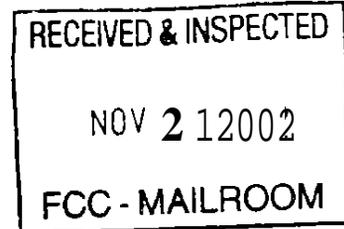


DOCKET FILED



STATE OF NEW YORK
EXECUTIVE DEPARTMENT
STATE CONSUMER PROTECTION BOARD



George E. Pataki
Governor

May M. Chao
Chairperson and Executive Director

November 22, 2002

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

Re: CG Docket No. 02-278 and CC Docket No. 92-90, FCC 02-250
In the Matter of Rules and Regulations Implementing the
Telephone Consumer Protection Act of 1991

Dear Secretary Dortch:

Introduction

The New York State Consumer Protection Board ("NYCPB") respectfully submits the following comments and responses to the questions posed in the Notice of Proposed Rulemaking ("NPRM") of October 8, 2002 in the Federal Register to amend the Federal Communication Commission's ("Commission's or FCC's") Rules and Regulations concerning the Telephone Consumer Protection Act ("TCPA") of 1991

The FCC seeks comments in three broad areas as to whether the Commission should: (1) refine its existing rules on the use of auto-dialers, prerecorded messages, and unsolicited facsimile advertisements to account for new technologies and emerging telemarketing practices; (2) adopt any additional rules that may be necessary to ensure that the privacy of individuals is protected consistent with allowing legitimate telemarketing practices; and (3) reconsider the option of establishing a national do-not-call list as authorized by Congress in the TCPA. With regard to the latter issue, the Commission has requested comments for entities not covered by the Federal Trade Commission's ("FTC's") proposed national do-not-call list, as well as the interplay between federal and state do-not-call lists. The Commission has requested separate submissions regarding the do-not-call list from all of the other issues upon which it seeks comment (Federal Register, Vol. 67, No. 195, October 8, 2002 at page 62668-9).

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LIST

Discussion

The NYCPB fully supports the FCC's efforts to expand the opportunity for consumers to prevent unwanted telemarketing sales calls, as we have supported a similar effort by the FTC.¹ The NYCPB is charged with administering and enforcing New York's do-not-call law (see, McKinney's New York General Business Law ("GBL") § 399-z, effective April 1, 2001). Based on our experience under New York's do-not-call law, the NYCPB has found that consumers welcome this type of protection. Our do-not-call Registry currently contains about 2,300,000 numbers, making it the largest such program in the United States. The overwhelming response that we have received from consumers is that the number of unwanted calls has decreased dramatically, and consumers have achieved enhanced levels of privacy in their homes, thanks to New York's do-not-call law. We believe that the FCC's efforts, as well as those of the FTC, in this regard can only improve consumer protection in this area, and we strongly welcome the FCC's initiative, particularly in those areas in which it has primary or exclusive jurisdiction separate from the FTC. We believe that the New York experience under our do-not-call law will be helpful to the FCC in its efforts, and are accordingly providing the following background material for the Commission's use.

A. New York's Do Not Call Law and Rules.

On October 12, 2000, New York State Governor George E. Pataki signed the New York State do-not-call law. The law, and the rules adopted to administer the do-not-call program, became effective on April 1, 2001. Pursuant to GBL § 399-z (2) and 21 New York Code of Rules and Regulations ("NYCRR") §§ 4602.2 and 4602.3, eligible New York State consumers may register for inclusion on the do-not-call Registry for a term of three years from the start of the next quarter following the date of enrollment (see, 21 NYCRR § 4602.2(g)). Consumers may sign up for the Registry by using the Internet, by telephone or by a paper application sent via U.S. mail, or by a facsimile transmission. The list of Registry enrollees is updated quarterly, and may be purchased from the NYCPB for a calendar yearly fee of \$800.00 for electronic Internet access or CD-ROM (see, 21 NYCRR §§ 4602.5(a), (b), (c) and (d)).

The New York do-not-call law in relevant part prohibits any telemarketer or seller to make or cause to be made any unsolicited telemarketing sales call after a thirty-day grace period from when the then current Registry is published, and after a consumer's name and telephone number appear on the Registry (see, GBL § 399-z (3) and 21 NYCRR §§ 4602.5(f) and 4603.1(a) (1) and (2)). The NYCPB has authority upon a complaint, or upon its own initiative, to conduct an inquiry as to the sufficiency of any alleged violations (see, 21 NYCRR § 4603.1(b)). The NYCPB has authority to assess a fine not to exceed \$5,000 for each do-not-call violation. Each call is a separate offense for penalty and enforcement purposes (see, GBL § 399-z (6) (a) and 21 NYCRR §§ 4603.1(a) and 4603.4(a)).

The law and rules provide for several exemptions and exceptions. The exemptions generally include not-for-profits, charitable, religious, and political organizations (see, 21

¹ The NYCPB's comments were filed with the FTC on March 26, 2002 in the proposed rulemaking to amend the Telemarketing Sales Rule, 16 CFR Part 310, FTC Rules Number R411001, to which we respectfully refer the Commission

NYCRR §4602.6(d)). The exceptions generally include calls made in response to an express written or verbal consumer request; an established business relationship which is ongoing; an existing customer relationship within the last 18 months, unless the customer has requested not to be called; and requests for a face-to-face meeting rather than concluding a sale over the telephone (see, GBL § 399-z(1)(j)(i-iv) and 21 NYCRR §4603.2(a)(1-4)).

B. The relationship of New York's Do Not Call Law and the Federal Do Not Call Programs.

The NYCPB has been enforcing the New York do-not-call law since May 2001, and we are pleased to share our experiences in administering the law with the FCC with a view toward future cooperation. As the Commission notes, it has explicit authority from Congress to establish and operate a national do-not-call database to prevent unwanted calls to consumers.² As discussed in the NPRM, when the Commission first visited the issue in 1992, it declined to establish such a list for reasons of costs, both to the industry and to consumers as the costs are passed on to them; the need for frequent updates; and privacy concerns (NPRM ¶¶ 51-52). As will be discussed in our attached comments, we believe that these concerns have largely been overcome. Further, as we view the FCC NPRM, it is apparent that the proposed national and New York State do-not-call lists are expected to exist concurrently, since Congress has not attempted to preempt state authority in this regard (see, the NYCPB comments regarding ¶¶ 48 and 62-66). The only requirements are that state standards do not violate the federal technical and procedural standards, and that lists incorporate consumer data from that state that exists on any federal do-not-call list to be established.³ In any event, it would require further action from the New York State Legislature, or changes in our rules, for the New York do-not-call program to be modified from its present form.

With respect to enforcement, if consumers are on both the national and New York State Registries, it appears as though they will be able to seek redress for unsolicited telemarketing sales calls under either state or federal law. While the proposed rulemaking would have no direct effect upon New York State's do-not-call program, other than incorporating registration data from consumers who have registered for the federal program, but not for the state program, it may lead to consumer confusion, i.e., consumers may likely confuse their rights and remedies under state and federal law. Consumers may register with the FCC, but file complaints with the NYCPB, and vice versa. Should the FTC establish a separate do-not-call list, the potential for consumer confusion will be magnified. Thus, we anticipate the need for close cooperation between the administration of New York's do-not-call program, and any federal do-not-call lists, whether established by the FCC or the FTC, or administered jointly by those agencies.

It is unclear as to where consumers would be best advised to file complaints in every circumstance, receive answers to questions, and generally receive relief from unwanted telemarketing sales calls. Based on the comments we have received in administering New York's do-not-call law, it is clear that consumers are sincerely grateful for the ability to stop most of these calls, subject to certain exemptions and exceptions in our law and rules, by listing their names and phone numbers on the NYCPB's Registry. The proposed federal do-not-call lists by the FCC and the FTC will certainly add a layer of protection

² See, NPRM at ¶ 49, and 47 U.S.C. § 227(c)(3)

³ See, 47 U.S.C. § 227(e)(1) and (2)

and enforcement for consumers. but should be designed to work in conjunction with existing laws for the states that already have do-not-call programs. We urge the FCC to work cooperatively with the FTC (as it apparently intends to do) as well as with those states, such as New York, that have do-not-call programs to ensure that consumers have access to a seamless complaint processing system that will secure the most efficacious remedy for their complaints, whether state or federal. To that end, we suggest that a referral system, as well as other appropriate measures, be considered to avoid consumer confusion and frustration. Specific measures are beyond the scope of the present comments to discuss in detail, but the NYCPB will work cooperatively with the FCC and FTC staffs to explore this potential area of cooperation, and to ensure the success of the federal initiatives in this regard.

Neither the FCC, nor the FTC, has addressed the specifics of under what circumstances enforcement on the federal level would take place. In some cases, the calls would be jurisdictional to the FCC, and in others, the FTC. These jurisdictional problems greatly concern the FCC, the FTC, and the NYCPB. but are of little concern to consumers. Consumers will want relief from unwanted telemarketing calls, not a complicated lecture on federal jurisdiction between the FCC and the FTC, or between either or both of these entities, and the State of New York. Thus, we view close federal and state cooperation as absolutely essential to provide complete coverage of all prohibited calls, whether federal or state.

There is also a further need for FCC and FTC coordination with the various states' consumer protection agencies, attorneys general, or other state agencies assigned to administer do-not-call programs. In some states, such programs are administered by consumer protection agencies, such as the NYCPB. In others, the state attorney general has such responsibility. Any rules adopted should be sufficiently flexible to accommodate these divergences, particularly regarding enforcement arrangements.

Further, many states, such as New York, have exemptions and exceptions to their laws and rules. Thus, on a given complaint, enforcement jurisdiction may lie only with the FCC or the FTC, if otherwise exempted or excepted under state law. Alternatively, state laws may be more stringent than the proposed FCC or FTC law and rules, in which event a complaint would probably be referred to the state in question by these agencies. In short, the various states' do-not-call programs, and their laws and exceptions, should be integrated into the workings of a national do-not-call program, and work smoothly together. These matters should hopefully be addressed prior to any federal do-not-call list implementation. To that end, we pledge our best efforts to work cooperatively with the FCC and the FTC in this regard.

Finally, it would be extremely anomalous if the federal government established two *do-not-call* registries by two separate federal agencies, and left consumers adrift *to sort out* the jurisdictional questions. We strongly recommend that the FCC and the FTC coordinate their lists, if established, such that there is only one federal list. Complaints could then be forwarded to the appropriate federal agency for enforcement, but consumers should not have *to* make that determination initially when they file a complaint. Complaints could also be forwarded to the states, including New York, as appropriate, if federal resources are

taxed initially in handling calls from consumers in states that do not have do-not-call programs, as may well occur. In any event, this is simply to suggest some of the problems that may arise, not to proffer any solutions, which should be explored in detail when the decision to establish a federal list, or lists, is made. These questions are explored in more depth in our attached responses to the FCC's questions, and we have raised similar concerns in our previously filed comments with the FTC.

Conclusion

We hope that our comments regarding New York's experience with our do-not-call law and rules, as well as our responses to the FCC's questions, are helpful in assisting the FCC in executing a comprehensive, effective national do-not-call list, hopefully in close coordination with the FTC as well as the various states that have do-not-call programs. We would be glad to assist the FCC and the FTC in any way that we can to further our mutual goal of enhanced consumer protection from unwanted telemarketing sales calls.

For further coordination regarding these matters, as well as any questions that you may have, please contact our General Counsel, James F. Warden, Jr., at (518)486-3934.

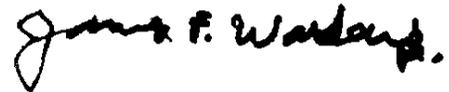
Respectfully submitted,



May **M.** Chao
Chairperson and Executive Director



Lisa R. Harris
Deputy General Counsel



By: _____
James F. Warden, Jr.
General Counsel
5 Empire State Plaza, Suite 2102
Albany, New York 12223-1556
(518) 486-3934 (voice)
(518) 474-2474 (fax)



Seth R. Lamont
Assistant Counsel

Enclosures:

- (1) NYCPB Responses to the Proposed Rules Other Than Issues Relating to a National Do-Not-Call List.
- (2) NYCPB Responses to the Proposed Rules Relating to a National Do-Not-Call List.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of

Rules and Regulations Implementing the
Telephone Consumer Protection Act of 1991

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

Responses To The
Proposed Rules Relating To A
National Do-Not-Call List

May M. Chao
Chairperson and Executive Director

James F. Warden, Jr
General Counsel

Lisa R. Harris
Deputy General Counsel

Seth R. Lamont
Assistant Counsel

Dated: November 22, 2002
Albany, New York

NEW YORK STATE CONSUMER PROTECTION BOARD
5 EMPIRE STATE PLAZA, SUITE 2101
ALBANY, NEW YORK 12223-1556
(518) 486-3934
<http://www.consumer.state.ny.us>

Before the
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In the Matter of)
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Rules and Regulations Implementing the) CG Docket No. 02-278
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) FCC 02-250

Responses To The
Proposed Rules Relating To A
National Do-Not-Call List

To: The Commission

The New York State Consumer Protection Board ("NYCPB") hereby respectfully submits the following responses in answer to the Federal Communications Commission's ("FCC's, or Commission's") questions that are contained in the Notice of Proposed Rulemaking and Memorandum Opinion and Order ("NPRM" or "Notice"), which was adopted September 12, 2002, released September 18, 2002, and noticed in the Federal Register, Vol. 67, No. 195, at pages 62667 et seq. on October 8, 2002. The NYCPB will reference the appropriate paragraph number in the September 18, 2002 Notice, and then give our response

Further, In accordance with the Commission's directions in the October 8, 2002 Federal Register at page 62669, this portion of our comments will concern the proposed rules changes that affect matters relating to the possible establishment of a national do-not-call list. Comments relating to matters other than the national do-not-call list are in a separate document enclosed herewith. Also, please also refer to the November 22, 2002 cover letter accompanying these question responses where some of the more

important issues to the NYCPB, as well as details of the New York Do Not Call program, are highlighted

NPRM, ¶ 49. National Do-Not-Call List.

The NYCPB strongly supports federal measures to empower consumers to stop unsolicited telemarketing sales calls that invade the privacy of their homes, whether jurisdictional to the FCC, or the Federal Trade Commission ("FTC").¹ The creation of a national do-not-call list by the FCC is a welcome addition in the prevention of unsolicited sales calls to the existing protection offered by New York's do-not-call law and rules, as well as those of other states (see, the November 22, 2002 cover letter enclosed herewith for an overview of the New York Do Not Call program). Further, for states that do not offer such programs, their citizens would be offered an opportunity for such protection that they do not now have

However, as we note in our cover letter to these comments, it would be extremely anomalous if the federal government established two do-not-call lists by two separate federal agencies (the FCC and the FTC), and left it to consumers to sort out the jurisdictional questions. This is apparently the Commission's thinking as well, since it refers to a "one-step method" for preventing such calls (see, NPRM at ¶ 49). This problem has not arisen within the states with do-not-call programs because they are limited to state residents.² We strongly recommend that the FCC and the FTC coordinate their respective lists, if established, such that there is only one federal list for

¹ See, the NYCPB comments in this regard submitted to the FTC dated March 26, 2002 in the Telemarketing Sales Rule Proceeding to amend 16 CPF Part 310, FTC Rule Number R411001.

² See, e.g., New York General Business Law ("GBL") § 399-z(1)(c) and 21 NYCRR § 4602.3(a)

consumer registration for do-not-call protection. Complaints could then be forwarded to the appropriate federal agency for enforcement, but consumers should not have to make that determination initially when they file a complaint. Complaints could also be forwarded to the states as appropriate, depending on where the most appropriate complaint resolution may lie. Such a combined list would also ease the compliance burden on the telemarketing community, and thereby facilitate greater compliance with enhanced consumer protection results. Finally, the FCC can and should undertake appropriate coordination measures with the FTC when it issues a ruling in this regard (see, NPRM, ¶ 49)

NPRM. ¶ 50. Constitutional Standards.

The Commission seeks comments on the application of the Central Hudson commercial free speech standards with regard to the establishment of a national do-not-call list.³ The state action issue currently is subject to four tests as enunciated in Central Hudson to determine whether the state interest outweighs the commercial free speech interest: (1) Is the speech protected by the first amendment?; (2) Is the asserted governmental interest substantial?; (3) Does the regulation advance the governmental interest?; and (4) Is the regulation not broader than necessary to satisfy that interest?⁴ The tests were not met in Central Hudson for reasons described in the opinion. However, this simply means the tests for state action were not met, not that

³ Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557, 567, 100 S. Ct. 2343, 65 L. Ed. 341 (1980).

⁴ See, NPRM at 712, where these tests are discussed; see also Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417, 113 S.Ct. 1505. 123 L.Ed.2d 99 (1993).

state action could not occur if they were met – a crucial distinction

The Central Hudson case is clearly distinguishable from the issues involving the Commission's power to establish a national do-not-call list. While Central Hudson involved state action (energy promotional advertisements were prohibited), such action was done at the state's behest through the Public Service Commission acting sua sponte without any regard as to whether consumers wanted to receive such messages or not. 447 U.S. 557, 559-560. In contrast, any national do-not-call list would involve state action to protect the peace and tranquility of consumers' homes at their request – an entirely different matter from the state prohibiting speech from entering the home without consumers even being consulted.

It has been a long standing principle that individuals have a well-nigh absolute right to stop intrusions into their homes, whether of junk mail or, in this instance, telephone calls. See, Rowen v. U.S. Post Office Dep't, 397 U.S. 728, 738, 90 S.Ct. 1484, 25 L.Ed. 2d 736 (1970) ("In effect, Congress has erected a wall—or more accurately permits a citizen to erect a wall—that no advertiser may penetrate without his acquiescence"), which is the leading case in this area. See also Martin v. Struthers, 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313 (1943) (door-to-door religious solicitations cannot be prohibited by state action, since it substitutes the judgment of the community for that of the individual, but dicta indicated that an individual's request could be enforced by state action, see 319 U.S. 141, 148-49)

The Rowen case involved a postal procedure whereby a citizen could ask to be removed from mail lists involving material believed to be erotically arousing or sexually

provocative. The procedure was to submit a form to the Post Office, which would then notify the sender not to send any more such material.⁵

The Supreme Court gave a far broader interpretation to this legislation than was probably originally intended. First, the Post Office was not to engage in content determination (make calls as to whether the material was objectionable) because that would put them in a censorship role. Thus, simply the request by the consumer was enough for the Post Office to act. 397 U.S. 728, 734

Second, the Court went further, finding that the consumer had "complete and unfettered discretion" in electing whether he wanted to receive material from the sender. The holding was thus not limited to erotic material. Id.

Third, the free speech argument was balanced with considerations of the rights of a householder to control what came into his house, and the householder won. The Court noted, "Nothing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit; we see no basis for according the printed word or pictures a different or more preferred status because they are sent by mail. The ancient concept that 'a man's home is his castle' into which 'not even the king may enter' has lost none of its vitality, and none of the recognized exceptions includes any right to communicate offensively with another." 397 U.S. 728, 737. The Court noted that even a dry goods catalogue could be prohibited. Id. The Court summed up its position by noting, "We therefore categorically reject the argument that a vendor has a right under

⁵ Interestingly, the Post Office Form 1500, "Application for Listing and/or Prohibitory Order" that was the subject of the Rowan case is still being used. Both the Form (1996 edition), and the current edition of the Post Office "Consumer's Guide to Postal Services & Products" (March, 1998, at pp 42-43) are clearly designed for obscene or objectionable materials even though the Rowan holding said the form could be used for any mailed material

the Constitution or otherwise to send unwanted material into the home of another. If this prohibition operates to impede the flow of even valid ideas, the answer is that no one has a right to press even 'good' ideas on an unwilling recipient." 397 U.S. 728, 738.

Thus, an individual can control material coming into the home. Since this right is enforced by the Post Office through the courts, this is state action in the sense of the government, whether state or federal, interfering with commercial speech, since the state is simply following the wishes of the individual. The same logic applies to do-not-call laws. See also Struthers, op.cit.

Indeed, one commentator has concluded regarding Struthers that:

In the final analysis, Martin v. Struthers is powerful authority for the constitutionality of a restriction on telemarketers which limits their calls solely to willing recipients, or more precisely, prohibits them from calling those who have indicated an unwillingness to be called. The narrowness of such a regulation would insulate it from constitutional infirmity.⁶
(emphasis added)

The same commentator discussed the probable constitutionality of do-not-call lists, such as might be adopted by the FCC. The author concluded that the case was probably stronger for telemarketing than for junk mail, but both were able to be protected, and, finally, that citizen choice legislation would probably be "effective and constitutional." See, 33 Santa Clara Law Review 51, at 78-79, 89

Another case, U.S. Postal Service v. Hustler Magazine, 630 F. Supp. 867 (D.C.Cir. 1986), discussed other criteria such that there must be alternative means of making the communication, that the government must be content-neutral, and the court also reiterated the significant governmental interest requirement of Central Hudson

⁶ See, "The Constitutionality of Requiring Telephone Companies to Protect Their Subscribers from Telemarketing Calls," James A. Albert 33 Santa Clara Law Review 51, 70 (1993).

630 F. Supp. 867, 873. The Hustler case involved the publisher of Hustler Magazine mailing copies to every member of Congress at their offices. The Court held that the law prohibiting such mailings was unconstitutional because it conflicted with the rights of citizens to petition their governmental representatives. The court noted in dicta that the same mailing to their homes could be properly restricted under the Rowan standards

630 F. Supp. 867, 871

Finally, a New York case, which extensively discussed federal constitutional standards, indicated that "[The State] can punish those who call at a home in defiance of the previously expressed will of the occupant." See, Tillman v. Distribution systems of America, Inc., 224 A.D.2d 79, 80, 648 N.Y.S.2d 630 (2nd Dep't 1996), app. dis. 89 N.Y.2d 938, 677 N.E.2d 289 (1997)(unwanted newspapers).

Thus, to the extent a federal do-not-call statute simply reflects the wishes of the individual, the NYCPB concludes that such action is squarely within the FCC's powers, since the Central Hudson tests, as well as other standards, have been met.

NPRM, ¶¶ 51-52. Implementation Challenges.

The technical difficulties that persuaded the Commission not to earlier adopt a national do-not-call list have largely been obviated. The updates have not been a substantial problem; the costs are reasonable because of the advances in computer technology; most computerized databases permit selective retrieval such that an entire database need not be downloaded, particularly by the smaller telemarketing firms; and the privacy problems are manageable. While we have no information regarding the

change of numbers each year, the Post Office locator service, or the National Change of Address ("NCOA") Service, typically allow databases to be reasonably accurate

Further, number portability is far advanced, such that consumer addresses may change, but the phone numbers do not, in which case only the database addresses need be updated. In any event, updates in the three to five year range provide a means for periodically checking the accuracy of databases.

Finally, while privacy remains a concern, such a concern is generally limited to unlisted numbers. If those numbers are included on a database, we are aware that they may be cross-checked by marketers using other databases to match names and addresses with the number. Since the number must be listed as an irreducible minimum for do-not-call lists, such consumers may well be advised not to list in any do-not-call list, notwithstanding legal prohibitions against the improper use of lists.

NPRM, ¶ 53. 47 U.S.C. § 227(c)(3) Requirements.

Most of the twelve criteria listed in ¶ 53 have been successfully addressed by the various states. See, e.g., GBL § 399-z and 21 NYCRR Parts 4602-4604, where these implementation problems have been detailed. We can only add that the specific federal problems, such as 753, item (I0), relating to the ability of a federal database to be used by the states, are solvable providing the technical standards adopted in the federal database are commonly used in the industry. Thus, there appears to be no obstacle for the Commission's database to interact with the proposed FTC database, or those databases already in place for the states

NPRM, ¶ 54. Notification Requirements

The NYCPB concurs with the FCC's interpretation of 47 U.S.C. § 227(c)(3)(B) and (C), which require notification by common carriers to consumers of the existence of the national do-not-call list. A similar requirement exists in the New York statute.⁷ We would suggest that regulated common carriers also be required to provide an annual notice in bills, as is required in New York.

NPRM, ¶ 55. Interaction of Any FCC Do-Not-Call List With the FTC proposals.

The Commission should extend its jurisdiction to cover any gaps for banks, insurance companies, and common carriers, and other entities that are not jurisdictional to the FTC. In this connection, and as previously discussed, we recommend that the FCC and the FTC promulgate one list, although the enforcement protocols would have to be determined based on jurisdiction. Our concern in this area – again reiterated – is that consumers have a seamless registration and enforcement process

NPRM, ¶ 56. Consistency Between the FCC and FTC Rules.

The FCC should coordinate with the FTC regarding rulemaking to eliminate any inconsistent regulations. As to the specific example cited (whether for-profit firms that solicit for charities might not be exempt under the proposed FTC regulations, while they might remain exempt under the FCC regulations), each Commission would, of course, rule on the merits using its best judgment. If the rulings differ, obviously enforcement

⁷ See, McKinney's New York Public Service Law § 92-d, which requires such notice to be published in telephone directories, and also be annually noticed in consumer bills.

will depend on jurisdiction. However, it is hoped that such inconsistencies will be minimized, since they could create confusion, both for consumers as well as within the telemarketing community, with adverse effects on both compliance and enforcement. In any event, speculation as to possible conflicts in this area is somewhat premature.

NPRM, ¶ 57. Wireless and Fee Issues Between the FCC and FTC Rules.

The NYCPB recommends that wireless customers be allowed on any national database, providing a residential listing exists, and the purpose of the call is also residential. Our experience in this area is that the boundaries are far from neat, and enforcement must proceed on a case-by-case basis. New York allows such registrations, since our statute does not differentiate between wireless and wire calls (see, GBL § 399-z(1)(h)), nor do our rules, which refer to consumers who have "telephone service in this state which receives incoming calls," and wireless service is certainly in this category. See, 21 NYCRR § 4602.3(a)(1)(ii). We also permit wire and wireless telephone listings that may include part-time businesses, provided that the listing is also residential as well. Business-to-business calls are exempt, since such entities are not permitted to enroll on our Registry. See, 21 NYCRR § 4602.3(a).

As to enforcement, if a complaint is received, we attempt to determine if the call is for a commercial (business-to-business) purpose for both wire and wireless calls by contacting the telemarketer as well as the consumer, and if so, the complaint is dropped. Otherwise, such calls are treated as apparent violations.

Finally, New York does not charge a fee for consumers to list on our Registry, and we recommend that any federal list be cost-free to consumers as well.

NPRM, ¶ 58. Recordkeeping Consistency Between the FCC and FTC Rules.

Simply put, telemarketers should not have to maintain dual sets of books regarding any national do-not-call list, since the cost of such compliance invariably will be borne by consumers in the form of higher prices. We urge again that such rules be thoroughly coordinated between the FCC and the FTC to preclude inconsistencies, or dual recordkeeping requirements.

NPRM, ¶ 59. Do-Not-Call Program Duration, Privacy, Database Methodology and Consumer Preference Considerations.

Generally, we do not believe that a two-year trial period is a good idea. The amount of time, effort and resources that will go into the establishment of any national do-not-call program will be tremendous (see, ¶ 51, fn. 181), even if the estimates earlier used by the Commission in its 1992 rulemaking proceeding are outdated because of technological advances in a generally declining cost industry. Consumers will no doubt build up a reliance on such a program to protect the calm and tranquility of their homes. Thus, such an effort should not be viewed as a trial, or experiment, but a commitment on the part of the federal government to provide such a service on an ongoing basis. While adjustments to the program are inevitable as experience is gained, the two year trial idea strikes us as unwise.

As to the privacy concerns in 759, as we noted in our FTC comments, ensuring a secure environment for potentially millions of telephone numbers will require that both the FCC, as well as the FTC, have the technology to establish an automated

registration and verification system that has the capability to detect telephone numbers that are not authorized to be registered, and provide appropriate security for proper numbers that are registered. The federal system should require that consumers be obligated to register from the telephone number they wish to add to the national do-not call list, and verify such registration via the Internet, or by calling a toll-free telephone number reserved for verification purposes only. Additionally, a separate toll-free telephone number or link on the Internet (using an electronic signature) should be provided for those consumers who wish to remove their telephone number or numbers from the national do-not-call list.

As to database concerns and processes, a default registration and support system would have to be established for those persons without touchtone telephone service. The automated and the default system would have to be supported by live administrative personnel that would register those consumers without touch tone telephone service and/or access to a computer for verification purposes as stated above. The administrative personnel would also be responsible for answering questions and taking complaints, as well as responding generally to consumer do-not-call needs.

New York allows consumers to sign up for the Registry from any telephone, via the Internet, through the U.S. mail, or by facsimile transmission. It has been New York's experience that allowing consumers to enter personal information that cannot be immediately verified creates invalid consumer applications due to missing, misprinted or mistakenly keyed (in the case of the Internet) information. Although the NYCPB does its best to correct invalid applications, it creates a heavy administrative burden to do so.

Therefore, only allowing consumers to sign up for a national do-not-call list using the telephone that corresponds with the telephone number they wish to have entered would be the most effective and efficient system, which could be jointly operated by the FCC and FTC. This would be similar to procedures used by credit card companies to periodically require consumers to re-validate their credit cards using their home telephones.

The NYCPB has also found, as we noted in our FTC comments, that an operator assisted verification process is very time consuming and administratively taxing. Accordingly, we now have a system in place for consumers to directly verify their registrations without contacting us, after about a two week delay for processing. However, more advanced systems should allow consumers to verify their registration in real time by calling from their residential telephone to a toll-free number, which would be reserved for verification of registration status only. Consumers should also be able to verify their status via the Internet. For example, consumers should be able to enter the telephone number they believe to be registered, and verification should appear on the screen with the date and time the registration was entered.

Finally, as to time, day or specific permitted telemarketing call preferences, as we noted in our FTC comments, such a procedure would certainly maximize consumer choice, but might well be administratively unmanageable, extremely costly, and ineffective. Some smaller telemarketers may not have the equipment to effectively comply with the Rule. The costs for the personnel and technical support that would be necessary to not only create, but update such information whenever a consumer feels that one time of the day is better than another to receive calls, would be probably be

considerable. Consumers may or may not remember the times and days they were not supposed to be called, or whether a specific telemarketer had permission to call, and such data would have to be verified by the FCC or FTC in processing the complaint.

Further, this approach would add to the costs that are ultimately passed on to the consumer. The burden could be particularly acute on smaller telemarketing firms. The NYCPB does not believe that the specific preferences of consumers as to days and hours, or permitted telemarketing calls, should further overburden what is likely to be a difficult administrative problem in any event. See, the NYCPB FTC comments, op.cit., for a fuller discussion at p. 11. As we noted in that discussion, while such a provision would maximize consumer choice, it would also potentially maximize consumer confusion. We recommended that a days/hours option not be adopted, or specific telemarketer calls permitted (other than through generic exceptions), and we reiterate that recommendation herein regarding any FCC list, or combined FCC/FTC list.

NPRM, ¶ 60. Effectiveness of State Do-Not-Call Lists/Federal Assistance in the Do-Not-Call Effort.

The history and operational effectiveness of the New York do-not-call program is discussed in our cover letter extensively, to which we respectfully refer the Commission.

Our view of federal efforts in this regard, whether by the FCC or the FTC, is that they can only help ensure greater protection for consumers. Another level of enforcement will be added, thereby adding incentives to compliance. Also, through time, both the states and the federal government may realize some economies of scale through cooperation regarding database management.

Finally, our view is that the state lists have generally worked well, based on anecdotal information we have received. and we know of no specific shortcomings that are in need of correction. For instance, as we noted in our cover letter, we currently have about 2.3 million numbers registered, and our registration base continues to increase month after month. We also receive direct input from consumers as to program effectiveness through our complaint process, and also by participating in outreach events, such as the New York State Fair. While consumers still occasionally complain about certain of the exemptions (our face-to-face exemption is often cited), the overwhelming majority of consumers believe that the volume of calls has decreased substantially, and believe the program has achieved its intended purpose

NPRM, ¶ 61. Relationship of a National Database to State Do-Not-Call Laws.

The clearly overlapping jurisdiction between the proposed federal do-not-call list, and existing state lists, may pose practical administrative challenges that should be the subject of federal-state discussions, and the possible development of administrative protocols as to how the same complaint would be handled. For example, a New York consumer who is registered on both the New York and the national lists may receive a phone call from a telemarketer in Kansas, and file a complaint with the NYCPB. Should New York take appropriate enforcement action on the call, and also refer it to the FCC? This would expose the telemarketer to potential liability for double violations. Is that the FCC's intent, or would state action be sufficient for the FCC's purposes? If New York State knew that the FCC was acting in a particular case, a wise use of our administrative resources might be to defer to the federal action, at least for interstate

calls. Such matters could be resolved on a case-by-case basis, but the development of appropriate federal-state protocols would ensure a seamless complaint resolution process for consumers. The NYCPB suggests that a collaborative network of technical and administrative assistance support any national do-not-call program that would provide an appropriate complaint process regardless of which agency – federal or state -- the consumer contacts. While it may be premature to deal with such questions at this stage of the proceeding, we would recommend that the FCC, working in conjunction with the FTC as well as the states, anticipate such problems and concerns, and provide resolutions, at an appropriate time. This might result in additional administrative and financial responsibilities being placed on the states to ensure that interstate complaints are referred to the appropriate federal office.

Consumers rely on the existing do-not-call programs around the country, including New York, for relief from unwanted telemarketing sales calls. Each state has addressed its unwanted telemarketing sales calls issue with a law that fits the needs and lifestyles of the consumers it serves, including various exemptions and exceptions that fit the needs of its citizens and the telemarketing community that does business with those citizens. These exceptions are far from uniform. The national do-not-call list may potentially prohibit a wider range of unwanted telemarketing sales calls, but such added protection should be carefully coordinated with existing state enforcement efforts. To that end, it is thus clear that any national list should be designed to work with, rather than preempt, state telemarketing laws. See Van Berghen v. Minnesota, 59 F.3d 1541 (8th Cir. 1995)

Further, New York State's Attorney General ("NYAG") is currently expressly empowered to take action on behalf of aggrieved residents in federal courts under existing law, and such powers may now include do-not-call violations based on complaints from consumers who are on any national do-not-call list (see, 47 U.S.C. § 227(f)), while the NYSCPБ does not bring such actions (see, McKinney's New York Executive Law ("Executive Law") § 63(1)). This would increase the NYAG's do-not-call role, thus serving to exacerbate consumer confusion concerning which agency is primarily responsible for enforcement actions in federal court under 47 U.S.C. § 227(f). As a practical matter, both the NYAG and NYCPB are involved in consumer complaint resolution, and we cooperate fully on matters of mutual interest according to the NYCPB's enabling legislation (see, Executive Law § 553(3)(b)). However, the NYCPB has jurisdiction over do-not-call violations.

We recommend that a proper consumer education program, and a comprehensive enforcement roadmap, should be provided to consumers, after appropriate coordination with the states, as they seek to enforce their rights under any new federal program. Without such a program and roadmap, consumers may become frustrated and confused with a system that is attempting to aid them. The cover letter to these comments discusses these issues as well

NPRM, ¶¶ 62-66. Intrastate Versus Interstate Jurisdictional Questions;
"Slamming" Rules Approach.

First, as was discussed extensively in our response to NPRM ¶ 48 with regard to state law preemption, the NYCPB does not believe that existing federal law has given

the Commission authority to preempt state statutes, even for clearly interstate calls, Further, given the wording of our statute, we are required to continue to enforce interstate violations, even if the FCC establishes a national do-not-call list unless and until our statute *is* changed by the Legislature.⁸ Thus, our enforcement of interstate calls will continue, and we will work together with the Commission to ensure a smooth registration and complaint resolution system in the event a national do-not-call list is established

Second, the "opt-in" approach for "slamming" has been adopted in New York. See, McKinney's New York Public Service Law ("PSL") § 92-e(3), where the Legislature has directed that rules be adopted that are consistent with federal law. Such an approach is not specifically authorized by the do-not-call statute, but in practice, we see no conflict. Where federal law or rules are stricter than in New York, we would simply refer any complaints to the FCC. Where federal law and rules are less strict, the New York statute and rules would be enforced. When the statutes and rules are essentially identical, dual enforcement, with appropriate coordination and protocols, would be the norm. Should our statute subsequently be amended by the Legislature to parallel the PSL § 92-e approach, that approach would be equally workable.

Third, for consumers that register only with the FCC, and have not registered with New York, we are required under the law to incorporate those registrations into our database, and would do so. See, 47 U.S.C. § 227(e)(2).

⁸ See, GBL §399-z(1)(d)(ii), which refers to telephone sales calls "from a location outside of this state to consumers residing in this state;"

Fourth, in terms of sharing data from our database for purposes of being incorporated into the federal database, that may well be a longer term proposition that holds considerable promise. but needs to be thoroughly staffed prior to implementation. As we read the discussion in the NPRM at ¶¶ 64-66, the federal database could effectively substitute for the existing state databases for state residents. This would, of course, necessitate incorporating all of the state data into the federal database, and that database would be used to process jurisdictional New York complaints, or complaints that might be both federally and state jurisdictional. This procedure might result in considerable financial savings for the various states that now either operate their own databases, or contract for such services, and is definitely worth considering.

However, such a change would require both statutory and rules changes in New York, since inter alia, registration on the New York list is required presently for enforcement (see, GBL §§ 399-z(2) and (3)), and federal registration would have to be added. Further, the New York program is envisioned to be primarily supported by sales of the New York do-not-call Registry, and if all our data were in the federal list, there would be no need to purchase the New York Registry. Consequently, we would have problems funding the enforcement aspect of the New York do-not-call program. Also, our rules require that redistribution of Registry data (such as any telemarketer use of the federal list would entail) is prohibited unless both the seller (the federal government), and the buyer (the telemarketer) purchase a copy of the Registry. Thus, any telemarketing firm that uses the federal list to scrub their data would also have to purchase the New York Registry, providing the federal list contains New York data. See, 21 NYCRR § 4602.5(e).

These difficulties are not insurmountable, and a mutually beneficial approach to solving them should be undertaken. We are certain that the prospect of a single list, as opposed to the plethora of existing state lists (with more on the way), as well as the prospect of potentially two federal lists, would be greeted by great relief by the telemarketing community, providing the smaller firms were not overburdened by the size of the combined list, and could access exactly the data they wished. However, particularly for any statutory changes, there is no guarantee that they can be speedily accomplished. Also, New York could only react in very general terms to such a proposal unless and until the federal proposals (including the FTC proposal) were finally adopted, hopefully through an integrated approach. In short, the ideal of federal-state cooperation in this area is very appealing, and indeed necessary for seamless service to consumers, but the NYCPB is not prepared at the present time to commit to any specific proposal absent further study and staffing on both the federal and state levels.

Finally, for consumers that have registered in New York, but not on the federal list, and may have complaints that are cognizable under federal law, but not under state law, those complaints would be referred to the FCC for possible registration and/or enforcement action. Indeed, the NYCPB does this presently for facsimile complaints, which are generally not prohibited under state law, but are strictly limited under federal law. See, 47 U.S.C. § 227(b)(1)(C); 47 CFR § 64.1200(a)(3); and GBL § 396-aa.

NPRM, ¶¶ 67-87. CC Docket 92-90 Closure; Procedural Issues.

No comments necessary.

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§ 227(e)(1), which notes that more restrictive intrastate requirements or regulations are not preempted. Indeed, the law provides that if the national database is established by the Commission (see 47 U.S.C. § 227(c)(3)), such database shall "be designed to enable States to use the database mechanism selected by the Commission for purposes of administering or enforcing State law;" See 47 U.S.C. § 227(c)(3)(J). Further, the chief requirement for the states is that "If, pursuant to subsection (c)(3) of this section, 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." See 47 U.S.C. § 227(e)(2).

Additionally, some states, such as New York, regulate what are clearly interstate calls, provided that such calls terminate in New York. See GBL § 399-z(l)(d), which provides that "doing business in this state" means conducting telephone sales calls: (i) from a location in this state; or (ii) from a location outside of this state to consumers residing in the state;" See also 21 NYCRR § 4602.3(a). Traditionally, such in personam state jurisdiction is proper, providing there is the requisite nexus with the state, such as calls for business purposes to New York State residents. See McKinney's New York Civil Practice Law and Rules ("CPLR") § 301; CPLR Comment C301:8; Landoil Resources Corp. v. Alexander & Alexander Services, Inc., 77 N.Y.2d 28, 33, 563 N.Y.S.2d 739, 565 N.E.2d 488 (1990). Additionally, New York's "long-arm" statute, CPLR § 302, provides another source of in personam jurisdiction. See, CPLR § 302(a)(1); CPLR Comments C302:1 and C302:6; Kreutter v. McFadden Oil Corp., 71

N.Y.2d 460, 467, 527 N.Y.S.2d 195, 522 N.E.2d 40 (1988)(a single act of business suffices).⁸ The intrastate requirements imposed on firms by New York's do-not-call law that conduct interstate business are entirely proper, and have not been preempted by federal law, even for calls that originate outside of New York State

The NYCPB believes that approach should continue, and that any FCC national do-not-call list should constitute an additional option for consumers.⁹ Absent amendment of our enabling legislation (see, GBL § 399-z(1)(d)), or explicit federal pre-emption, which is not evident in 47 U.S.C. § 227(e), the NYCPB will continue to enforce our law with regard to both interstate and intrastate calls.

This approach is consistent with existing law. As a general matter, to the extent Congress has not explicitly preempted state law, such preemption does not occur, even where such preemption could occur (see, AT&T Corp v. Iowa Utilities Board, 525 U.S. 366, 382, n. 8, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999)) ("Insofar as Congress has remained silent, however, § 152(b) continues to function." referring to the state powers reservation clause in the FCC legislation). See, 47 U.S.C. § 152(b), and Louisiana Public Service Commission v. FCC, 476 U.S. 355, 374-375, 106 S.Ct. 1890, 90 L.Ed.2d 369 (1986), where the court noted: "Thus, we simply cannot accept an argument that

⁸ The current in personam "long-arm" requirements were generally set forth in International Shoe Company v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945). and its progeny, where the jurisdiction can be asserted if the person has appropriate contacts with the state, and that litigation in that state is appropriate.

⁹ The FTC proceeding regarding a national do-not-call list, which preceded the instant FCC proceeding, refers to its proposed national list as an "option" for Consumers, and other options would presumably include listing on a state list as **well**. The FTC also notes that some states may rescind their own provisions dealing with interstate calls when the Rule becomes effective. but are apparently not required to do so (see, FTC NPRM to Amend the Telemarketing Sales Rule, 16 CPF Part 310, FTC File Number R411011, at 77, 117):

the FCC may nevertheless take action which it thinks will best effectuate a federal policy. An agency may not confer power upon itself. To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress. This we are both unwilling and unable to do."

Simply put, Congress has not explicitly preempted any state laws that establish and maintain do-not-call lists in favor of a similar federal approach for either interstate calls terminating in the state, or intrastate calls, nor is there any evidence that such state laws are counterproductive to federal regulation. American Financial Services Ass's v. Federal Trade Commission, 767 F.2d 957 (D.C. Cir. 1985). cert. den. 475 U.S. 1011, 106 S.Ct. 1185, 89 L.Ed. 2d 301 (1986). Nor can any intent be discerned to occupy the field. Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 142, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963). Quite the contrary, since the statute not only deals with preemption, but limits the reach of federal requirements to the use of federal data in state lists. Thus, nothing need be inferred as to Congress' preemptive intent – it was explicit and limited. See Van Bergen v. Minnesota, 59 F.3d 1541, 1548 (8th Cir. 1995). In the absence of explicit statutory preemption, the FCC cannot preempt state law dealing with interstate calls through its present rulemaking proceeding."

As we noted in our previously submitted FTC comments, op. cit., in order to preempt state do-not-call lists, the FCC must show that the Supremacy Clause of the United States Constitution, Article VI, Clause Two, has been invoked by Congress in the Act, and that the following preemption tests have been met:

¹⁰ Indeed. Congress is well aware of states' efforts with regard to the establishment of do-not-call lists, and has not acted to preempt state do-not-call legislation in favor of either FTC or, in this instance, FCC, actions that might lead to the establishment of a national list that would preempt all state lists. See also the discussion in Bergen at 59 F 3d 1541, 1548 on this issue.

- (a) Congress expresses a clear intent to preempt state law;
- (b) There is outright or actual conflict between state and federal law;
- (c) Compliance with both federal and state law is in effect physically impossible;
- (d) There is implicit in federal law a barrier to state regulation;
- (e) Congress has legislated comprehensively, occupying the field with no room for the states to supplement federal law;
- (f) State law stands as an obstacle to the accomplishment and execution of the full objectives of Congress; and,
- (g) Congress has delegated the authority to the FCC to preempt state law.

See, Louisiana v. PSC, supra, 476 U.S. 355, 369, 370, where these tests are summarized, and the various authorities discussed (citations omitted). See also Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 715, 105 S.Ct. 2371, 85 L.Ed.2d 714 (1985), which repeats with approval the earlier Jones case discussion that the assumption is "that the historic police powers of the states were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." In short, with regard to jurisdiction, what is not clearly federal is clearly state jurisdiction by operation of Hillsborough.

The FCC's possible establishment of a national do-not-call list is properly viewed as an additional protection for consumers, not a preemption of any rights they may have

¹¹ See Jones v. Rath Packing Co., 430 U.S. 519, 525, 97 S.Ct. 1305, 51 L.Ed.2d 604 (1977). and Medtronic, Inc. v. Lohr, 518 U.S. 470, 485, 116 S.Ct. 2240 (1996). Cf. People of the State of New York v. FCC, 267 F.3d 91, 102 (2d Cir. 2001), where the Louisiana standard of an explicit grant of Congressional authority was upheld, but found to be present because of the explicit grant of federal authority in 47 U.S.C. § 251(e). There is no such explicit grant of authority in the FCC's enabling legislation with regard to preemption of state do-not-call laws, even for interstate calls.

under existing state laws. Such rights remain fully enforceable under state law for the reasons stated supra.

* *

This concludes the NYCPB responses to the FCC questions contained in paragraphs 1-48, which generally concern rules issues other than the establishment of a national do-not-call list. Should the FCC require any clarification of our responses, or require any additional information, please contact our General Counsel, James F. Warden, Jr. at (518) 486-3934, or at the address shown on the November 22, 2002 cover letter accompanying these responses.

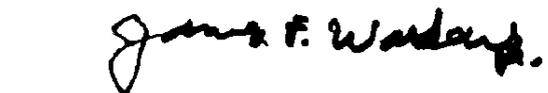
Respectfully submitted,



May M. Chao
Chairperson and Executive Director



Lisa R. Harris
Deputy General Counsel



By: _____
James F. Warden, Jr.
General Counsel
5 Empire State Plaza, Suite 2102
Albany, New York 12223-1556
(518) 486-3934 (voice)
(518) 474-2474 (fax)



Seth R. Lamont
Assistant Counsel

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Albany, New York