

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

In the Matter of)
)
Notice of Proposed Rulemaking) CG Docket No. 02-278
Rules and Regulations Implementing)
the Telephone Consumer Protection Act of 1991)

**REPLY COMMENTS OF
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TABLE OF CONTENTS

1.	Introduction	1
2.	Summary	1
3.	Problems of Telemarketing Calls	2
4.	The Overall Effectiveness of Company Specific Do-Not-Call Lists	4
5.	The Overall Effectiveness of the Direct Marketing Association's Telephone Preference Service	6
6.	Calls to Invite People to Listen to a Radio Program	7
7.	Calls Soliciting a Further Meeting	9
8.	Calls to Businesses	10
9.	Network technologies	11
10.	Established Business Relationships	12
11.	Wireless telephone numbers	13
12.	National Do Not Call List	14
13.	FCC vs. FTC Do Not Call List Issues	16
14.	Proposal for a <i>De Minimis</i> Exemption.....	17
15.	Conclusion	17

1. INTRODUCTION

I respectfully submit these reply comments in response to comments to the Commission's Notice of Proposed Rulemaking (NPRM)¹, in the above-referenced docket. I comment as a telephone subscriber only. I have no relationship with any telemarketer, telecommunications business, or user of telemarketing services. I have no particular expertise in telephone business or technology.

I am a resident of New York State and use the New York State Do Not Call list to block telemarketing calls to my home.

The following comments are in reply to several of the comments submitted in this matter.

2. SUMMARY

Since submitting my own comment, I have reviewed several of the comments submitted by those on both sides of the various issues.

Some commenters seem to believe that the main consumer objection to telemarketing calls is either improper sales practices or repeat calls. The primary objection is to the disruptive nature of the calls themselves, whether repeat calls or first time calls.

Some commenters claim that a national DNC list would damage their interests. However, other commenters in the same businesses have pointed out that there is no reason, and some cost, to call customers who do not want to talk to telemarketers. If there is no reason to call those who do not want to receive the calls, the loss of ability to do so would favor, rather than oppose, the interest of these telemarketers.

The current company specific do-not-call approach does not solve the problem and will not solve the problem because it cannot eliminate the "first call" by the telemarketer.

A national do-not-call (DNC) list should be adopted by the Commission.

The FCC is in a better position than the FTC to adopt and maintain a national DNC list and to enforce do-not-call complaints from consumers.

I propose a *de minimis* exemption for certain calls.

¹ *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Notice of Proposed Rulemaking and Memorandum Opinion and Order, CG Docket No. 02-278 and CC Docket No. 92-90, FCC 02-250 (Sept. 18, 2002) 67 Fed. Reg. at 62667, October 8, 2002 (NPRM).

3. PROBLEMS OF TELEMARKETING CALLS

Discussion

Some commenters appear to believe that the primary problem with unsolicited telephone calls was that the consumer would be sold something he did not want, or somehow subjected to a fraudulent or otherwise improper sales attempt.

WorldCom cites statistics from a survey that “one half of households surveyed purchased a product or service over the phone in the last year”.² The survey cited by WorldCom provides some additional information that does not support WorldCom’s argument. According to the survey only one in six respondents reported a purchase from a local company with whom they did not otherwise do business³ and only two in ten purchased from a national company with whom they did not otherwise do business.⁴ This does not support the effectiveness or the customer satisfaction with “cold call” telemarketing.

WorldCom claims that the survey revealed that “the main reason respondents provided for being unlikely to purchase over the phone was not privacy, rather it is an inability to see what they purchase.”⁵

The actual statement from the survey report is:

Only one in seven of those surveyed believe they will make a purchase in response to a call to their household in the near future. Respondents offered as explanatory reasons the fact that they prefer to see what they purchase (23%), they dislike sales calls (19%), or they do not make purchases over the telephone (19%). Interestingly, very few respondents (7%) cited privacy concerns – telephone calls are intrusive -- as a reason they were unlikely to buy a product or service over the telephone in the future.⁶

² WorldCom, Inc comments at 39 (citing Michael A. Turner, Ph.D., Information Policy Institute, *Consumers, Citizens, Charity and Content: Attitudes Toward Teleservices*, Final Report, (Jun. 4, 2002)(“IPI”) at 4, 5 and 17). The IPI report is available at www.infopolicy.org (last visited December 17, 2002).

³ IPI at 17.

⁴ IPI at 16. Also see IPI table 5A at 16.

⁵ WorldCom at 7, citing IPI at 4.

⁶ IPI at 4. Also see IPI table 10C at 25.

Although 23% of those that did not believe they would make a purchase through a telemarketer said that they “prefer to see what they purchase”, a larger number gave reasons indicating a dislike for telemarketing calls, including “disliked sales calls”, “did not make purchases over the telephone”, and “privacy concerns”. It appears from this data that general dislike or distrust of telemarketing, stated in different ways, is a major factor for the six out of seven respondents who do not expect to make a purchase in the near future.

The IPI report does not support a conclusion that the public is satisfied with the current regulations on telemarketing.⁷

Comments are also based on the belief that objections to telemarketing calls are only against repeat calls from the same telemarketer. For example, WorldCom, Inc. argues that “A message cannot truly be deemed unwanted until it is received and rejected at least once.”⁸ I disagree. One single call from many telemarketers is just as bad as many telephone calls from a single telemarketer.

For many telephone subscribers, unwanted telephone calls are more than a mere annoyance. They can wake us up or cause us to interrupt important activities in order to rush to the phone. They deny us the ability to receive expected, important, incoming calls during the time it takes to answer the phone and tell the telemarketer not to call back.

When the telemarketer interrupts the sleep of a person who is sleeping during the day due to night work or travel, the loss of sleep can continue to be a problem during the rest of the day. This is particularly a problem to those who are not used to sleeping during the day and find it particularly difficult to get back to sleep after an interruption.

A busy or sleeping telephone subscriber does not have an acceptable alternative of turning off the phone if that subscriber knows that there is some chance that an important call (a call from a child’s school, an emergency call from a family member, etc.) might be received.

An elderly person living alone can have a particularly difficult problem getting to the phone. Ignoring the call is not a valid option if the person is awaiting a return call from a doctor, a pharmacy, a friend, or a loved one.

⁷ Although I understand that telephone surveys are used for many survey subjects, I question the accuracy of a telephone survey about telemarketing. According to the IPI report (pp. 35, 36), 11 percent of the respondents who could be reached completed the survey. It would skew the survey if people who are most likely to want relief from telemarketing calls (e.g. night shift workers) were better represented among the 89% refusing to complete the survey and those who do not object to telemarketing were better represented among the 11% who took the time (11 minutes) to complete survey.

⁸ WorldCom at 38.

The various state Attorneys General, in their joint comments, best describe the telemarketing problem: “The ability to keep uninvited marketers out of one’s home is an issue of consumer sovereignty and autonomy -- as fundamental as the ability to ward off door-to-door peddlers with a ‘No Trespassing Sign’.”⁹

Conclusion

The primary problem with unsolicited telephone calls is the annoying, inconvenient, and disruptive effect of having to answer the phone or being awakened from sleep. It is this problem that should be addressed by the Commission’s rulemaking.

In my comments I am not specifically addressing telemarketers who use fraudulent or deceptive business practices to cause economic harm to consumers. While such telemarketers exist, other rules, particularly the FTC’s Telemarketing Sales Rule¹⁰, address such problems. The issues I address here concern the harm to telephone subscribers by the unwanted telephone calls and fax transmissions from telemarketers, including those from the vast majority of business that are honest and have no intention of deceiving consumers.

4. THE OVERALL EFFECTIVENESS OF COMPANY SPECIFIC DO-NOT-CALL LISTS

Discussion

Several comments from companies involved in telemarketers (advertisers, companies providing telemarketing services, and their trade organizations) indicate a belief that company specific do-not-call (DNC) lists are effective under the present regulations.

MasterCard states that “The TCPA focuses on the need to protect consumers by ensuring they can avoid receiving those ‘telephone solicitations *to which they object*’”¹¹ and further comments that the rules allow consumers “...to stop unwanted calls from certain telemarketers...”.

DialAmerica Marketing, Inc. asserts that the company specific DNC approach “works very well”¹² as evidenced by the large quantity of numbers on their DNC list, and that the company specific approach is not burdensome to the consumer because the telemarketing

⁹ National Association of Attorneys General comments at 7.

¹⁰ 16 CFR Part 310

¹¹ MasterCard International comments at 3 (quotation from 47 U.S.C 227 (c)(1), emphasis original to MasterCard comments).

¹² DialAmerica Marketing, Inc. comments at 7.

company initiates the call and the consumer makes the request to be removed.¹³ This ignores the fact that, in order to make the request to stop calling, the consumer must first answer the phone, often at some inconvenience.

Conclusion

The present company specific DNC lists do not sufficiently balance the consumer interest in limiting unsolicited advertising with telemarketers' interest in providing beneficial services to consumers, as determined by the TCPA Order.¹⁴

First, there are a number of reasons why the company specific approach is not effective in protecting consumer interest and is unreasonably burdensome for consumers (NPRM ¶14).

- The “first call” of a telephone call of a telemarketer causes an intrusion with the damage described above, even if there are no more calls from that particular telemarketer.
- The burden of keeping records of DNC requests falls upon the consumer. If the consumer makes a request that he not be called, and, at some later time, is called, the consumer will not be able to take any action against the telemarketer unless the consumer had recorded the name of the telemarketer at the time of the first call.

Second, the reliance only upon company specific DNC lists is not necessary to balance the telemarketers' interest with the consumers' interest. Telemarketers should have no interest in calling consumers who do not want to receive the telephone call. Instead, such calls work against the telemarketers interest by angering consumers who were awakened by interrupted by the call. Specifically, several companies that use telemarketing submitted comments that support this argument. For example, BellSouth states (in opposition to a national DNC list) that “any reputable firm that continued to contact a customer, or potential customer, after having been told to cease such action surely could not count on obtaining business of that customer”¹⁵ For the same reason a reputable firm should have no interest in contacting a potential customer who has indicated an unwillingness to do business with telemarketers. That customer could be less likely to respond to the firm's advertising messages in other media if the customer had received an unwanted telemarketing call from the firm.

¹³ Dial America at 7.

¹⁴ TCPA Order, 7 FCC Rcd at 8765-66, ¶ 23.

¹⁵ BellSouth Corporation comments at p. 4.

Conclusion

The commenters who assert that company specific DNC lists provide sufficient consumer protection do not understand that the “first calls” from any one telemarketer are a significant problem even if the consumer is able to make his DNC request and there are no violations of that request.

In my opinion the company specific DNC lists do not provide consumers with a reasonable means to curb unwanted telephone solicitations.

5. THE OVERALL EFFECTIVENESS OF THE DIRECT MARKETING ASSOCIATION’S TELEPHONE PREFERENCE SERVICE

Discussion

In the NPRM the Commission seeks comment on the effectiveness of private sector initiatives such as Direct Marketing Association’s (DMA) Telephone Preference Service (TPS)¹⁶

The DMA, in their comments, claim that their TPS “is very effective in reducing unwarranted solicitations” and use that claim to argue that it is not necessary to adopt a national DNC list. However, in survey results that the DMA gave in their comments they report that of the 80.5 % of subscribers who said that they noticed a decrease in the number of solicitations only 42% reported a “significant” decrease in calls while a greater number, 45%, report a “moderate” decrease. A moderate decrease is not good enough.

Compare the consumer response to the TPS to that of the state DNC lists. According to the DMA, their TPS includes approximately 7.5 million numbers¹⁷ after 16 years of operation. The various state DNC lists contain (according to the Attorneys General comments)¹⁸ more than 7 million numbers, even though the state lists are newer and do not include California, the largest state.

One problem with the DMA program and similar programs is that, because it is mandatory for members only, it applies only to the most reputable telemarketers but not to the least reputable and most offensive. Any program that applies to the best but not the worst cannot be effective.

¹⁶ NPRM at ¶17.

¹⁷ Direct Marketing Association comments at 5.

¹⁸ The Attorneys General at 15.

Conclusion

Private sector initiatives, while commendable, are not a sufficient solution and do not eliminate the need for a national DNC list.

6. CALLS TO INVITE PEOPLE TO LISTEN TO A RADIO PROGRAM

Discussion

The Commission asked for comments on prerecorded messages sent by radio and television broadcasters to encourage telephone subscribers to tune in.¹⁹

Two related comments focus on this question:

The National Association of Broadcasters (NAB)²⁰ argues that “broadcast audience invitation” messages are exempt from the law and the regulations because of two exemption: that they are not made for a commercial purpose²¹ and that they “do not promote the commercial availability or commercial quality of property, goods, or services”²².

Comments from Marc B. Hershovitz, Michael Jablonski, Ned Blumenthal, and C. Ronald Ellington²³ (one submittal on behalf of the four individuals) take the opposite stand and argue that calls asking the subscriber to listen to a particular radio station are commercial²⁴ calls and contain an unsolicited advertisement²⁵.

Hershovitz, et al. specifically address prerecorded calls from several Georgia radio stations promoting their programming and contests (they are plaintiffs’ attorneys in a civil lawsuit against the radio stations, according to NAB).

As to the question of whether “invitation messages” are commercial, it is clear that when a radio station, whose income comes from advertising with income dependent upon

¹⁹ NPRM at ¶31.

²⁰ National Association of Broadcasters (NAB) comments.

²¹ NAB at 9.

²² NAB at 10.

²³ Hershovitz, et al. comments.

²⁴ Hershovitz, et al. at 6.

²⁵ Hershovitz, et al. at 8.

audience size, spends money to increase the size of the audience and therefore the advertising revenue, the purpose is commercial.

As to whether the messages do not contain any “unsolicited advertisement”: what is an “advertisement”? I expect that when a radio pays to deliver a message on television stations or places messages on billboards inviting the public to listen to the station, those messages are called “advertising”.

The FCC regulations that forbid to calls to residences using prerecorded voices²⁶ provide an exception for messages that are not commercial²⁷, and for those that are commercial but do not “include the transmission of any unsolicited advertising”²⁸.

To me it seems clear that a prerecorded automatic telephone call to ask the subscriber to listen to a particular station is a commercial call delivering an advertisement for that station. However, what may be clear to me, and clear to someone who has to rush from the shower to catch what might be an important phone call but instead hears Britney Spears promoting a radio station,²⁹ is apparently not clear to the National Association of Broadcasters and to some radio stations.

Conclusion and Recommendations

I encourage the Commission to specifically define such “invitation to listen” calls to be commercial, as well as to broadly define commercial calls to be any calls with the intent of furtherance of the caller’s commercial or profit interest.

I do not see any reason to exclude commercial calls that do not contain an unsolicited advertisement. The provision at 47 CFR §64.1200 (c)(2) should, therefore, be removed and, if deemed necessary, replaced with specific exemptions for certain types of calls.

If the Commission decides to implement a national DNC list the above recommendations should apply to any calls, prerecorded or live, to subscribers listed on the DNC list.

²⁶ 47 CFR §64.1200 (a)(2).

²⁷ 47 CFR §64.1200 (c)(1).

²⁸ 47 CFR §64.1200 (c)(2).

²⁹ See Hershovitz, et al. at appendix A (scripts of some actual recorded messages).

7. CALLS SOLICITING A FURTHER MEETING

Discussion

The National Associations of Insurance & Financial Advisors (NAIFA) comments that the Commission should adopt the FTC's views on face-to-face transactions.³⁰ NAIFA points out that custom or law in insurance sales is to not make any sale final until there is a face-to-face meeting between the customer and the sales agent. They claim that calls that can not result in a sale over the phone "...avoid many of the negative aspects of telemarketing calls...". The FTC's discussion of this exemption indicates that the exemption is because "The [FTC] continues to believe that the incidence of fraud may be lessened when a transaction is not completed, and payment is not made, until a face-to-face meeting occurs between the buyer and seller."³¹ The FTC also, however, notes that the record shows that consumers are increasingly frustrated with such calls. The final rule does not exempt such calls seeking an appointment from the DNC list provisions.³²

While I do not disagree that such calls do not present as much chance that a consumer will be pressured into making an unwise purchase, I disagree that this avoids the negative aspects of telemarketing calls. The call still interrupts and intrudes upon the consumer.

The NAIFA comments are based on the mistaken idea that the consumer dislike for telemarketing calls are based only on the sales tactics of the caller. While there are certainly cases of objectionable sales tactics, those tactics are not the only basis to objections to unsolicited calls. As I discuss above, most of the consumer objections are to the interruption and inconvenience of the telephone call.

Conclusion and Recommendation

Calls made to initiate an attempt to sell a product or service, even when the actual sale will be completed in a face-to-face meeting, are commercial calls and should not be distinguished from any other commercial call.

³⁰ National Associations of Insurance & Financial Advisors. (NAIFA) comments at ¶3.

³¹ FTC Notice of Proposed Rulemaking (FTC NPRM) at 98.

³² FTC Final Amended Rule and accompanying Statement of Basis and Purpose at 201, 203-206, rule at the new 16 CFR §310.6.

8. CALLS TO BUSINESSES

Discussion

NAIF also argues that DNC lists should not include business numbers.³³ They state that unsolicited calls do not raise the same objection as those to homes.

SBC Communications Inc. argues that the rules should not be applicable to businesses located in residences.³⁴

The TCPA does, as SBC says, clearly refer to residential privacy issues and Congress' intent clearly "is to protect the privacy interest of the residential telephone subscriber".³⁵

While I agree that telemarketing calls to business numbers usually are far less objectionable, a business line in a home will interrupt the activities of the home just as much as a residential line. Many business lines in homes are not the primary lines used by the business but are lines used, for example, by field sales or service people who usually work from their homes. The lines are needed to allow important phone calls from a small number of clients, not for general use. Both the company specific DNC regulations and any national DNC regulations established by the commission should apply to any number, regardless of whether or not it is listed under a business name or an individual's name. If the subscriber says that he does not want to be called on that line, he should not be called on that line.

Conclusion and Recommendation

While most business phone numbers ring only in offices, stores, factories, etc. a few do enter homes. One way of protecting the privacy interest of the residential telephone subscriber who also has a business line into his home is to allow the listing of such lines on the DNC list.

I oppose any restriction of the addition of business lines to DNC lists. If the Commission decides to adopt a national DNC list it should not exclude business telephone numbers from the list.

³³ NAIFA. at ¶ 3

³⁴ SBC Communications Inc. comments at 15.

³⁵ SBC. at 15, referring to the Telephone Consumer Protection Act of 1991, P. L. 102-243 (1991), 47 U. S. C. §227 (TCPA).

9. NETWORK TECHNOLOGIES

Discussion

Technology is changing fast. New technology has enabled the telemarketing industry to grow rapidly. There have been several comments submitted concerning new technology that, in the commenter's opinion, may reduce the problem of unwanted telephone calls.

Commenters point to Caller ID as a method of filtering unwanted calls. Caller ID still will allow unwanted phone calls to wake up or interrupt the activities of the consumer who must look at the name or number of the calling party. A further limitation on the usefulness of Caller ID is that the consumer may not know the name or phone number of an incoming important phone number. A child might be calling from a friend's home or even from a friend's neighbor's phone. An emergency call might be received from a rescuer's cell phone.

Phone companies can also reject calls from phones that block Caller ID. For example, SBC points to their subscriber service of Anonymous Call Rejection.³⁶

These services will reject, or allow the consumer to reject, calls that may not be telemarketing calls but instead may be important phone calls. For example, a parent with a child who is at a friend's homes will certainly want to receive a call from the child even if the friend's parents had blocked Caller ID. To be useful, any such service should be able to specifically block sales calls without blocking other calls.

Technology that blocks calls other than telemarketing calls should not be relied on and does not obviate the need for a national DNC list.

A service that transmitted a code identifying the call as a sales call together with a local telephone company service that optionally blocked such phones calls would be an acceptable alternative to DNC lists.

The internet has had a particularly large effect on how data is handled. Just the fact that I can submit comments to the Commission with the comments appearing on the docket for others to see the following day, and I can easily review other comments the day after they are submitted indicates how fast technology is changing in this area.

A service that allowed a subscriber to call, captured the subscriber's phone number, and added that number to a list accessible on-line by telemarketers should be possible and would eliminate much of the trouble of implementing a DNC list. It should also be possible for the telephone company to remove a number from the list at the time the subscriber gave up the number.

³⁶ SBC at 14.

10. ESTABLISHED BUSINESS RELATIONSHIPS

Discussion

A particularly thorny issue raised in many of the comments is the exemption for established business relationships.

Several financial services companies want the ability to call their customers with appropriate information even if the customer's number is listed on a DNC list. For example, American Express Financial Advisors, Inc³⁷. comment that they have a fiduciary duty to act in their customers' best interests, and that sometimes they must contact there customers with time-sensitive information.

Calls of holders of accounts with a brokerage or financial advisor should be exempted as an EBR. Advising a customer to sell a security should not be considered a sales call even though the broker receives a commission for the sale.

Calls to someone who does not have an account at a brokerage or financial advisor should not be exempted.

Conclusion and Recommendations

An Existing Business Relationship should be narrowly defined. Most likely, in order to avoid the creation of limitless loop holes waiting to be discovered, the definition of the activity that establishes and continues an EBR will have to be strictly defined in the regulations.

The following comments apply to EBR exemptions from the provisions of a national DNC list:

- The fact that a consumer has a credit card or other account should not create an EBR that would exempt the company from the provisions of a national DNC list with respect to sales calls attempting to sell other products, or enhancements to the account, to that customer.
- A call by a consumer to ask directions or hours of operation should not establish an EBR.
- An EBR established by a customer inquiry should be limited to response to that inquiry and not allow the consumers telephone number to be placed on a list of numbers to be called by telemarketers.

³⁷ American Express Travel Related Services Company, Inc. and American Express Financial Advisors, Inc. comments at ¶ 2.

- A company should be able to call a customer concerning the renewal of a subscription or lease, but not for other purposes.

11. WIRELESS TELEPHONE NUMBERS

Discussion – Survey Calls

CMOR, a trade association representing the survey research industry, submitted comments that asked for research calls to be exempt from the TCPA³⁸ with the exemption applying to the prohibitions on calls to wireless telephones.³⁹ COMA. also makes the astounding assertion that “survey research calls to wireless numbers to not pose privacy or economic concerns.”⁴⁰

According to COMA., a cell phone user would expect at most one to two survey research calls a year. In my own experience (before my residential wire line number was placed on the New York State DNC list), I received many more than two survey calls each year, most from local organizations.

If “survey calls” are exempted from all provisions of the TCPA many sham surveys could come about as telemarketer try to circumvent the regulations.

Discussion – Other Wireless Issues

The Cellular Telecommunications and Internet Association (CTIA.) submitted comments on the impact of number portability and the prohibition on the use of automatic telephone dialing systems to call a wireless phone and comments that telemarketers will be able to identify phones whose numbers have been ported to a wireless device.⁴¹

AT&T Wireless Services, Inc. comments support the inclusion of wireless subscribers in a national DNC list.⁴² I agree. Allowing wireless subscribers to add their wireless numbers to a DNC list would overcome any problem caused by telemarketers lack of ability to identify wireless numbers.

³⁸ COMA comments at 3.

³⁹ COMA at 7.

⁴⁰ COMA at 7.

⁴¹ The Cellular Telecommunications and Internet Association. (CTIA) comment at 3.

⁴² AT&T Wireless Services, Inc. comments at 30.

Discussion - Classification of Wireless Telephones as Residential Lines

Several commenters objected to the classification of cell phones as residential phones⁴³. In the past, due to cost, almost all wireless telephones were used by businesses or by individuals for work related purposes.

Now, however, there are a large number of cell phones used by individuals for personal use, much in the same way as they would use residential phones. When the wireless subscriber is at home, the wireless phone is a residential phone. The time has come that schools find a need to request that all cell phones be turned off while in class. These phones are not business phones.

In addition to the usual problems of unsolicited phone calls discussed above, there are particular problems with unsolicited calls to wireless phones:

A phone may be in the possession of a person driving a vehicle or who for other reasons cannot safely answer the phone.

Wireless phones are frequently used by travelers who may be in time zones other than the time zone indicated by their area code. For example, a person with a cell phone from the west coast may be traveling to the east coast. A call from a west coast telemarketer just before 9:00 pm will reach the traveler at almost midnight.

Conclusion and Recommendations

Unsolicited calls to wireless numbers create a significant nuisance, inconvenience, and even safety hazard, and should continue to be prohibited. If the telephone portability makes it impossible for a caller to block calls to wireless telephones, a solution would be the use of a national DNC list. A wireless subscriber could simply place the number on the list.

Wireless phones should be classified as residential lines for the purpose of company specific DNC lists, any national DNC lists, and prohibitions on the use of automatic dialers.

12. NATIONAL DO NOT CALL LIST

Discussion

The focus of many comments concerned the need for a national DNC list. Many of the commenters based their opposition to the national DNC list simply on their assertions that the company specific and DMA lists were sufficient. These were discussed above.

⁴³ AT&T Wireless at 30, 31.

Bell South's argued that "...disreputable firms will not follow the mandates of a national DNC list and, therefore, nothing would be gained by this requirement"⁴⁴ (of a national DNC list).

I disagree. In the case of disreputable firms a DNC list would give the consumer the ability to initiate enforcement based on the simple knowledge that the consumer had been added to a the list. The consumer would not have to keep records of the name of every company on whose lists they had been placed (as on company-specific lists).

Several commenters objected to the national DNC list due to the harm that it might cause their businesses or industries. For example, Dialamerica Marketing, Inc. refers to possible loss of jobs in the outbound telemarketing industry.⁴⁵

Any change in the modes used for advertising brought about by changes in technology, economics, or consumer response will, unfortunately, result in changes in employment and loss of jobs. For example, when economics and changes in consumer interest caused a decrease in the printing of large catalogs, a paper mill making the paper for catalogs closed, causing a loss of jobs. If the Commission adopts a national DNC list in response to customer demand, harmful effects on individual companies may occur just as consumer preferences affect many industries. It must be emphasized that if the Commission adopts regulations in response to consumer wishes, the effects of those regulations are the result of consumer opinion.

Worldcom argues that a national DNC list "will severely hinder competition in the telecommunications industry, harming telecommunications consumers."⁴⁶

If there were no other forms of advertising, then a national DNC list would have a significant harmful effect on competition. However, consumers receive advertising about the latest local and long distance offers by television and print advertising as well. Any telecommunications company has the opportunity to inform consumers of new services or pricing through the use of the other media available to it.

WorldCom⁴⁷ implies that telemarketing calls allow a more personal form of communications that will allow consumers to "ask questions and obtain the information needed to choose the service that fits their individual needs, and provides a simple means to subscribe to those services".

⁴⁴ BellSouth at p. 4.

⁴⁵ DialAmerica at 17.

⁴⁶ WorldCom at 7.

⁴⁷ WorldCom at 12.

It has been my experience that callers from telemarketers such as MCI (subsidiary of WorldCom) were not knowledgeable about the services, pricing, and competitive comparison. They read from a script and just wanted to get my permission to switch the service.

The alternative to telemarketing is the ability of the consumer, after seeing an advertisement on television or elsewhere and at the consumer's convenience, to call one or more companies to obtain information and make competitive comparisons.

Many comments supported the creation of a national DNC list.

Although not a comment submitted to the Commission, the report from IPI, cited above, provides some measure of public interest in a national DNC list. According to the report, "Specifically, while the majority of the public will endorse an 'all or nothing' regulatory regime involving DNC lists when offered this option, results also reveal that more limited marketing restrictions also have considerable, albeit somewhat less, public appeal."⁴⁸ According to Table 11c of the report, 73% of the respondents support the choice of "create 'Do Not Call' list prohibiting calls from all organizations."⁴⁹

Recommendation

The Commission should establish a national DNC list.

13. FCC VS. FTC DO NOT CALL LIST ISSUES

Discussion

After the initial comments were submitted and while these reply comments are being written, the FTC announced their final amended TSR containing provisions for a national DNC list.

Recommendation

Because of the limitations in industries subject to the FTC DNC list, the FCC should adopt a national DNC list. There should be only one national list. The operation of the list can be arranged by cooperation between the FCC and the FTC.

⁴⁸ IPI at 27.

⁴⁹ IPI at 26.

14. PROPOSAL FOR A *DE MINIMIS* EXEMPTION

Discussion

The National Association of Insurance & Financial Advisors (NAIFA), in their comments, proposed⁵⁰ a *de minimis* exemption that would allow a business to make a small number of telemarketing calls without searching a national DNC list.

The Direct Selling Association, in their comments, also proposed that the regulation have an explicit exemption for occasional and incidental uses of the telephone.⁵¹

Because the details of EBR and other exemptions to a national DNC list and other regulations can easily become very complex, and there may be situations that haven't been, or cannot easily be, defined in the regulations, a *de minimis* exemption would cover seldom occurring situations.

Conclusion and Recommendation

I agree with the concept. I encourage the Commission to adopt language in the regulations to provide a *de minimis* exemption that would allow a limited number of calls per day to be exempt from certain regulation, provided that such calls are not made using an automatic dialer or a predictive dialer and that such calls are not made to numbers obtained by the caller from any list of phone numbers obtained from other companies.

15. CONCLUSION

I thank the Commission for the opportunity to submit these reply comments and continue to urge the adoption of a national Do-Not-Call list.

⁵⁰ NAIFA at p. 4.

⁵¹ Direct Selling Association comments at 6.