

**Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
Rules and Regulations Implementing the) CG Docket No. 02-278
Telephone Consumer Protection Act of 1991) CC Docket No. 92-90

**COMMENTS OF THE NATIONAL ASSOCIATION
OF STATE UTILITY CONSUMER ADVOCATES**

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TABLE OF CONTENTS

| | PAGE |
|---|------|
| <u>I.</u> <u>INTRODUCTION AND SUMMARY</u> | 1 |
| <u>II.</u> <u>THE COMMISSION SHOULD HELP CONSUMERS AVOID UNWANTED AND ANNOYING TELEMARKETING CALLS BY RESTRICTING THE USE OF AUTOMATED CALLING SYSTEMS AND PROHIBITING TELEMARKETERS FROM BLOCKING CALLER ID.</u> | 3 |
| <u>A.</u> <u>The Commission Should Help Reduce the Number of Annoying Calls That Consumers Receive from Telemarketers by Restricting Telemarketers’ Use of Automated Calling Systems.</u> | 4 |
| <u>B.</u> <u>Telemarketers Should Not Be Allowed to Block Consumers’ Caller ID.</u> | 8 |
| <u>III.</u> <u>THE COMMISSION SHOULD WORK WITH THE FTC TO ESTABLISH A BROAD-RANGING, CONSUMER-FRIENDLY NATIONAL DO-NOT-CALL REGISTRY.</u> | 9 |
| <u>A.</u> <u>It Should Be Easy for Consumers to Be Placed on the National Do-Not-Call Registry.</u> | 12 |
| <u>B.</u> <u>State “Do-Not-Call” Requirements That Provide Consumers with Greater Protection Against Telemarketers Than the Federally Adopted Rules Should Not Be Preempted.</u> | 14 |
| <u>C.</u> <u>A National Do-Not-Call Registry Should Exist in Tandem with Company-Specific Do-Not-Call Lists.</u> | 15 |
| <u>IV.</u> <u>THE COMMISSION SHOULD REDEFINE “ESTABLISHED BUSINESS RELATIONSHIP” TO REQUIRE THAT THE RELATIONSHIP BE ONGOING, AND SHOULD EXTEND THE REACH OF DO-NOT-CALL REQUESTS TO AFFILIATED COMPANIES.</u> | 16 |
| <u>V.</u> <u>IMPLEMENTATION OF A NATIONAL DO-NOT-CALL REGISTRY SHOULD INCLUDE CONSUMER EDUCATION.</u> | 18 |
| <u>VI.</u> <u>TELEMARKETING TO WIRELESS TELEPHONE NUMBERS SHOULD BE PROHIBITED UNLESS EXPRESSLY AUTHORIZED BY THE SUBSCRIBER.</u> | 19 |
| <u>VII.</u> <u>CONCLUSION</u> | 19 |

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I. INTRODUCTION AND SUMMARY

On September 18, 2002, the Federal Communications Commission (“FCC” or “Commission”) issued a *Notice of Proposed Rulemaking and Memorandum Opinion and Order* (“*Notice*”) in this proceeding.¹ The *Notice* seeks comment on the Commission’s proposals to amend its rules implementing the Telephone Consumer Protection Act of 1991 (“TCPA”).² In general, the Commission proposes to change its current rules on telemarketers’ use of autodialers, prerecorded messages and fax machines, to adopt additional rules to protect individuals’ privacy, and to establish a national registry for consumers who do not wish to receive telemarketing telephone calls (“national do-not-call registry”).³

¹ FCC 02-250, 17 FCC Rcd 17459 (2002).

² Pub. L. No. 102-243, 105 Stat. 2394, codified at 47 U.S.C. § 227.

³ *Notice*, ¶ 11.

The National Association of State Utility Consumer Advocates (“NASUCA”)⁴ hereby submits these Comments to the Commission’s *Notice*. One of the major complaints that consumers have concerning telephone service deals with unwanted telemarketing calls that interrupt their lives. The Commission’s current rules allow telemarketers to continue to intrude in consumers’ homes until directly told by the consumer not to call again. This has been ineffective in protecting consumers’ privacy. Consumers face repeated telemarketing calls, including abandoned calls from automated dialing systems. It is imperative that the Commission institute other mechanisms to protect consumers.

NASUCA urges the Commission to adopt further restrictions on telemarketers’ use of autodialers and predictive dialers and to prohibit telemarketers from blocking consumers’ Caller ID. The Commission should also work with the Federal Trade Commission (“FTC”) to establish a comprehensive, consumer-friendly national do-not-call registry. A national registry must not preempt or otherwise harm or hamstring existing state systems that provide consumers with greater protection. Specifically, any federal system should complement existing state systems rather than facilitating the circumvention of these state programs. A national registry should give consumers multiple methods – including telephone, the Internet and regular mail – for registering their telephone numbers, while still allowing consumers to register with their own state’s do-not-call program, if one exists.

The FTC is also conducting a proceeding dealing with many of the same issues,⁵ pursuant to the FTC’s authority under the Telemarketing Consumer Fraud and Abuse Prevention Act of

⁴ NASUCA is an association of 42 consumer advocates in 40 states and the District of Columbia. NASUCA’s members are designated by the laws of their respective states to represent the interests of utility consumers before state and federal regulators and in the courts.

⁵ *Notice of Proposed Rulemaking*, FTC File No. R411001 (“FTC NPRM”), 67 Fed. Reg. 4492.

1994 (“TCFAPA.”).⁶ However, the FTC’s jurisdiction does not extend to banks, credit unions, savings and loans, common carriers, nonprofit organizations and insurance companies.⁷

The FCC’s jurisdiction has no such limitation. Section 227 plainly states that the enumerated prohibitions apply to “*any* person within the United States....” (Emphasis added.) Thus, the Commission has the authority to regulate the methods that telemarketers may use to contact residential consumers, regardless of whom the telemarketer is or may represent.

II. THE COMMISSION SHOULD HELP CONSUMERS AVOID UNWANTED AND ANNOYING TELEMARKETING CALLS BY RESTRICTING THE USE OF AUTOMATED CALLING SYSTEMS AND PROHIBITING TELEMARKETERS FROM BLOCKING CALLER ID.

The Commission seeks comment on how it may regulate the use of automated calling systems (e.g., predictive dialers and answering machine detection systems) in order to reduce the number of annoying calls consumers receive.⁸ The Commission also asks whether it should prohibit telemarketers using an automated calling system from blocking consumers’ Caller ID.⁹

NASUCA urges the Commission to adopt rules that bring automated calling systems’ abandonment rates as close to zero as possible, and that prohibit all telemarketers – even those not using an automated calling system – from blocking consumers’ Caller ID. These rules should apply to telemarketers regardless of whether they have an established business relationship with the consumer being called. Such rules will help reduce the number of unwanted and annoying calls that consumers receive from telemarketers.

⁶ Pub. L. No. 103-297, 108 Stat. 1545, codified at 15 U.S.C. §§ 6101-6108.

⁷ See *Notice*, ¶ 10. The FTC has noted, however, that its jurisdiction does reach third-party telemarketers working on behalf of such entities. 67 Fed. Reg. at 4497.

⁸ See *Notice*, ¶¶ 26-27.

⁹ *Id.*, ¶ 26.

A. The Commission Should Help Reduce the Number of Annoying Calls That Consumers Receive from Telemarketers by Restricting Telemarketers' Use of Automated Calling Systems.

Predictive dialers are software programs that may simultaneously call more telephone numbers than telemarketers can handle, then disconnect those that have not been transferred to an available telemarketer. Answering machine detection technology will connect the called party to a telemarketer only if a person, rather than an answering machine, answers the phone. The use of each calling method often causes consumers to hear a hang-up or “dead air” on the other end of the line when answering the phone.¹⁰

The use of these technologies has created considerable consternation and annoyance for consumers. In the *Notice*, the Commission recognizes the problems experienced by consumers, particularly the elderly, those with disabilities and individuals with home-based businesses.¹¹ The FTC too has noted an increase in consumer complaints, and the industry's acknowledgement of consumer objections, about the use of predictive dialers.¹² The Commission seeks comment on any legitimate business or commercial speech interest that these calls may promote.¹³

Any rules that the Commission adopts in this area should apply to all automated dialing technologies. It is clear that in adopting the TCPA, Congress was attempting to solve a problem – too many automated or prerecorded calls to consumers – rather than restrict a specific calling technology. Thus, the Commission need not identify the specific types of technologies addressed by the rules.¹⁴ By making the rules applicable to all automated dialing technologies,

¹⁰ *Id.*, ¶ 15.

¹¹ *Id.*

¹² FTC NPRM, 67 Fed. Reg. at 4523-24.

¹³ *Notice*, ¶ 15.

¹⁴ See *id.*, ¶ 23.

the Commission will serve the purpose of the TCPA and avoid having to revisit its rules every time new technology emerges.

In revising the rules concerning the use of automated dialing technologies, the Commission seeks to balance the legitimate business interests of companies to market their products with the rights of consumers not to be annoyed by abandoned calls from telemarketers. Automated calling systems unfairly tip the scale in telemarketers' favor. This technology allows telemarketing operations of even modest size to reach literally thousands of consumers in one day. Telemarketers' use of automated calling systems benefits only telemarketers, by allowing them to make more calls and contact more people who often do not want to talk to them – to the detriment of consumers. As the FTC has noted:

regardless of the increased productivity that predictive dialers provide to the telemarketing industry, the harm to consumers is very real and falls squarely within the areas of abuse that the [TCFAPA] explicitly aimed to address.¹⁵

In its rulemaking, the FTC has addressed the predictive dialer problem by proposing to require telemarketers to make certain disclosures to the person receiving the call.¹⁶ Failure to make the disclosures would be considered an abusive telemarketing act or practice.¹⁷ In addition, a person would “receive a call” upon answering the phone; thus, once a consumer has answered the telephone, telemarketers would commit an abusive marketing practice by disconnecting the call without making the required disclosures.¹⁸ Accordingly, a telemarketer

¹⁵ FTC NPRM, 67 Fed. Reg. at 4524.

¹⁶ *Id.* The disclosures include the identity of the seller, that the purpose of the call is to sell goods or services, the nature of the goods or services and that no payment or purchase is necessary to participate in a prize promotion or win a prize if a prize is offered. See *id.* at 4543.

¹⁷ *Id.*

¹⁸ *Id.*

that uses a predictive dialer would commit an abusive act or practice if the telemarketer does not make the required disclosures on any call in which a consumer answers the phone.

Although application of the FTC's proposed rule would tend to reduce hang-ups and dead air calls by predictive dialers to near zero for the short term, the rule's application might not address the problem noted by the FTC – the inability of consumers to get on the do-not-call lists of telemarketers that use predictive dialers.¹⁹ For example, instead of hanging up, the predictive dialer could trigger a recorded message giving the four disclosures required by the FTC's proposed rule. Even after those disclosures, consumers – especially those without Caller ID (even assuming that telemarketers could not block Caller ID) – would not know whom to contact to get on the telemarketer's do-not-call list.

Moreover, if a telemarketer uses a recorded message as suggested above, the proposed application of the rule could actually *increase* the number of abandoned calls. By using a recorded message, a telemarketer could make repeated predictive dialer calls to the same consumer monthly or daily and abandon all of them, because with each call the required disclosures would be made.

Although the Direct Marketing Association (“DMA”) has established guidelines under which a telemarketer should have no more than five percent abandoned calls and cannot abandon the same caller more than twice in a month,²⁰ the guidelines are inadequate to prevent large numbers of complaints concerning hang-ups and dead air on telemarketing calls. For one thing, each consumer could still be subjected to numerous abandoned calls each month, depending on the number of telemarketers calling. In addition, these guidelines are voluntary, even for DMA

¹⁹ See *id.* at 4523.

²⁰ See *id.*

members. Telemarketers may follow them at their whim, and indeed some telemarketers have an abandonment rate as high as forty percent.²¹ The only “punishment” for telemarketers that fail to follow the guidelines is possible expulsion from DMA.²²

The real problem associated with abandoned calls is the number of such calls that each consumer may receive during a given month, rather than the overall percentage of a telemarketer’s calls that are abandoned. After all, a consumer is annoyed by the abandoned calls that he or she *does* receive, not the calls that others *may* receive. Thus, the proposed rules should focus on the individual.

Stronger enforcement is needed. In order to balance the interests of telemarketers and consumers, the Commission should move the scale back in the direction of consumers by reining in telemarketers’ use of automated calling systems. The Commission should adopt a standard, applicable to all telemarketers that choose to use these devices, that brings automated systems’ abandoned calls as close to zero as possible. If it is technically infeasible for automated systems to have a zero abandonment rate, the Commission should adopt a rule limiting abandoned calls from an automated dialing system to the same telephone number more than once every 180 days.

This would necessitate that consumers have a means of monitoring who is making calls through automated systems. The Commission should require that abandoned calls made by automated systems include the four disclosures proposed by the FTC. In addition, the consumer should be offered the same right to be placed on that company’s internal do-not-call list. Thus, abandoned calls made by automated systems should also include information – including a toll-free number – on how to be placed on the caller’s do-not-call list.

²¹ See *id.*, n. 301.

²² See *id.* at 4517, n. 241.

B. Telemarketers Should Not Be Allowed to Block Consumers' Caller ID.

The Commission seeks comment on whether it should prohibit telemarketers from blocking consumers' Caller ID.²³ The purpose of Caller ID is to allow the person receiving a call to identify who is calling. Caller ID is an important feature for many consumers who want to avoid unwanted and annoying telephone calls.

Caller ID blocking, on the other hand, is a privacy feature designed to protect the telephone number of the caller from being disclosed to the party being called. Consumers use it to protect their privacy, including protecting the whereabouts of abused spouses, keeping unlisted numbers from being disclosed, etc. Consumers have the personal right to prevent their telephone numbers from being displayed, and are asserting such rights at substantial extra personal costs. Telemarketers, whose business intrudes into consumers' homes, should not have these rights.

Telemarketers have no valid reason to prevent their numbers from being displayed by Caller ID. Just as consumers have a right to know who is knocking on their door before they decide to open it, consumers have a right to know who is calling before they answer the phone. That is why consumers spend millions of dollars each year on Caller ID – to have the ability to ask, “Who’s there?” before answering the phone.

The Commission should amend the Caller ID rules to prohibit telemarketers from blocking consumers' Caller ID.²⁴ Such a prohibition would especially aid consumers who receive telemarketing calls placed with a predictive dialer. As the FTC noted, “when the predictive dialer disconnects the call, the consumer often has no effective way to determine from

²³ Notice, ¶ 22.

²⁴ 47 C.F.R. § 64.1600 *et seq.*

whom the call originated and thus to whom he or she should direct a ‘do-not-call’ request....”²⁵

If telemarketers are prohibited from blocking Caller ID, consumers with Caller ID would have a greater ability to get on do-not-call lists and monitor telemarketers that make use of predictive dialers.²⁶ If the Commission does not adopt NASUCA’s proposal concerning predictive dialers, a Commission rule prohibiting the blocking of Caller ID by telemarketers would be even more important for consumers.

In addition, the Caller ID rules exempt Private Branch Exchange (“PBX”) and Centrex systems that do not pass calling party number information.²⁷ Thus, the number of the individual making the call cannot be transmitted to the called party. Many such systems, however, at least have the capability of transmitting the main number or the name of the business from where the individual is calling. The Commission should consider amending the Caller ID rules to require the transmission of that information by PBX and Centrex systems that have such capability.

III. THE COMMISSION SHOULD WORK WITH THE FTC TO ESTABLISH A BROAD-RANGING, CONSUMER-FRIENDLY NATIONAL DO-NOT-CALL REGISTRY.

As noted *supra*, the FCC’s jurisdiction regarding telemarketing under the TCPA extends to certain entities (e.g., banks, common carriers and insurance companies) over which the FTC has no direct jurisdiction.²⁸ The Commission seeks comment on a variety of issues concerning a proposed national do-not-call registry, including whether the Commission should extend any

²⁵ FTC NPRM, 67 Fed. Reg. at 4523.

²⁶ The restrictions on the use of automated calling systems, discussed in Section II.A, should provide additional protections to assist customers who do not have Caller ID.

²⁷ 47 C.F.R. § 64.1601(d)(3).

²⁸ *Notice*, ¶ 55.

FTC requirements to those entities not under the FTC's jurisdiction and the role the Commission should play in the administration and enforcement of a national database.²⁹

The Commission should adopt rules for a national do-not-call registry that works in conjunction with existing state do-not-call programs, thereby promoting such successful state endeavors already protecting consumers. Such a national do-not-call registry should be consistent with many of the proposals of the FTC, including the changes discussed herein, to create an effective, consumer-friendly national do-not-call registry.

One concern expressed by the Commission is that there may be inconsistencies between rules that the Commission adopts in this proceeding and those adopted by the FTC in its rulemaking.³⁰ The Commission's concerns are unfounded. The FTC apparently plans to complete its rulemaking by the end of 2002, before reply comments are due in the instant proceeding. Thus before the FCC issues its rules, it will have an opportunity to review the FTC's final rule and resolve any inconsistencies. If the FTC's final rules differ greatly from that agency's proposed rules, the FCC should also consider putting its rules out for an additional round of comments.

The Commission is also concerned about application of the rules to tax-exempt nonprofit organizations and to charitable solicitations made by for-profit entities.³¹ Although 47 U.S.C. § 227(a)(3)(C) excludes calls made *by* tax-exempt nonprofit organizations from the definition of "telephone solicitation" under the TCPA, the Commission by rule extended that exemption to include calls made *on behalf of* such organizations.³² Last year, in Section 1011 of the Uniting

²⁹ See *id.*, ¶¶ 55-66.

³⁰ *Id.*, ¶ 56.

³¹ *Id.*

³² *Id.*

and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001,³³ Congress amended 15 U.S.C. § 6106 to specifically *include* in the definition of “telemarketing” calls made “to induce purchases of goods or services, or a charitable contribution....” Congress did not amend the TCPA, however. Nevertheless, it would be illogical to conclude that Congress would direct the FTC to enact rules to prevent telemarketers from soliciting charitable contributions in a manner that may be abusive of consumers’ right to privacy,³⁴ but allow the FCC to continue to exempt telemarketers that call on behalf of charitable organizations from regulations designed to protect consumers’ right to privacy. The Commission should revisit its decision to extend the exemption found in 47 U.S.C. § 227(a)(3)(C).

The Commission should preserve the right of the states to enforce their own laws and state do-not-call programs and to work cooperatively with federal authorities for the benefit of consumers. It is important that even if the proposal adopted by the Commission does not actually preempt state law, the effect of the rules does not create a de facto preemption of state law. De facto preemption might occur should the proposed federal program undermine the state’s ability to enforce its own do-not-call programs or should state funds supporting these programs be diminished in any way. The Commission should carefully review this matter and apply traditional preemption analysis in order to ensure that the rules that it adopts do not result in preemption in any manner.

³³ Pub. L. No. 107-56, 115 Stat. 396. This Act forms the basis for the FTC’s proposed national do-not-call registry. See FTC NPRM, 67 Fed. Reg. 4493.

³⁴ 15 U.S.C. § 6102(a)(3)(A).

A. It Should Be Easy for Consumers to Be Placed on the National Do-Not-Call Registry.

Administration of the registry should be easy and convenient for consumers. Consumers should have free access to whatever method the Commission uses to place names on the list. Section 227(c)(3) prohibits the Commission from charging residential subscribers to be placed on or removed from a national do-not-call registry. Residential subscribers also should not have to make a toll call to be placed on or removed from the registry.

Telemarketers are similar to door-to-door salespeople; both intrude upon consumers at their residences in an effort to sell the consumers something that they may not want or need. Consumers do not have to pay a fee to keep door-to-door salespeople from ringing the doorbell; a homemade “no soliciting” sign usually suffices. Similarly, consumers should not have to pay to prevent calls from telemarketers. The national do-not-call registry should serve as the “no soliciting” sign for telemarketers. In addition, free placement on the registry for consumers would help deter scams that charge consumers to stop telemarketing calls, but do not deliver.

Consumers should have numerous avenues for placing themselves on the registry. Telephone registration should be available. It should not be the only means for being placed on the registry, however. Even with a well prepared and fortified program, a telephone registration system could easily be overloaded – such as occurred in Kentucky, Tennessee and Georgia when their “no-call” lists were implemented³⁵ – and thus prevent consumers from registering.

NASUCA, therefore, recommends additional means for consumers to be placed on the registry. One method could be a scannable postcard or similar form that consumers can request, which contains all the information necessary to place a consumer on the registry. Consumers

³⁵ See FTC NPRM, 67 Fed. Reg. at 4517-18, note 242.

should also be allowed to register online. Further, any program adopted by the Commission should support rather than diminish state do-not-call programs by promoting the option of continued consumer registration at the state level. These additional registration methods would increase the effectiveness of the national registry thereby ensuring the consumer protection the Commission desires to achieve.

Anyone authorized by the subscriber (e.g., a family member or a social service agency) should be allowed place the subscriber's number on the registry. This would help effectuate the subscriber's placement on the registry, especially for the elderly or the infirm. However, in an effort to deter scams, the Commission should identify which non-family third parties may be appropriately authorized to collect and forward requests to be placed on the registry.

Placement of a consumer on the registry should establish a blanket prohibition on telemarketers calling the consumer, unless the consumer makes an affirmative act to authorize calls from the specific entity on whose behalf the telemarketer is calling.³⁶ Authorization by negative option can be confusing to consumers and would be ineffective in reducing unwanted telemarketing calls. It should not be allowed.

Authorizations should be company-specific and purpose-specific. Entities should not be allowed to trade authorizations among affiliates and subsidiaries, or to sell authorizations to other companies. The latter situation has been a particular problem. Consumers who make online or telephone purchases with one company, or even respond to a company's survey, often receive telemarketing calls for other purposes or for other companies. Consumers should be able to deal with the entities of their choice without being subjected to unwanted telemarketing calls.

³⁶ This does not obviate the need for company-specific do-not-call lists, as discussed below.

B. State “Do-Not-Call” Requirements That Provide Consumers with Greater Protection Against Telemarketers Than the Federally Adopted Rules Should Not Be Preempted.

The Commission seeks comments on the interplay between its proposed rules and states’ “do-not-call” requirements.³⁷ Specifically, the Commission asks whether its rules should preempt state requirements.³⁸ The Commission also seeks comment on whether the federal and state databases should be able to share do-not-call request information.³⁹

The Commission’s regulations should not preempt state “do-not-call” requirements that provide consumers with greater protection against telemarketers. It would be illogical for the Commission’s proposed rule to *reduce* the protections afforded consumers, via either de jure or de facto preemption, in those states whose do-not-call laws are more beneficial to consumers.

In addition, it is clear from the TCPA that Congress intended for states to be able to provide their consumers with greater protections against telemarketers. Section 227(e)(1)(D) prohibits preemption of any state law that “imposes more restrictive intrastate requirements or regulations on ... the making of telephone solicitations.” Thus, the Commission may not preempt state laws that are more restrictive on telemarketers.

States with do-not-call laws have enforced their own do-not-call database laws against telemarketers across the country, irrespective of whether the call was “intrastate” or “interstate” in nature. Since telemarketers are aware that they must comply with state law, most of them have purchased existing state do-not-call lists and have removed the telephone numbers of consumers on those list from their own solicitation lists. Many states have taken action against telemarketers that violate state laws by calling consumers who are listed on the state’s do-not-

³⁷ Notice, ¶¶ 60-66.

³⁸ *Id.*, ¶ 66.

³⁹ *Id.*, ¶ 65.

call list. No action taken against a telemarketer has been challenged by the argument that a state cannot protect its residents in this manner.

Moreover, nearly half of the states have already responded to demands by their citizens to combat unwanted telemarketing calls. It is of utmost importance that the Commission consider the possible impact its actions might have on existing and developing state database systems.

State do-not-call databases must be given some measure of protection. The Commission should require that telemarketers must comply with state law so that effective state do-not-call registries will continue to operate. Such a requirement would allow for the state and federal programs to work most efficiently.

As for sharing information, the Commission notes that 47 U.S.C. § 227(e)(2) requires states to include in their databases any do-not-call requests from their states that are found in any national database.⁴⁰ The information should flow the other way as well, to ensure that the federal database is as comprehensive as possible. The FCC and the FTC should support the continued success of effective state do-not-call programs by working with the states to implement a means for placing in the national database do-not-call requests found in state databases.

C. A National Do-Not-Call Registry Should Exist in Tandem with Company-Specific Do-Not-Call Lists.

The Commission seeks comment on whether the current system of company-specific do-not-call lists adequately balances the interests of consumers and telemarketers.⁴¹ The Commission's concern in this regard is that the use of company-specific lists may unduly burden consumers because they must repeat their requests not to be called each time a telemarketer calls.

⁴⁰ *Id.*

⁴¹ *Id.*, ¶ 14.

If conducted properly, company-specific do-not-call lists allow consumers to cull out unwanted companies from those whose calls are at least tolerated. This allows a consumer who does not mind receiving some calls to select the companies that may continue to contact the consumer. Problems develop only when companies do not follow the rules for maintaining a company-specific do-not-call list.

Company-specific do-not-call lists should exist in tandem with a national do-not-call registry. Consumers would thus have a choice of blocking telemarketing calls on a company-by-company basis or easily placing a blanket prohibition on calls from telemarketers. Having both a national registry and company-specific do-not-call lists would give consumers a choice of means – general and specific – to prevent unwanted telemarketing calls.

The Commission also seeks comment on whether the requirement that do-not-call requests be honored for ten years is reasonable for consumers and telemarketers.⁴² Given the invasive nature of telemarketing into consumers' privacy, ten years may not be enough. The Commission should consider revisiting the rule to make do-not-call requests permanent unless the consumer makes an affirmative act to revoke the request.

IV. THE COMMISSION SHOULD REDEFINE " ESTABLISHED BUSINESS RELATIONSHIP" TO REQUIRE THAT THE RELATIONSHIP BE ONGOING, AND SHOULD EXTEND THE REACH OF DO-NOT-CALL REQUESTS TO AFFILIATED COMPANIES .

The Commission's rules exempt from the restrictions on the use of prerecorded messages calls to "any person with whom the caller has an established business relationship at the time the call is made..."⁴³ The Commission defines "established business relationship" as

⁴² *Id.*

⁴³ 47 C.F.R. § 64.1200(c)(3).

a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.⁴⁴

The Commission seeks comment on whether it should revise the definition and the interplay between an established business relationship and a consumer's request not to receive calls from the person or entity with whom the relationship has been established.⁴⁵

The current definition is too broad, increasing the likelihood that consumers may get unwanted telemarketing calls. For example, a consumer could answer a company's survey concerning the types of products and services offered by the company or one of its clients. Based on this "inquiry," the company or one of its affiliates could call the consumer numerous times in order to market one or more of the products. In addition, requests to be placed on the company's do-not-call list may not stop calls from affiliates "unless the consumer reasonably would expect [the affiliates] to be included given the identification of the caller and the product being advertised."⁴⁶

Not every contact with an entity should establish a business relationship between the entity and the consumer. A consumer who merely inquires or provides an opinion about a company's products and services should not be subjected to subsequent telemarketing calls from the company. In order to be considered "established," the relationship should also be ongoing, i.e., where the consumer has completed a transaction (making a purchase or a payment) with a company within the 24 consecutive months prior to the call. In addition, if a consumer requests to be placed on a company's do-not-call list, that request should be extended to all of the

⁴⁴ 47 C.F.R. § 64.1200(f)(4).

⁴⁵ *Notice*, ¶¶ 34-35.

⁴⁶ 47 C.F.R. § 64.1200(e)(2)(v).

company's affiliates with whom the consumer does not have an ongoing relationship. Such a measure is necessary to counter the ability companies now have to share consumer information with their affiliates.

Extending the "established business relationship" exemption to affiliated companies is contrary to the clear wording of the statute. The TCPA defines "unsolicited advertisement" as an advertisement sent to a person "without that person's prior express invitation or permission."⁴⁷ A consumer who does not do business with a company's affiliate cannot give "express invitation or permission" to the affiliate to call the consumer for telemarketing purposes. Extending the "established business relationship" exemption to affiliates is contrary to Congressional intent. The Commission should not extend the exemption by rule.

V. IMPLEMENTATION OF A NATIONAL DO-NOT-CALL REGISTRY SHOULD INCLUDE CONSUMER EDUCATION.

It is important that consumers be educated and aware of the various options available to them concerning a national do-not-call registry. Under Section 227(c)(3), common carriers would be required to notify their subscribers of the existence of the national do-not-call registry. In addition, the FCC and the FTC should develop a program to publicize the national do-not-call registry. Such a consumer education program should provide instructions for consumers to register and information on reporting violations and filing complaints.

It is unclear whether sufficient resources have been set aside to ensure that a successful consumer education campaign accompany the proposed federal registry. As states with existing do-not-call programs can attest, registries must be explained and promoted to consumers for a successful enrollment process. Clarification concerning the interplay of the state do-not-call

⁴⁷ 47 U.S.C. § 227(a)(4).

registries and the federal registries should also be addressed. The Commission should consider this factor in its evaluation and implementation of the national registry.

VI. TELEMARKETING TO WIRELESS TELEPHONE NUMBERS SHOULD BE PROHIBITED UNLESS EXPRESSLY AUTHORIZED BY THE SUBSCRIBER.

The Commission also seeks comment on several issues concerning telemarketing to wireless telephone subscribers.⁴⁸ Telemarketing to wireless subscribers often is an invasion of privacy, since many consumers subscribe to wireless systems because the telephone numbers are unlisted. Moreover, wireless subscribers have to pay to receive telemarketing calls.

The Commission should prohibit all commercial telemarketing calls to wireless telephone numbers unless expressly authorized by the subscriber. Several states have legislation that prohibits commercial telemarketing calls to wireless phones.⁴⁹ As the wireless market becomes larger and more and more consumers have wireless telephones, it is imperative that the Commission implement rules that would prevent telemarketers from calling wireless telephones.

VII. CONCLUSION

The use of automated dialing systems is purely for the benefit of telemarketers, but unfortunately has resulted in considerable detriment for consumers. The Commission should restrict the use of automated dialing systems as recommended herein. In addition, a broad-ranging, consumer-friendly national do-not-call registry that does not interfere with, but bolsters

⁴⁸ Notice, ¶¶ 41-46.

⁴⁹ Arizona (Ariz. Rev. Stat. Ann. § 44-1278(B)(3)); California (Business and Professions Code) § 17590, *et seq.*; Connecticut (Conn. Gen. Stat. § 52-570c); Illinois (Ill. Pub. Act No. 92-0795 (Aug. 9, 2002); S.B. 1637, 92nd G.A. (April 4, 2002)); Kentucky (Ky. Rev. Stat. § 367.46951); Maine (10 Me. Rev. Stat. Ann. § 1498 (prohibition on calls placed by an automatic dialing device includes wireless telephone numbers); Minnesota (Minn. Stat. § 325E.26-.31 (2000)); New Jersey (2002 N.J. S.B. 153, 210th Legislature (September 26, 2002)); New York (NY CLS Gen. Bus. § 399-z (2002); Tennessee (Tenn. Code Ann. § 47-18-1526(b)); Wyoming (Wyo. Stat. Ann. § 40-12-302(b)).

existing state do-not-call programs would provide consumers with much-needed flexibility in dealing with telemarketers. The Commission should help ensure that such a registry becomes reality.

Respectfully submitted,

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