovian dogs, pointlessly responding to ringing bells at home. As for the 3 million jobs Pernick claims to be at risk; in 1990 (before the PD onslaught) the industry's estimated revenues were \$435 billion. [See: Public Law 102-243 §2(4)]. The estimate for 2001 is \$669 billion (see DMA 2000 Forecast). Assuming a 3% annual inflation rate, revenues grew \$67 billion (9%) over the past 11 years.

The revenues cited above are total figures. The 2001 estimate includes \$392 billion, or 59% from business-to-business (B-B) calls, where PD use is rare, and \$277 billion or 41% to what is termed "consumer" calls. There are two basic types of "consumer" telemarketing. They are consumer-to-business (C-B) calls, where no PD calling occurs, and business-to-consumer (B-C) calls, where the bulk of PDs are used. Therefore, the \$277 billion in "consumer" calls must be further divided to arrive at the instant regulatory impact on B-C / PD calls.

With the rapid growth of infomercials, and the addition of three toll-free (in-bound) area codes (888, 877, 866) since 1990, C-B calls are evidently an important component of the \$277 billion "consumer" revenue. Add to that, the billions spent by pharmaceutical firms on TV prescription drug ads (not extant in 1990), likely most of the 9% growth is due to C-B "consumer" calls, and not affected by PD regulation.

Also, as the drumbeat of B-C "consumer" calling accelerates, the pool of folks willing to listen to such pitches, decrease. In turn, this causes the junk call industry to ratchet its frenetic intrusion rate even higher, thus further lowering individual response rates.

Who clearly benefits? Telephone companies! Who is clearly looses? American households! For example, SBC/Ameritech sells predictive dialers to telemarketing firms, and Privacy Manager (a predictive dialer blocking technology) to residents.

This is not a victimless 'crime'. I conservatively estimate that the 10 largest telemarketing firms have the combined phone-firepower to call 560 residents per second (average 56 calls per second [cps], per firm). Assuming only 33% of that capacity is used, 672,000 residents will have their dinner hour interrupted in each time zone, every day of the year. Using these conservative figures, we arrive at 2,690,000 dinner-hour calls by just ten firms. Assuming a 2.5% abandonment rate, we have 67,250 people called to the phone every day during dinner by 10 firms, with a telemarketing device programmed to hang-up on them.

To gain a fuller sense of the telemarketing industry's mindless intrusiveness, I submit the following. The January 17, 2002 issue of DM News reported that the New York Consumer Protection Board sent letters to 20,800 businesses engaged in telemarketing, concerning the state's do-not-call list. Given the number of calls that 10 firms are capable of, let us now extrapolate that calling rate to include all firms using PDs. (The following calculation attempts to be conservative, to an extreme.)

Assuming that 3% of all telemarketing operations use a PD, we have  $(20,780 \times 3\%)$  623 firms.  
Assuming  $1/8^{\text{th}}$  the call rate capability for these 623 'smaller' firms we have  $(56 / 8)$  7 cps.  
Multiplying  $623 \times 7$  cps = 4,361 total cps / 33% utilization = 1,453 actual cps or 5,233,000 calls/hour  
Multiplying  $5,233,000 \times 2.5\%$  AR = 130,825 x 4 time zones = 523,300  
Add these 523,300 dinner hour hang-up calls due to 'smaller' firms to the 67,250 = 590,550.  
By multiplying the 590,550 dinner hour hang-ups by 300 days/year (excluding Sunday/holiday calls) we arrive at the number of calls per year that interrupt family dinners hourly with a 'hang-up' machine.

American families are attacked by machines, programmed to call and hang up when answered during the dinner hour, 177,165,000 times a year. Yet telemarketing consultants such as Ms. Pernick attempt to couch the issue in terms of 'one dinnertime call vs. 3 million jobs'. Without the use of the industry's tele-logic, it is impossible to fathom how one hang-up call (or 177 million of them) can generate one cent, or maintain the employment of 3 million people.

If an enemy of traditional American values were to annually call and hang-up on U.S. residents 177 million times during dinner (or over one-half billion times throughout the day), our government would surely take swift action to stop it.

My hope is that the Federal Trade Commission will take swift and effective action to protect traditional American value its residents from an industry that is out of control, and barging into the final sanctuary of its citizens; their homes.

Sincerely,

Robert Bulmash,            President - Private Citizen, Inc.  
Post Office Box 233  
Naperville, IL 60566  
630-393-1555  
pci@privatecitizen.com

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