Written Comments on the Proposed Changes to
the Telephone Sales Rule (TSR)

from
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## Background

1. My name is Robert Arkow. In 1994, my residence was receiving two to four telemarketing calls a day. At the time, I was employed by the State of California, Department of General Services, as a senior radio technician. I was assigned to the California Highway Patrol's Dispatch Center in Los Angeles, and was responsible for the maintenance of the radio communications equipment at the facility. I was on 24-hour call, and could not "screen" my calls with an answering machine. When the phone rang, I was required to answer it.
2. By a stroke of luck, I read an article by the Associated Press about a gentleman named Robert Bulmash, a consumer advocate who ran a small organization called Private Citizen Inc. I contacted Mr. Bulmash and told him about my situation. Since I was planning a trip to the midwest, I asked to meet with him. We did meet, and we discussed what steps I could take to eliminate the unwanted junk calls. Mr. Bulmash did not hold out much hope, as there were few laws to protect consumers at that time. However, he did give me a copy of the laws we commonly refer to as the Telephone Consumer Protection Act (TCPA).
3. I started using the TCPA in an attempt to reduce the number of calls to my home. To put it bluntly, it didn't work. The companies kept calling, many of them claiming that it would take eight to twelve weeks to get on their "Do-Not-Call" list.
4. In reviewing the TCPA, I discovered that a company must release its written "Do-Not-Call" policy upon demand. In another section of the TCPA, I noted that the law provided a "private right of action" for "an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation." It seemed to me that providing a written copy of a company's "Do-Not-Call" policy was a requirement of the law, and failure to do so was grounds for a lawsuit under the act.
5. When companies called my home in order to solicit me on the phone, I asked them for a copy of their written "Do-Not-Call" policy. Needless to say, they did not know what I was talking about. After a reasonable attempt to get the policy, I filed a lawsuit under the TCPA.
6. Rather than go to court, most companies offered to settle out of court. The lawsuits did, however, generate some media attention. In early 1995, I received a call from a Dateline NBC producer, who at the time was doing a story on the TCPA. I agreed to do the interview,

and took Dateline's undercover cameras to a telemarketer's convention in Long Beach, California.

7. It was there that we discovered the poor attitude that the industry has towards consumers. As an example, one predictive dialer salesman at the convention proudly exclaimed, "We interrupt a quarter of a million dinners a night!" This was caught on tape and broadcast on the Dateline NBC segment, which aired on November 15, 1995. It was clear from the Dateline broadcast that the industry was not concerned in the least about consumer privacy or compliance with FCC rules.

8. In early 1996, the Internet was starting to become available to home users. After realizing how much interest the Dateline NBC story had generated, I decided to erect a web site (which in those days was a difficult undertaking) to let others know about the TCPA and their rights under the law. Thus, Californians Against Telephone Solicitation (C.A.T.S.) was born, and we were on the World Wide Web.

9. Since that time, C.A.T.S. has provided assistance to many consumers, including Mr. Jerry Standefer. With our assistance, he received the largest judgment on a TCPA case in California history, against America On Line ($5000 plus court costs). We have worked with members of the California State Legislature to pass SB-771, California's "Do-Not-Call" list bill, which was signed by the Governor of California on October 12, 2001. Consumer interest in this subject has risen, and as a result I have appeared on numerous other media outlets such as CNN Headline News, The Fox News Channel, and USA Today.

## Comments on the Proposed TSR

10. C.A.T.S. has a concern about the so called "Do-Not-Call Safe Harbor" rules [§310.4.(b)(2)]. Under the "Safe Harbor" rules, a company will not be held liable for violations of the rule's "do-not-call" provisions. While the FTC supports the "Safe Harbor" concept, C.A.T.S opposes such a ruling. After dealing with the telemarketing industry for over seven years, it has been our experience that companies, and their high-priced lawyers, twist the facts when it comes to compliance with TCPA's "do-not-call' rules and other provisions. We see this as a way for a telemarketer to violate the rules and then claim that they have made a "good faith" effort to comply with the rules. When telemarketers violate FCC rules, such as not putting consumers on their "do-not-call" list or failing to send a copy of their "do-not-call" policy, the company's response is usually that they follow all rules, and that the failure was due to an errant employee. Since the telemarketing industry has a very high turnover rate for its employees, the so-called "errant employee" is often "no longer with the company." Thus, telemarketing companies can blame people in their employ rather than themselves. As a result, companies seldom face action when they violate the TCPA.

11. In one particular case, a politician running for Governor of California placed thousands of pre-recorded telephone calls in order to get votes. While it is not illegal to do this, FCC rules require that proper identification be provided during the call. Since the calls were directed to answering machines, we were able to obtain a legal recording of the violation. We transcribed the tape and wrote to the FCC about the violation. After reviewing the transcript, the FCC found the politician in violation of FCC rules. The FCC contacted the offending party, who claimed to be unaware of the rules. Using a concept similar to the "Safe Harbor" rules, the FCC took no further action. By the way, the politician running for Governor was Dan Lundgren, who, at the time, was California's Attorney General. The FCC let Mr.

Lundgren "slide" without a notice of apparent liability, simply because his Lundgren's staff claimed ignorance of the law!

12. We believe similar things will happen if the so-called "Safe Harbor" rules are applied in the proposed TSR. If the Attorney General of the most populated state in the union can get away with breaking FCC rules because his staff was "unaware" of the rules, any half-wit lawyer defending a company can generate an excuse and "beat" the FTC's proposed rules, thanks to the "Safe Harbor" provisions. The FTC can increase or reduce fines as they see fit, so there is no need for a safe harbor, anyway.

13. Another concern that we at C.A.T.S. have is the ability of the FTC to enforce the provisions of law that are being proposed. We base this on the fact that the FCC tried to impose restrictions on the outbound telemarketing industry, but due to a lack of budget, they have been unable to effectively enforce the laws that they have currently. The FCC gives consumers a "private right of action" in certain circumstances, and this has been somewhat effective. The FTC currently has a $50,000.00 limit before one can take legal action. This limit effectively makes the ability to take legal action impossible. When was the last time you received an offer on the telephone for a product or service that cost over $50,000.00? This industry does not sell products or services that cost $50,000.00 or more, as a general rule.

14. Given the current state of the US Government since 9/11, it is unlikely that there will be more funds available to enforce the provisions suggested in the Notice of Proposed Rulemaking (NPR) that the FTC currently has. While the FTC's NPR correctly points out that only Congress can enact a "Private Right of Action" statute, the FTC could approach Congress and suggest such legislation, especially since the FTC cannot enforce the proposed rule changes based on the agency's current budget. Without some form of economic sanctions for violating the proposed rules, the telemarketing industry will continue to do what they have always done – ignore the law.

15. It is no secret that telemarketers, for the most part, do not obey current law. If the FTC is to succeed in protecting the public from unwanted and intrusive telephone calls, they must have some kind of deterrent to prevent the industry from continuing to ignore the law. If the Commission does not have manpower to enforce the law, and there is no ability for consumers to take action on their own, the current proposed rules would not be worth the paper they are printed on.

16. We at C.A.T.S. believe that both consumer AND telemarketer education will go a long way to help solve the problems with the telemarketing industry. In dealing with the industry, we find that many telemarketers do not know the laws that regulate their industry. The ones that do know the law, and don't like it, simply just ignore the current regulations.

17. One way that we "test" a telemarketer's compliance with the FCC rules is to simply ask them for a copy of the telemarketer's written "Do-Not-Call" policy. According to FCC rules, the policy must be "available upon demand." Yet when we ask for "Do-Not-Call" policies, very few companies will provide one. The industry claims that their members are in compliance and the problem is not in the industry leaders, but in a small minority of so-called "small operators" or "fly-by-night" businesses that refuse to comply with the law. OUR EXPERIENCE IS JUST THE OPPOSITE. Here is a short list of some of the companies that

(until we threatened legal action and/or took them to court) refused to provide their written "Do-Not-Call" policy upon demand, as the law requires:

Prodigy
Bank of America
Circuit City
Household International
GE Capital
Wells Fargo Bank
America on line (AOL)
Time Warner Cable
Continental Cable (now AT&T Broadband)
Winston Tire Company
Chase Manhattan Bank
Southland Protection Services (an ADT dealer)

18. The above-listed companies are not so-called "small operators" or "fly-by-night" businesses, as described by industry groups such as the American Teleservices Association (ATA) or the Direct Marketing Association (DMA). Rather, they are icons of American commerce. Many of the names below are DMA and/or ATA members. They routinely break the FCC's rules when it comes to telephone solicitation. Time Warner Cable lost a court case earlier this year, when they called a cellular phone to solicit their products (a violation of the TCPA); yet TIME WARNER IS STILL CONTINUING THE PRACTICE TO THIS DAY! And another icon of American banking, Washington Mutual Bank, admitted to us in a letter that they don't even have a written "Do-Not-Call" policy!

19. Politicians violate the rules, as well. While former Attorney General Dan Lundgren was running for Governor of California, he sent a pre-recorded phone pitch to thousands of households to promote his campaign. When we sent a transcript of the call to the FCC, they found that Lundgren did not properly identify, as required by the rules. When Lundgren's staff was advised of this, they claimed ignorance of the law! If the Attorney General of the most populated state in the union can violate the TCPA and get away with it, claiming they didn't know the law, then anyone can.

20. The point here is that if the FTC expects their rules to be followed by this industry, the Commission will have to have a large amount of resources, which Congress may not allocate in the current budget crisis. The telemarketing industry has a tradition of failing to obey current law. Without vigorous enforcement, telemarketers will ignore the FTC rules, as well. In drafting California's "Do-Not-Call" list bill (SB-771), legislators recognized that a private right of action would be a reasonable deterrent to a telemarketer ignoring the law. In our opinion, the FTC must lobby Congress for a similar statute, or the whole bill is likely to be ignored by the telemarketing industry, just as they did in the past with the TCPA.

21. In closing, the NPR is a 145-page document, providing a wealth of information about the abuses in the outbound telemarketing industry. The real question is whether the rules, as proposed, will be adhered to by the industry; and if not, what remedies does the law provide to insure compliance? We at C.A.T.S. believe that, given the current state of industry compliance, the FTC must devote a large number of resources to insure compliance and convince Congress to provide the consumer with a reasonable private right of action for

violations of the act. The FTC should engage in a partnership with consumers to oppose those that would violate the Telephone Sales Rule. Without consumer involvement, the proposed TSR will not achieve the goals it was *enacted* to achieve.

22. Finally, the industry itself would benefit from this law. The passing of a nationwide "Do-Not-Call" list will deter the rest of the states from passing similar legislation, as well as providing a "one stop" place for consumers to opt out of telemarketing calls. To the industry, this means less wasted calls to those households that do not want to be called. For an industry which constantly claims "we don't want to call anyone who does not want to be called," we believe this will benefit them by targeting just the households that want their products and services. After all, isn't this what the industry wanted all along?

Respectfully submitted,

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