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December 9, 2002

Federal Communications Commission  
Washington, D.C.

Re: CG Docket No. 02-278

Gentlemen:

The purpose of this correspondence is to submit written comments on the Notice of Proposed Rulemaking (“NPRM”) issued by the Federal Communications Commission (“FCC” or the “Commission”) in the above referenced docket number. I submit these comments as a private citizen and not on behalf of any client. However, my comments are necessarily informed by my experiences both as an attorney and a consumer of telecommunications services.

The NPRM proposes and solicits comment on revisions to the FCC regulations pursuant to the Telephone Consumer Protection Act (the “Regulations”).<sup>1</sup> The Commission solicited comment on several specific items in the NPRM. My comments, however, are limited to those portions of the NPRM about which I am able to comment knowledgeably.

In general, I support the Commission’s effort to revise and modernize the Regulations and to strengthen consumer protection. However, there are areas in which the Commission could take an even more consumer-oriented view.

Specifically, I recommend the following to the Commission with respect to the Regulations:

1. Require telemarketers to transmit their caller ID information.
2. Create a national do-not-call list that will preempt state do-not-call lists.
3. Cooperate with FTC in creating, administering and maintaining the national do-not-call list, but vest enforcement of the Regulations in the appropriate supervisory agencies based on the type of entity over which each agency has jurisdiction.
4. Subject calls made by telemarketers on behalf of nonprofit tax-exempt organizations to the Regulations.
5. Forego subjecting calls made by nonprofit tax-exempt organizations to the Regulations because the TPCA does not allow it.

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<sup>1</sup> Telephone Consumer Protection Act of 1991, Pub.L. No. 102-243, 105 Stat. 2394 (1991), *codified at* 47 U.S.C. § 227 (“TCPA”).

My comments are detailed below in an outline format for the convenience of the FCC staff members who will be reading and interpreting these comments.

## I. Telemarketer Identification Requirements

The Regulations currently require that a telemarketer<sup>2</sup> state the name of the individual caller, the person or entity on whose behalf the call is made, and a telephone number or address at which the person or entity may be contacted.<sup>3</sup>

In the NPRM, the Commission sought comment on these identification requirements.<sup>4</sup> The Commission mentioned several alternatives to the identification requirements currently contained in the Regulations.<sup>5</sup>

The Commission, however, did not mention one common sense requirement that would greatly empower consumers. The identification requirements contained in the Regulations should be amended to require telemarketers to transmit their caller ID information to the person being called. Currently, the caller ID information of telemarketers does not appear; an “out of area” designation usually appears and the number is not displayed.

If telemarketers are required to transmit their full caller ID information, including their name and telephone number, consumers with caller ID will be able to avoid unwanted telemarketing calls simply by not answering them. In addition, it allows consumers who are on a do-not-call list (either company-specific or a state do-not-call list) to enforce their rights under the TCPA by invoking the private right of action that the law contains.<sup>6</sup> It is much easier to know whom to sue and to effectuate service of process when the consumer knows what company has been calling in contravention of the TCPA. In addition, having such information increases the possibility of a consumer prevailing in a private TCPA action; the caller ID registry could serve as evidence.<sup>7</sup>

Therefore, I propose that the Commission amend the Regulations to require telemarketers to transmit their caller ID information to the persons or entities that they call.<sup>8</sup>

## II. Nationwide Do-Not-Call List and Collaboration with FTC

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<sup>2</sup> This letter adopts the same definition of “telemarketer” as used by the Commission in the NPRM. *See* NPRM at ¶ 1, n.3.

<sup>3</sup> *See* 47 C.F.R. § 64.1200(e)(2)(iv).

<sup>4</sup> *See* NPRM at ¶¶ 28, 29.

<sup>5</sup> *See id.*

<sup>6</sup> *See* 47 U.S.C. § 227(b)(3).

<sup>7</sup> *See, e.g.*, Tex. R. Evid. 901(b)(6)(A).

<sup>8</sup> The Federal Trade Commission (“FTC”) has proposed exactly this in its proposed do-not-call regulations. *See* Telemarketing Sales Rule, 67 Fed. Reg. 4491, 4514-16 (proposed Jan. 30, 2002). FTC also noted the possible technological obstacles and their possible solutions. *See id.* & nn. 217-29. The fact that FTC has proposed the transmission of caller ID information and FCC has not highlights the importance of the two agencies working together to promulgate a single, national do-not-call list and adopting regulations. *See infra* part II.

The NPRM specifically requested comment on whether the Commission should consider the creation of a nationwide do-not-call list, and the interaction of the FCC list with the national do-not-call list proposed by the Federal Trade Commission (“FTC”)<sup>9</sup> and existing state do-not-call lists.<sup>10</sup>

One of the principal reasons that FCC proffered for not adopting a national do-not-call list in 1992 was the cost of such an endeavor.<sup>11</sup> However, since then, technological advances have greatly reduced the cost of transmitting, sharing and analyzing information. For instance, the national do-not-call list could be maintained on a server, with updates submitted daily; telemarketers could download the updates through a secure Web site connected to this server and thus keep their lists current. As a result, cost may no longer be the obstacle to creating a national do-not-call list that it was ten years ago.

The Commission also requested comment on the cost of establishing a national do-not-call list.<sup>12</sup> The Commission stated that “FTC estimates that the cost to develop and implement a national registry will be approximately \$5 million in the first year.”<sup>13</sup> In the proposed FTC rule, however, FTC did not clearly state how it arrived at this figure. It may very well be that the cost will be substantially less than this amount.

Even considering, however, that the cost of implementing a national do-not-call list will cost the \$5 million projected by FTC, only \$3 million of this amount is to be recouped from companies purchasing the list. This proposition raises four observations.

First, the \$3 million projected to be raised from telemarketers is spread over 3,000 telemarketers. This is an average cost of \$1,000 per telemarketer. In addition, the data will be sold per area code, with an annual cap of \$3,000 per telemarketer.<sup>14</sup> Even assuming that a telemarketer has to pay the full \$3,000, this is not unreasonable. Complying with the law is a cost of business, and a telemarketer can avoid substantial legal liability (in many cases, much more than \$3,000) under the private cause of action<sup>15</sup> and the forfeiture penalty provisions of the TCPA by simply purchasing the do-not-call list and not calling those registered on it.<sup>16</sup> As a result, the do-not-call list is actually providing a benefit to telemarketers, even assuming that it cost \$3,000 per telemarketer.

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<sup>9</sup> See NPRM at ¶¶ 49, 55, 58, 80.

<sup>10</sup> See *id.* at ¶¶ 61, 62.

<sup>11</sup> See *id.* at ¶¶ 5, 51.

<sup>12</sup> See *id.* at ¶ 52.

<sup>13</sup> Telemarketing Sales Rule User Fees, 67 Fed. Reg. 37,362, 37,363 (proposed May 29, 2002).

<sup>14</sup> *Id.* at 37,364.

<sup>15</sup> See 47 U.S.C. § 227(b)(3).

<sup>16</sup> See 47 U.S.C. § 503(b)(1) (allowing Commission to assess a forfeiture penalty for willful and repeated violations of the Federal Telecommunications Act or the Commission’s rules and regulations).

Second, telemarketers should pay the full \$5 million. While consumers that enroll benefit from their inclusion on the list, telemarketers also benefit by avoiding legal liability under the private cause of action afforded by the TCPA<sup>17</sup> and its forfeiture penalty provisions.<sup>18</sup> Many other agencies make their regulated entities absorb the full costs of regulation, even though the ultimate beneficiaries are consumers. The national do-not-call list should be no exception.

Third, the initial creation of the list would be the most expensive and time-consuming part of the endeavor; maintenance of the list would be largely self-effectuating at little cost to the agencies or the telemarketers. The creation of the list would be a sunk cost; the marginal cost of maintaining it would be low.

Fourth, if the agencies decide not to pass the cost of creating and maintaining the list on to telemarketers, and thus decide to absorb this expense as a cost of government, the agencies can split the cost. Such an approach would therefore make the national do-not-call list a much smaller burden on each agency's budget.

In creating a national do-not-call list, I strongly urge the Commission to collaborate with FTC. This collaboration could take the form of an interagency panel to create the list and its founding regulations, both agencies promulgating a uniform regulation implementing the list, both agencies maintaining the list, and each agency enforcing the regulations with respect to the entities under its supervisory authority.

An excellent model for interagency cooperation in regulatory matters that FCC and FTC could imitate is found in the cooperation between the various Federal banking agencies.<sup>19 20</sup>

The Federal banking agencies coordinate their rulemaking through the Federal Financial Institutions Examination Council ("FFIEC"). Congress created FFIEC<sup>21</sup> to "prescribe uniform principles and standards for the Federal examination of financial institutions[,]...make recommendations to promote uniformity in the supervision of these financial institutions...[and]...to promote consistency in such examination."<sup>22</sup>

The heads of each Federal banking agency represent their agencies on FFIEC.<sup>23</sup> FFIEC considers regulations and creates a uniform text of the

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<sup>17</sup> See 47 U.S.C. § 227(b)(3).

<sup>18</sup> See 47 U.S.C. § 503(b)(1).

<sup>19</sup> I am familiar with the federal banking laws and regulations because a large part of my practice involves legal representation of financial institutions.

<sup>20</sup> The Federal banking agencies are the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the Office of Thrift Supervision. See 12 U.S.C. § 1813(q).

<sup>21</sup> Federal Financial Institutions Examination Council Act of 1978, Pub.L. No. 95-630, tit. X, *codified at* 12 U.S.C. §§ 3301 – 3308 (2001).

<sup>22</sup> 12 U.S.C. § 3301.

<sup>23</sup> See 12 U.S.C. § 3303(a).

regulation, which each Federal banking agency is encouraged to adopt.<sup>24</sup> In many cases, the final regulation promulgated by each agency is the uniform text created by FFIEC. This is because the substantive content of the regulation has already been the source of extensive study, review and debate by the heads of each Federal banking agency. Enforcement of the regulations, however, remains with the appropriate Federal banking agency with supervisory authority over each type of institution.<sup>25</sup>

As stated earlier, FFIEC was created by statute with the express purpose of integrating the rulemaking procedures of the Federal banking agencies.<sup>26</sup> It has been effective in streamlining the rulemaking process of the Federal banking agencies.

I realize that no such statutorily created mechanism exists to streamline rulemaking for FCC and FTC. But this does not mean that the agencies cannot work together without such an express statutory mandate. As a result, I wholeheartedly recommend that FCC cooperate with FTC to promulgate a national do-not-call list, with enforcement functions vested in the agency that has supervisory authority over each type of entity.<sup>27</sup>

A single, national list promulgated by the two agencies would benefit both consumers and telemarketers. For consumers, it would help them avoid more unwanted calls by essentially consolidating the current company-specific approach to do-not-call lists.

A single, national do-not-call list would also benefit telemarketers, because it would reduce each company's administrative costs in continually updating its internal do-not-call list. Telemarketers would have to purchase only one list, which would be continually updated by FCC and FTC. This would greatly reduce these companies' administrative burden. A single, national do-not-call list would most likely aid internal compliance measures as well.

The Commission also solicited comment on the interaction between a national do-not-call list and the various do-not-call lists maintained by state agencies.

As a preliminary matter, the national do-not-call list could be formed by combining the state do-not-call lists and the do-not-call lists currently

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<sup>24</sup> See 12 U.S.C. § 3305(a), (b)(2).

<sup>25</sup> For national banks, this is the Office of the Comptroller of the Currency; for bank holding companies and state banks that are members of the Federal Reserve System, the Board of Governors of the Federal Reserve System; for state banks that are not members of the Federal Reserve System, the Federal Deposit Insurance Corporation; for savings associations, the Office of the Thrift Supervision. See 12 U.S.C. § 1813(q).

<sup>26</sup> See *supra* note 22 and accompanying text.

<sup>27</sup> For FCC, this would be common carriers. See 47 U.S.C. § 205(a). FTC would have supervisory authority over the other entities to the extent allowed by section 5(a)(2) of the Federal Trade Commission Act (Act of Sept. 26, 1914, 38 Stat. 717 (1914), *codified as amended at* 15 U.S.C. §§ 41 – 77 (“FTC Act”)), 15 U.S.C. § 45(a)(2). The Supreme Court has recently endorsed a broad interpretation of FTC's jurisdiction. See *infra* note 50.

maintained by each telemarketer.<sup>28</sup> This would greatly reduce FCC's burden in creating the list; the majority of the work would have already been performed by state agencies and telemarketers. The only significant obstacle that FCC might face is integrating the lists and reconciling the different formats. This obstacle, however, could be remedied by effective information technology services, either performed by FCC or by a private company pursuant to a contract with the federal government.<sup>29</sup>

FCC solicited comment regarding the federalism concerns of establishing a national do-not-call list.<sup>30</sup> Federalism concerns, however, are only implicated if the national list preempts the state lists.

I am in favor of a national do-not-call list that would preempt the state do-not-call lists. The federalism concerns that the Commission expressed in the NPRM are easily answered.

The United States Constitution grants Congress the right to “regulate Commerce...among the several States...”<sup>31</sup> The Supreme Court has construed this right broadly, allowing Congress to regulate “three broad categories of activity that Congress may regulate under its commerce power.”<sup>32</sup> The first is the use of the channels of interstate commerce.<sup>33</sup> The second category is “the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities.”<sup>34</sup> The third type is composed of “those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce.”<sup>35</sup>

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<sup>28</sup> This could implicate a taking under the Fifth Amendment to the United States Constitution for which FCC would have to pay just compensation. *See* U.S. Const. amend. V (“nor shall private property be taken for public use, without just compensation.”). However, the Supreme Court has held “as long as [the entity] is aware of the conditions under which the data are submitted, and the conditions are rationally related to a legitimate Government interest, a voluntary submission of data by an applicant in exchange for the economic advantages of a registration can hardly be called a taking.” *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1007 (1984). The Court in *Ruckelshaus* rejected the argument that “that the [law’s] requirement that a submitter give up its property interest in the data constitutes placing an unconstitutional condition on the right to a valuable Government benefit...[especially] in an area that has long been the source of public concern and the subject of government regulation.” *Id.* Telephonic communications have “long been the source of public concern and the subject of government regulation.” *Id.* Therefore, it appears that FCC requiring telemarketers to provide their do-not-call lists to comply with the Regulations would be permissible under the Fifth Amendment, because the telemarketers would receive the economic advantages of registration and subscription to the national do-not-call list. In addition, requiring telemarketers to provide their current do-not-call lists in exchange for subscription to the national do-not-call list would presumably help telemarketers avoid liability under the private cause of action and forfeiture penalty provisions of the TCPA. *See* 47 U.S.C. §§ 227(b)(3), 503(b)(1).

<sup>29</sup> FCC noted in the NPRM that FTC may outsource the compilation and maintenance of the national do-not-call list. *See* FTC Privacy Notice, 67 Fed. Reg. 8985 (2002) *cited in* NPRM at ¶ 52, n.185. Outsourcing may benefit development and maintenance of the FCC do-not-call list also, and as a result, I urge the Commission to consider it.

<sup>30</sup> *See* ANPR at ¶ 48.

<sup>31</sup> U.S. Const. art. I, § 8, cl. 3. This clause is commonly referred to as the Commerce Clause.

<sup>32</sup> *United States v. Lopez*, 514 U.S. 449, 558 (1995).

<sup>33</sup> *See id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 558-59.

The telephone is inherently an instrumentality of interstate commerce.<sup>36</sup> This proposition is based both on established legal principles<sup>37</sup> as well as technological fact; some calls must travel to switching stations located in other states or otherwise be processed or routed through facilities located in another state.<sup>38</sup> It would be extremely difficult (if not impossible) for common carriers and telemarketers to confine their calls within a given state in order to avoid FCC jurisdiction.<sup>39</sup>

As a result, FCC has the exclusive right to regulate matters affecting telecommunications, including intrastate activities.<sup>40</sup> FCC would therefore be well within its rights in preempting state laws and regulations with respect to do-not-call lists. As a result, the mandates of Executive Order 13,132 are moot, because Congress granted this authority; FCC did not assume it of its own will.<sup>41</sup> Therefore, FCC can preempt state laws regarding do-not-call lists.

Therefore, I urge the Commission to establish a national do-not-call list that will preempt the state do-not-call lists. This list could originally be

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<sup>36</sup> The Supreme Court has yet to expressly decide this issue, although in one case it stated that “maintenance and operation of telephone...lines...were all exclusively in furtherance of...interstate business.” *Ozark Pipeline Corp v. Monier*, 266 U.S. 555, 565, 45 S.Ct. 184, 186, 69 L.Ed. 439 (1925). The courts of appeals that have considered the question, however, have uniformly held that the telephone is an instrumentality of interstate commerce, even if it is only used for intrastate communications. See *United States v. Cisneros*, \_\_\_ F.3d \_\_\_, n.5 (5<sup>th</sup> Cir. 2001) (en banc) (“courts typically treat the...term ‘instrumentality of interstate commerce’ as encompassing ‘means of transportation’ like cars and telephones.” (citations omitted)); *United States v. Gilbert*, 181 F.3d 152, 158 (1<sup>st</sup> Cir. 1999) (“a telephone is an instrumentality of interstate commerce and this alone is a sufficient basis for jurisdiction based on interstate commerce.”); *United States v. Weathers*, 169 F.3d 336, 341 (6<sup>th</sup> Cir. 1999) (“It is well established that telephones, even when used intrastate, constitute instrumentalities of interstate commerce.”); *Myzel v. Fields*, 368 F.2d 718, 728 (8<sup>th</sup> Cir. 1968) (“the telephone system and its voice transmission by wire is an integrated system of both intrastate and interstate commerce.”); *Pavlak v. Church*, 727 F.2d 1425, 1427 (9<sup>th</sup> Cir. 1984) (“That the calls may have been made within one state does not prevent the application of the Federal Communications Act...”); *Kerbs v. Fall River Indus., Inc.*, 502 F.2d 731, 738 (10<sup>th</sup> Cir. 1974) (“[A]s long as the instrumentality itself is an integral part of an interstate system, Congress has power, when necessary for the protection of interstate commerce, to include intrastate activities within its regulatory control.” (citation omitted)). In addition, at least one federal district court has embraced this theory as well with respect to the Federal Communications Act. See *Kratz v. Kratz*, 477 F.Supp. 463, 475 (E.D.Pa. 1979) (“Since the telephone is an instrumentality of interstate commerce, Congress has plenary power under the Constitution to regulate its use and abuse.”). This interpretation is consistent with the Supreme Court’s Commerce Clause jurisprudence starting with *The Shreveport Rate Case (Houston E. & W. Texas Ry. Co. v. United States)*, 234 U.S. 342 (1914) and *Wickard v. Filburn*, 317 U.S. 111 (1942), in which the Court recognized Congress’ authority to regulate the instrumentalities of interstate commerce and intrastate activity that affects interstate commerce as a whole. This authority has been upheld and applied in a long line of Supreme Court cases. See *Lopez*, 514 U.S. at 558-59. But see 47 U.S.C. § 152(b)(1); *Louisiana Pub. Service Comm’n v. FCC*, 476 U.S. 355 (1986); *California v. FCC*, 905 F.2d 1217 (9<sup>th</sup> Cir. 1990) (limiting FCC authority over intrastate communications).

<sup>37</sup> See *supra* note 36.

<sup>38</sup> See *Louisiana Pub. Service Comm’n*, 476 U.S. at 360 (1986) (recognizing that “virtually all telephone plant that is used to provide intrastate service is also used to provide interstate service...”).

<sup>39</sup> See *id.* (noting that “the realities of technology and economics belie such a clean parceling of responsibility” between FCC and the states).

<sup>40</sup> Two legal scholars also support that TPCA extends to intrastate activities. See Hilary B. Miller and Robert R. Biggerstaff, *Application of the Telephone Consumer Protection Act to Intrastate Telemarketing Calls and Faxes*, 52 Fed. Comm. L. J. 667 (2000) (available at <http://www.law.indiana.edu/felj/pubs/v52/no3/miller1.pdf>).

<sup>41</sup> Exec. Order 13,132, 64 Fed.Reg. 43,255 (1999) (directing federal agencies to consider federalism concerns when promulgating regulations or proposing legislation to Congress).

created by combining the state do-not-call lists and the company-specific do-not-call lists currently maintained by telemarketers. This will greatly reduce the cost of creating such a list. I also urge FCC to cooperate with FTC in establishing the list and its governing regulations. This approach will ultimately benefit both consumers and telemarketing businesses. In addition, FCC is well within its legal authority to promulgate and administer such a list.

### III. Applicability of the Regulations to Non-Profit Entities

The Commission solicited comment as to the applicability of the Regulations to non-profit entities.<sup>42</sup> The Commission correctly noted in the NPRM that the TCPA excluded tax-exempt non-profit organizations from its reach.<sup>43</sup> As a result, the Regulations do not apply to these entities.

The Commission took this exclusion one step further by exempting calls made by telemarketers on behalf of tax-exempt nonprofit organizations.<sup>44</sup>

I urge the Commission to apply the Regulations to tax-exempt nonprofit organizations to the extent possible under the TPCA. While the TCPA expressly excludes calls by these organizations, thereby foreclosing the Commission's ability to restrict them, the Commission's exclusion of calls made by telemarketers on behalf of such organizations should be reconsidered. Specifically, these types of calls should be subject to the Regulations.

There are two reasons why these types of calls should be subject to the Regulations. One is based on the law, the other on policy.

First, the TCPA excludes calls made "by a tax-exempt nonprofit organization"; the statute does not say "on behalf of."<sup>45</sup> As a result, it appears that the Commission exceeded its exemptive authority when excluding calls "on behalf of...tax-exempt nonprofit organizations."<sup>46</sup> An even cursory reading of the TCPA leads to the conclusion that the Regulations should not be so broad.

Second, it is appropriate from a policy standpoint to subject calls made by telemarketers on behalf of tax-exempt nonprofit organizations to the Regulations. Telemarketers making calls on behalf of such organizations normally do not render their services for free; they receive a commission on the sales that they generate.<sup>47</sup> This most certainly satisfies the definition of a telephone call made for a commercial purpose.

In addition, these types of calls are just as frequent as telemarketing calls not made on behalf of tax-exempt nonprofit organizations. As a result,

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<sup>42</sup> See NPRM at ¶ 56.

<sup>43</sup> See *id.*; 47 U.S.C. § 227(a)(3)(C).

<sup>44</sup> See NPRM at ¶ 33.

<sup>45</sup> 47 U.S.C. § 227(a)(3)(C) (emphasis added).

<sup>46</sup> 47 C.F.R. § 64.1200(c)(4).

<sup>47</sup> See NPRM at ¶ 33.

these calls are within the types of calls from which Congress was seeking to protect consumers.<sup>48</sup>

The Commission also requested comment on whether the Regulations should encompass a situation in which “a nonprofit organization calls consumers to sell another company’s magazines and receives a portion of the proceeds...”<sup>49</sup>

I agree that in the above-cited situation, such calls would have a commercial purpose; the purpose is to sell magazines and raise funds for the organization. However, the TCPA’s exemptions are disjunctive; the exclusion is available to both calls made without a commercial purpose *and* those made by a tax-exempt nonprofit organization. This means that calls made by a tax-exempt nonprofit organization are excluded even if they have a commercial purpose; they are entitled to the exclusion by reason of the fact they are made by a tax-exempt non-profit organization. Consequently, no further inquiry is necessary.

Although I would certainly prefer that commercial calls by tax-exempt nonprofit organizations be subject to the Regulations, the TCPA does not permit such an interpretation. FCC’s Office of Legislative Affairs, however, could propose to Congress that it amend the TCPA to either make the exclusion conjunctive (*i.e.*, calls would be excluded only if they are made by a tax-exempt nonprofit organization *and* do not have a commercial purpose) or expressly deem calls by tax-exempt nonprofit organizations as commercial in nature. These calls would then fall within the reach of the TCPA and the Regulations. In any event, the Commission does not have the authority to regulate beyond the parameters that Congress has set in the TCPA.

Therefore, under current law, calls made by tax-exempt non-profit organizations without a commercial purpose are exempt from the TCPA and the Regulations. However, if FCC and FTC collaborate in the creation of a national do-not-call list, FTC could regulate and enforce the do-not-call list with respect to tax-exempt nonprofit organizations. This is because the FTC Act does not exempt these organizations from FTC’s regulatory authority.<sup>50</sup>

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<sup>48</sup> See 137 Cong.Rec. S9874 (July 8, 1991) (statement of Sen. Hollings) *quoted in* NPRM at ¶ 24, n. 90.

<sup>49</sup> NPRM at ¶ 33.

<sup>50</sup> See FTC Act § 5(a)(2), *codified at* 15 U.S.C. § 45(a)(2) (“The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions..., Federal credit unions..., common carriers..., air carriers and foreign air carriers...from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.”). The FTC Act defines corporation as “any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members, and has shares of capital or capital stock or certificates of interest, and any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, without shares of capital or capital stock or certificates of interest, except partnerships, which is organized to carry on business for its own profit or that of its members.” The Supreme Court recently held that the FTC Act applies to nonprofit professional associations. See *California Dental Ass’n v. FTC*, 526 U.S. 756, 119 S.Ct. 1604 (1999) (“*CDA*”). The Court specifically left open the question of whether the FTC Act applies to “nonprofit organizations that do not confer profit on for-profit members but do, for example, show annual income surpluses, engage in significant commerce, or compete in relevant markets with for-profit players.”

#### IV. Conclusion

The foregoing comments address some, but by no means all, of the points upon which the Commission requested comment in the NPRM.

This comment letter analyzes the applicable law and fact scenarios, and advocates the following action by the Commission:

1. Require telemarketers to transmit their caller ID information.
2. Create a national do-not-call list that will preempt state do-not-call lists.
3. Cooperate with FTC in creating, administering and maintaining the national do-not-call list, but vest enforcement of the Regulations in the appropriate supervisory agencies based on the type of entity over which each agency has jurisdiction.
4. Subject calls made by telemarketers on behalf of nonprofit tax-exempt organizations to the Regulations.
5. Forego subjecting calls made by nonprofit tax-exempt organizations to the Regulations because the TPCA does not allow it.

Thank you for the opportunity to comment on the NPRM, and I hope that my comments are helpful to you in considering the text of the amendments to the Regulations.

Very truly yours,

/s/  
Samuel E. Whitley

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*See id.*, 119 S.Ct. at 1611, n.6. However, a careful reading of the definition of corporation cited above could also support the conclusion that the FTC has jurisdiction over all nonprofit organizations, as long as they are “organized to carry on business for [their] own profit or that of [their] members.” FTC Act sec. 4, *codified as amended at* 15 U.S.C. § 44. Given that nonprofit corporation enjoy the same privileges under state corporate law that for-profit corporations do, *compare, e.g.* Texas Non-Profit Corporation Act, Tex. Rev. Civ. Stat. 1396-2.02 § A (2001) (enumerating the powers of a Texas non-profit corporation) *with* Tex. Bus. Corp. Act art. 2.02 § A (2001) (enumerating the powers of a Texas for-profit corporation), it would be appropriate to subject them to the same laws and obligations that apply to for-profit entities. This broad grant of corporate power, along with the Supreme Court’s endorsement of the expansive jurisdictional reach of FTC in *CDA*, supports this conclusion.