AMERICAN BANKERS ASSOCIATION

1120 Connecticut Avenue, NW
Washington, DC 20036

1-800-BANKERS
www.aba.com

World-Class Solutions, Leadership & Advocacy Since 1875

Nessa Feddis
Senior Federal Counsel
Phone: 202-663-5433
Nfeddis@aba.com

9 December 2002

Ms. Marlene H. Dortch
Office of the Secretary
The Federal Communications Commission
445 12th Street, SW
Room TW-A325
Washington, D.C. 20554

Re: CG Docket No. 02-278
CC Docket No. 92-90
FCC 02-250

The American Bankers Association ("ABA') is pleased to submit our comments to the Federal Communications Commission's ("FCC") Notice of Proposed Rulemaking regarding the Telephone Consumer Protection Act of 1991 published in the 8 October 2002 *Federal Register.* The FCC is seeking comment on whether to revise or clarify its rules governing unwanted telephone solicitation and the use of automatic telephone dialing systems, prerecorded or artificial voice messages, and telephone facsimile machines. It is also seeking comment on the effectiveness of company-specific do-not-call ("DNC") lists and whether it should establish a national do-not-call list.

The ABA brings together all elements of the banking community to represent the interests of this rapidly changing industry. Its membership – which includes community, regional, and money center banks and holding companies, as well as savings associations, trust companies, and savings banks – makes ABA the largest banking trade association in the country.

Generally.

If a national DNC list is adopted, it is critical that it preempt state DNC lists. In addition, the FCC rather than the FTC should promulgate any such regulation, making clear that the federal regulation preempts state DNC list laws. Congress specifically conveyed to the FCC the discretion to develop a national DNC list. Congress also appropriately envisioned preemption of related state laws. Further, a single uniform law makes sense for regulating businesses that essentially operate on a nationwide basis. If the FCC uses the FTC's proposed DNC list scheme, we strongly recommend that it publish a revised regulation for comment before proceeding to address the many issues and challenges presented with that original proposal.

ABA believes that the current company-specific DNC lists works well and conveys to consumers the most control in managing telemarketing calls. However, the system could be improved by prohibiting interference with caller identification and allowing consumers to request addition to company DNC lists through a toll-free number or website. These measures will also address issues related to abandoned calls. In addition, abandoned calls could be reduced by adoption of guidelines setting acceptable abandonment at 5 percent per day. We believe that these measures will eliminate any need to restrict or prohibit use of predictive dialers or answering machine detection systems, which are very efficient marketing tools.

Network Technologies.

The FCC is seeking comment on whether network technologies have been developed that may allow consumers to avoid receiving unwanted telephone solicitations. Specifically, the FCC asks whether telemarketers should be required to transmit the name and telephone number of the calling party, when possible, or prohibit them from blocking or altering the transmission of such information. We believe that prohibiting interference is a workable, balanced solution that gives consumers the most control over managing telemarketing calls: consumers can choose whether they wish to talk to the particular telemarketer or not. For example, a consumer interested in obtaining a new credit card or in changing telephone services, may wish to hear about offers related to those products at a particular time, but may not want to hear about other products. However, if they have chosen to be included in a state or national DNC list, they will not receive those offers that interest them. Caller identification, which has become much more ubiquitous and available, allows the consumer to effectively screen, an option not available through a government-sponsored DNC list.

Any final rule should clarify that the telemarketer has no liability if the caller identification does not work. On occasions, systems cannot relay the information for various reasons. Telemarketers have no control over this failure and should not be liable. It is sufficient to prohibit active interference.

Predictive Dialers.

The FCC is asking for information on whether predictive dialers, as a form of automatic telephone dialing system, are subject to the ban on calls to emergency lines etc. We have no objection to prohibiting predictive dialers to call to emergency lines etc. This is an appropriate ban.

The FCC also seeks comment on whether it should adopt rules to further restrict the use of predictive dialers to dial consumers' telephone numbers, noting its recognition of the benefits of predictive dialing to the telemarketing industry. Specifically, it invites comment on whether requiring a maximum setting on the number of abandoned calls or requiring telemarketers who use predictive dialers to also transmit caller identification information are feasible options for telemarketers.

Predictive dialers are automatic dialing software programs that automatically dial consumers' telephone numbers in a predetermined manner such that the consumer will answer the phone at the same time that a telemarketer is free to take the call. In some instances, however, there is no telemarketer free to take the call when the consumer picks up. The consumer hears nothing or just a click as the dialer hangs up. Consumers have complained that they rush to pick up the phone, only to be met with dead air and no ability to determine the source of the call.

We recommend an approach built on the Direct Marketing Association ("DMA") guidelines. In addition, depending on costs and feasibility, some kind of caller identification, by number or name, may be an alternative. The DMA guidelines set acceptable maximum abandonment at 5 percent per day. The DMA guidelines also limit the number of times a marketer may abandon a consumer's telephone number in one month. We believe this is an appropriate and flexible standard. At this time, it is not feasible to eliminate all abandoned calls and a zero tolerance would, in effect, eliminate an efficient tool.

The suggestion to require that telemarketers transmit caller identification information could at least alleviate consumer concern that the hang-ups are due to harassment, for example. However, there may be technical impediments and any rule should make clear that telemarketers are only responsible for transmitting the identification information, not for ensuring its receipt, which is beyond their control. Any rule should also be flexible so that either a number or name is acceptable and that the name and number may relate to either the telemarketer or the seller.

In any case, the FCC should support federal preemption of any similar state laws to eliminate multiple and varying rules that will cause confusion and add unnecessary costs without any discernable benefit.

Answering Machine Detection.

The FCC speculates that another reason for "dead air" may be the use of answering machine detection ("AMD") technology that monitors calls once they are answered. AMD may either send a prerecorded message to an answering machine or transfer the call to a telemarketer once it detects that a customer has answered the call. In the event the

person has answered the telephone and the call is transferred to a sales representative, there may be "dead air" while the call is being transferred.

The FCC seeks comment on whether AMD technology is responsible for much of the dead air. AMD may contribute to some, but by no means most or all of the "dead air" phone calls. In any case, it does not contribute enough to justify restrictions or a prohibition given its usefulness and efficiency.

AMD is a very effective and efficient tool to contact consumers. A large percentage of messages are relayed to answering machines. Consumers can choose to simply delete the message if they are not interested or respond to it they are. In this fashion, both the consumer and the telemarketer save time.

Regulations require that persons making a telephone solicitation must provide 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 of address which the person may be contacted. The term "telephone solicitation" is defined to mean the initiation of a call or *message* for the purposes of encouraging the purchase or rental of property goods or services.

The FCC asks whether it is necessary to modify the rules to state expressly that the identification requirements apply to otherwise lawful artificial or prerecorded messages as well as to live solicitation calls. We believe that the rule should require identification. This allows consumers to be deleted from telemarketers' lists.

The FCC seeks comment on the identification requirements to predictive dialing and other circumstances involving abandoned calls. The Federal Trade Commission ("FTC") assumes that abandoned calls violate the Telemarketing Sales Rule because the telemarketer fails to identify itself. The FCC asks whether it should adopt a similar stance.

As noted in our letter to the FTC, we strongly disagree that abandoned calls violate the Telemarketing Sales Rule and recommend that the FCC not adopt this position. Nevertheless, we agree that the issue should be addressed as discussed earlier in the section related to predictive dialers. We recommend an approach that sets maximum abandonment rates, based on the DMA guidelines and, depending on costs and feasibility, some kind of caller identification by number or name.

Established Business Relationship.

The regulations provide an "established business relationship" exemption from the restrictions on artificial or prerecorded message calls to residences. The FCC concluded that a solicitation to someone with

whom a prior business relationship exists does not adversely affect subscriber privacy interests. "Established business relationship" means:

> [P]rior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.

The FCC specifically seeks comment on whether it should clarify the type of consumer inquiry that would create an established business relationship for purposes of the exemption. For example, it asks whether it should clarify that a consumer's request for information related to business hour or directions to a business location is not an inquiry that would establish the requisite business relationship.

Such a clarification appears unnecessary. The definition refers to a "communication . . . on the basis of an inquiry . . .regarding products or services offered. . ." An inquiry related to location does not appear to be an inquiry about a product or service.

Wireless Telephone Numbers.

The rules specifically prohibit telephone calls using an autodialer or an artificial or prerecorded voice message to any telephone number assigned to a paging service, cellular telephone service, or any service for which the called party is charged for the call except in emergencies or with prior consent. Rules also provide that live telephone solicitations to residential telephone subscribers must comply with time of day restrictions and must institute procedures for maintaining do-not-call lists. The FCC has not opined on whether wireless subscribers are "residential telephone subscribers."

The FCC is seeking comment on the extent to which telemarketing to wireless consumers exists today. We are not aware of any telemarketing made to cellular phones today. However, as telephone numbers become portable between cellular and wireline telephones, it will be a greater challenge to make a distinction and avoid cellular phones. Telephone companies would have to provide the information if calls are prohibited to cellular phones.

State Law Preemption.

The FCC seeks comment on whether state requirements should be preempted. We strongly urge the FCC to clarify that any federal regulation preempts state laws, particularly with regard to DNC list laws.

As the FCC notes, the Consumer Telephone Protection Act provides that only *intrastate* laws are preempted. Clearly, Congress anticipated a uniform law to be applied to entities and systems that it recognized are national in their activities and reach.

Moreover, a single, uniform law makes sense under the circumstances. First, telemarketing calls most often involve interstate commerce and entities that do business on a nationwide basis. Second, the federal law provides strong protections to consumers. The cost of compliance with the various and numerous state laws, including monitoring state laws, developing programs to ensure the various state laws are followed, auditing compliance with multiple state laws, etc., outweighs any minimum benefits bestowed by state laws. The government-sponsored DNA lists are particularly illustrative. The variations in the state laws simply do not justify the existence of multiple lists – and fees. It is a waste of valuable resources.

For these reasons, we strongly urge the FCC to clarify that the federal regulation preempts state laws.

National Do-Not-Call List and State Do-Not-Call Lists.

The FCC is revisiting the possibility of creating a national DNC list. Previously, it had considered creating a national DNC list, but declined. Instead, it opted to require company-specific DNC lists. Based on changes in the marketplace, technological developments, and the FTC's initiative to create a national DNC list, it is reviewing the issue.

If the FCC adopts a national DNC list, it should make clear that the federal regulation preempts state DNC list laws. Otherwise, it should not adopt such a national DNA list. We also believe that the FCC rather than the FTC should adopt the national DNC list regulation. Finally, if the FTC DNC list proposal is the model, it should be revised and reissued for public comment.

The FCC should make clear that a national DNC list preempts any state DNC list requirements. A federal list otherwise adds little. As we noted in our comments to the FTC, obviously, a single national list is more efficient and less costly for the government, users, and consumers: consumers need sign up only once, not each time they move; a single reconciliation rather than dozens costs less; and a single format costs less. Multiple lists are unnecessarily expensive for users. Fees for users of state DNA lists are currently expensive. Users must not only buy from each state, but often must buy multiple subscriptions from each state. Fees are also collected for violations.

Creation of a single national DNC list and regulation will help significantly in minimizing costs and improving the system generally. Indeed, there is little benefit for businesses to create a federal DNC list absent federal preemption of state laws.

We also believe that if there is to be a national DNC list, the FCC rather than the FTC should adopt the regulation establishing such a DNC list. The Consumer Telephone Protection Act specifically addresses telemarketing and specifically notes that regulations may require "the establishment and operation of a single national database to compile a list of residential subscribers who object to receiving telephone solicitations." (47 USC Section 227(c)(3)) Clearly, Congress envisioned that if there were to be a national DNC list, it would be established under the Consumer Telephone Protection Act, pursuant to the FCC's discretion.

In addition, if the FCC is looking to the FTC proposal as a model, it should put out a revised proposal for additional public comment. The FTC proposal posed significant challenges and raised numerous questions. Too many questions and details need resolution to rely on the initial proposal. (See attached ABA comment letter to the FTC.)

Company-specific do-not-call approach.

FCC is seeking comment on the overall effectiveness of the company-specific-do-not-call approach in providing consumers with a reasonable means to curb unwanted telephone solicitations. ABA believes that generally, the company-specific DNC approach works well and allows consumers the greatest control over telemarketing calls. As the FCC notes, there are advantages to this approach:

- It is already maintained by many telemarketers;
- It allows subscribers to selectively halt calls;
- It allows business to gain useful information about consumer preferences;
- It protects consumer confidentiality.

We are not aware of any problems with telemarketers not responding appropriately to requests, but any problems should be remedied with enforcement, not new requirements.

The FCC notes that predictive dialers may result in hang-ups or dead air calls so that the consumer loses the opportunity to be removed from the list. If dead air is limited based on the previously discussed DMA approach, incidents where the consumer does not have the opportunity to be deleted from the list will also be minimized.

The FCC asks whether companies should be required to provide a toll-free number and/or a website that consumers can access to register

their name on the do-not-call list. So long as the telemarketer has the option to choose either the toll-free number or website, we do not object.

The FCC also ask whether companies should be required to respond affirmatively to requests or otherwise provide some means of confirmation so that consumers may verify that their requests have been processed. We believe that this is unnecessary and expensive. Compliance should be assumed absent evidence to the contrary.

The FCC asks whether inclusion on the list for ten years is a reasonable length of time for consumers and telemarketers. We believe that it is an unreasonable and impractical length of time given the frequency with which people move and change telephone numbers. Lists become obsolete long before ten years, usually by five years. To be balanced and reasonable, five years should be the maximum time.

If the FCC believes that steps are necessary to better inform consumers of their right to request placement on the company's do-not-call list, the FCC, not the industry should fund those initiatives.

The FCC asks whether the rules could be modified to minimize unnecessary burdens on telemarketers. Federal preemption of state DNC list laws would serve to reduce significantly unnecessary burdens on telemarketers by eliminating duplicate efforts and lists and by reducing fees.

Conclusion.

The ABA appreciates the opportunity to comment on this important issue. We believe that the current company-specific DNC list generally works well, though it could be improved. The FCC should only adopt a national DNC list if it makes clear that the FCC regulation preempts related state laws. We are happy to provide additional information.

Sincerely,

Nessa Eileen Feddis