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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 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

REPLY COMMENTS
OF THE DIRECT MARKETING ASSOCIATION

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SUMMARY OF COMMENTS

The Federal Communications Commission must act immediately and decisively to establish a national do-not-call database under the TCPA. The Federal Trade Commission's ("FTC") decision to adopt a national do-not-call registry, announced during the period between filing deadlines in this proceeding, has altered the core issue this agency must consider: The question now is how a national do-not-call ("DNC") program should be structured, implemented, and administered. As we explain below, the FTC's program falls short of what the TCPA requires, and what consumers and marketers need. Therefore, this Commission should independently establish a truly national program pursuant to the TCPA, assume primary responsibility for its development and implementation, and preempt state DNC requirements. The DMA advocates a "Sum of the Slates" approach, built on The DMA's Telephone Preference Service, which could be operational within 45 days of a final decision to implement it.

The Commission must also adopt reasonable, preemptive standards for the operation of predictive dialers, including standards for call abandonment. The FTC's new rules in this area, too, reflect its lack of expertise with communications technologies and capabilities, and of the manner in which they are and can be used. In particular, the Commission should avoid the sort of "safe harbor" approach that the FTC adopted. The Commission also must clarify its limits on the use of prerecorded messages to ensure that there is sufficient flexibility to enable marketers to serve their customers, comply with the TCPA, and play a recorded message as necessary to avail themselves of the FTC's "safe harbor" for abandoning certain marketing calls.

We maintain that the Commission should not revise its current definition of an established business relationship. The FCC also should not to alter its rules governing

affiliates' obligation to honor DNC requests. The FTC has adopted standards that conform to this Commission's rules; since the agencies' standards are now consistent, we urge this Commission not to alter its rules. Finally, the Commission should continue to study the feasibility, as well as the costs and benefits, of mandating the transmission of caller identification. The FTC's decision to require transmission of caller ID at this time was premature and this Commission, with superior expertise and a broader mission, must not be pressed into a hasty or ill-considered ruling.

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Just after the deadline for filing initial comments in this rulemaking, the Federal Trade Commission ("FTC") announced its decision to adopt a national do-not-call registry, subject to Congressional funding approval. The question before this agency, therefore, is no longer whether there should be a national do-not-call ("DNC") list; the FTC's decision can be assumed to have mooted that inquiry, leaving matters concerning the constitutionality of a DNC list or the FTC's statutory authority to promulgate such a requirement to Congress and the courts. Rather, the question now before this Commission is whether the DNC plan that the FTC has announced – and its separate but related plan for dealing with abandoned calls – are adequate to the task of enabling consumers to avoid unwanted telephone solicitations and enabling marketers to satisfy consumer expectations.

The DMA maintains that the only way to assure that a national do-not-call registry achieves its objectives of protecting both consumer and business interests is to make it truly national in that it applies to all telemarketing calls and to all telemarketers. The FTC's list does not achieve either of these objectives: Intrastate calls are untouched by the FTC's rule and whole industries that are heavily dependent upon the telephone as a marketing medium are beyond the FTC's jurisdiction. By contrast, the FCC can establish a national registry that does meet these fundamental goals. This agency – and

only this agency – has an authorizing statute that is specifically designed to support a national list. This agency also has the requisite expertise in telephone technology to realize the purposes underlying a national list, at a fraction of the cost that the FTC's program will entail. Unless the FCC exercises its powers under the TCPA, marketers and consumers alike will be forced to sort through a maze ofduplicative and overlapping regulation at a horrific (and as yet unquantified) cost that is guaranteed to spawn daunting competitive imbalances.

The FTC's "abandoned call" regime similarly suffers from jurisdictional and technological problems. The FCC has the requisite grasp of communications technologies and capabilities, and of the manner in which these technologies are and can be used in the marketplace, to formulate policies that not only protect consumers but also are technologically realistic. Unless the FCC exercises its powers under the TCPA and the Communications Act, the country will not have a national telemarketing regime; it will have a national telemarketing quagmire.

If chaos is to be avoided, this Commission must act immediately and decisively to establish a national do-not-call database under the TCPA and to exercise its exclusive jurisdiction over customer premises equipment to establish coherent national standards regarding "dead air" and "abandoned" calls. The TCPA represents a reasonably well considered plan to permit this agency to create a true national do-not-call list that will satisfy consumer expectations without drowning marketers in a maze of duplicative and inconsistent regulatory requirements. Moreover, as we have shown in our initial comments, a national list created under the TCPA, through the Sum of the States approach, can be accomplished in far less than the seven or more months the FTC has, far too optimistically, projected. The DMA believes that an FCC-created list built upon the

DMA's Telephone Preference Service list can be operational in **45** days and at a fraction of the cost that the FTC now contemplates. For similar reasons, this Commission must exercise the power it has over customer premises equipment ("CPE") to create a single, national standard governing predictive dialers.

For the reasons more fully outlined in these reply comments, we urge this Commission to take the initiative. It must bring order out of the chaos that now exists in the telemarketing field by rational and reasonable exercise of its powers under the TCPA and the Communications Act.

PART I – REPLY COMMENTS REGARDING A NATIONAL DO-NOT-CALL LIST

There is no question that this agency has full legal authority to establish a national do-not-call database and corresponding standards for honoring and enforcing DNC requests. This Commission also is not hampered by jurisdictional limitations that the FTC and states must confront. Under the TPCA, this Commission unquestionably may prescribe DNC standards applicable to both interstate and intrastate calls,[1] and impose its requirements consistently on entities that are beyond the FTC's jurisdiction, such as common carriers, banks and certain other financial institutions, and insurance companies. The TCPA also leaves no doubt that the FCC is authorized to collect fees to fund a DNC program.[2] Furthermore, no other agency brings to bear the comprehensive understanding and experience with the communications infrastructure and technologies on which the telemarketing industry depends. This depth and breadth of expertise is critical to the successful operation of a national DNC registry. The FTC's program does not address several issues that Congress specifically directed this agency to consider in establishing a

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1 See e.g., 47 U.S.C. § 152(b); Texas v. American Blast Fax. Inc. 121 F. **Supp.** 2d 1085 (W.D. Tex. *2000).*

2 47 U.S.C. §§ 227(c)(3)(E) and (H).

national DNC database. Most importantly, a national list and multiple state lists with varying limits, requirements, and conditions simply cannot coexist and be effective Congress made clear its expectation that a national DNC database, ifcreated, would be the only DNC list marketers would have to honor. Hence, the Commission should preempt slate DNC laws; indeed, the TCPA compels this result.

A. PREEMPTION

A number of parties, most notably the Attorneys General, argue that the FCC should not, and under the TCPA may not, preempt stale laws establishing DNC list requirements.[3] These views are based on both a flawed reading of the TCPA's savings provision and a mistaken interpretation of the criteria that the TCPA requires the FCC to consider if it establishes a national DNC list. They also ignore the TCPA's legislative history.

First, NAAG and other commenters claim that a passage in subsection (e)(1) of the TCPA precludes the Commission from preempting state law except with respect technical and procedural standards. Subsection (e)(1) provides that "[e]xcept for the standards prescribed under subsection (d) of this section and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits," four types of specifically enumerated activities.[4]

NAAG's comments focus narrowly on the clause stating that "[e]xcept for the standards prescribed under subsection (d)" of the TCPA, claiming that it means that the

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[1] See, e.g., Comments and Recommendations of the National Association of Attorneys General, filed with the FCC, at 9-16. (hereinafter "NAAG Comments at ____"); Comments of the National Association of State Utility Consumer Advocates, filed with the FCC dated December 9, **2002,** at 14-15. (hereinafter "NASUCA Comments at—").

[4] 47 U.S.C. § 227(e)(1).

TCPA only permits the FCC to preempt state standards - governing technical and procedural matters – adopted pursuant to subsection (d). Yet, the states overlook the fact that subsection (e)(1) says much more: Subsection (e)(1) also makes the "savings" provision it contains "subiect to paragraph 2" of subsection (e). And, subsection (e)(2) provides that, if the FCC adopts a nationwide DNC registry, no state may require the use of any database that does not include the part of the national database that relates to that state.[5] Thus, NAAG's argument is flawed because it rests on an incomplete and, ultimately, incorrect reading of the TCPA.[6] Subsection (e) automatically preempts state lists if the FCC mandates a national DNC regime. The "single national" list mandated by Congress means that there can be one – and only one – list.

Further, as we explained in our initial comments, apart from Constitutional considerations, in enacting the TCPA Congress decided not to permit the states to exercise whatever powers they might otherwise have had over interstate telemarketing, and confined them to regulation of a limited set of purely intrastate activities,' and even then only allowed state regulation in the context of the overriding command that there be a "single national" database.

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5 The TCPA would, rhus, also preclude the Commission from adopting any program that, for example, allows states to "opt-out" of the national list program. Compare, e.g., Comments and Recommendations of the Tennessee Regulatory Authority and the Tennessee Attorney General filed with the FCC dated December 6, 2002, at 3-5.

6 Any reliance on Van Bergen v. Minnesota, 59 F.3d 1541 (8" Cir. 1995), is misplaced for the same reason. The Court's analysis ignores the "except as" and "subject to" provisos, which begin subsection (e)(i) and limit all of the savings language that follows. Thus, the Van Bergen opinion is at best overstated. In any event, the discussion is dicta, since Van Bergen intended to make political calls not subject to the TCPA in the first instance.

7 See Comments of the Direct Marketing Association filed with the FCC dated December 19, 2002 at 43-44. NAAG's argument about the reach of state long-arm is relevant, but not germane. See NAAG Comments at 14. The cases NAAG cites at note 31 are merely examples of the successful use of long-arm statutes lo attain personal jurisdiction over out-of state defendants. Yet, states' ability to exercise personal jurisdiction over out-of-state defendants through long-arm statutes is no substitute for the independent obligation *to* demonstrate that the court has jurisdiction over the subject matter and that they satisfy traditional requirements of due process. See World-Wide Volkswaaen Corp. v. Woodson, 444 U.S. 286 (1980); 4 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure, §§ 1063, 1067.2 (3d ed. 2002).

NAAG and others have fundamentally misconstrued the references to "state law" that are embedded in the criteria the Commission must consider in adopting a national DNC program.[8] Specifically, they point to subsection (c)(3)(J), which requires the Commission to design any national DNC database "to enable States to use the database for purposes of administering or enforcing State law."') According to the Attorneys Gcncral, this evidences Congressional intent to preserve state DNC laws. To the conlrary, the legislative history repeatedly demonstrates that Congress not only regarded states as lacking authority over interstate telemarketing, but also intended to preempt state DNC requirements and the duplicative regulatory obligations they would entail.

The Commission is certainly required to enable states to incorporate statewide lists into the national list and to access the list, but the "state law" to which the TCPA refers in subsection (c)(3)(J) relates to state laws authorizing (I) state officials and (2) individual consumers to initiate actions to enforce the TCPA. The TCPA empowers state officials to enforce federal standards, but state law determines which official(s) within a state may do so and, subject to the TCPA limits, what criteria they must follow to do so.[10] Similarly, the TCPA permits individuals to initiate a private cause of action to enforce the TCPA, but small claims suits or similar actions are creatures of state law and, as Congress recognized state law will govern access to those court."[11] Thus, the TCPA allows states and consumers to enforce the TCPA, and requires the FCC to make the DNC data available to facilitate such enforcement, even though the procedures for

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8 See **NAAG** Comments at 13.

9 47 U.S.C. § 227(c)(3)(J).

10 Id. § **227** (f).

11 Id. § 227(c)(5) (providing that a person who has received more **than** one call in violation of the Commission's DNC regulations **may** "if otherwise permitted by the **law** or rules of court of a State" file suit **in** state court). See also, e.g., 137 Cong. Rec. S. **16,204,** 16,205-6, (daily ed. Nov. **7,** 1991) (Remarks of Sen. Hollings, regarding S. **1462,** and **states'** power to proscribe procedures for initiating actions in state court).

initiating such enforcement are largely governed by state law. That does not, however, alter the fact that Congress clearly expected the FCC to ensure, through preemption, that marketers face only one set of DNC requirements and need only obtain one DNC list

It bears repeating that Congress authorized the FCC to establish and operate a "single national database."[12] It did not empower the Commission to allow a patchwork of confusing and inconsistent rules. The legislative history of the TCPA repeatedly emphasizes that states do not have authority over interstate communications, including interstate telemarketing communications. That history also makes clear that Congress intended the FCC, if it adopted a national DNC registry, to preempt state standards as mandated by subsection (e)(2). Examples of such references include:

- Regarding S. 1462, in the version that was enacted as the TCPA and containing language, in both subsection (c)(3)(J) and subsection (e), that is identical to current law:

  > Section 227(e)(1) clarifies that the bill Is not intended to preempt State authority regarding intrastate communications except with respect to the technical standards under section 227(d) and subject *to* 227(e)(2). Pursuant to the general preemptive effect of the Communications Act of 1934, State regulation of interstate communications, including interstate communications initiated for telemarketing purposes, is preempted.[13]

- Regarding an earlier version of **S.** 1462:

  > The State law does not. and cannot. regulate interstate calls. Only Congress can protect citizens from telephone calls that cross State boundaries.[14]

- In connection with the House of Representatives' consideration of S. 1462:

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12 **47** U.S.C. § 227(c)(3).

13 137 Cong. Rec. S 18,781, 18,784 (daily ed. **Nov.** 27, 1991) (remarks of Sen. Hollings) (emphasis added).

14 137 Cong. Rec. S 16,204, 16,205 (daily ed. **Nov.** 7, 1991) (Remarks of Sen. Hollings) (emphasis added). His version of S. 1462 contained language similar, but not identical to that contained in subsection (e) of the **TCPA;** this version of S. 1462 did not include DNC provisions, which accounts for some of the difference in the language.

> To ensure a uniform approach to this nationwide problem, this bill would preempt the States from adopting a database approach, if the FCC mandates a national database.[15]

- From the Committee Report on S. 1462:

> . . . over 40 States have enacted legislation limiting the use of ADRMPS or otherwise restricting unsolicited telemarketing. These measures have had limited effect, however, because Slates do not have jurisdiction over interstate calls.[16]

The Communications Act, the TCPA, and the history of the telemarketing legislation are unmistakably clear: Marketers may only be required to subscribe to one list and honor one set of rules, and if the Commission adopts a national DNC database program, subsection (e)(2) automatically preempts state DNC requirements.

We note that practical considerations that commenters raise in opposition to preemption also lack serious merit. Preempting state DNC laws will not leave states powerless to protect their citizens. The TCPA gives state officials the power to enforce consistent national standards;" the Sum of the States framework that The DMA proposes would also enable them to play an important role in developing a system to collect and re-distribute DNC requests. Any concern that preemption will disrupt consumer reliance on state databases is also unfounded. Under the Sum of the States approach, consumers who are already on a state list would be incorporated into the national list. Consumers in states which do not have state-wide lists could register directly with the national list administrator. Indeed, The DMA's experience with TPS establishes that consumers on

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15 137 Cong. Rec. H. 11,307,11,311 (daily ed. **Nov.** 26, 1991) (remarks of Rep. Rinaldo) (emphasis added).

16 Sen. Rep. No. 102-178 at 3 (1991), reprinted in 1991 U.S.C.C.A.N. 1968, 1970. (emphasis added).

17 *47* U.S.C. § 227(f)

that list – which is national in scope – tend not to re-register at the state level, finding it unnecessary to do so.

B. IMPACT OF THE FTC RULE AND FCC INTERVENTION

The greatest potential impact – and shortcoming – of the FTC's ruling is the possibility that it could result in the establishment of a federal list and 50 state lists, each carrying its own set of compliance requirements and procedures. The FTC did not -- and may not – preempt state law under the Telemarketing and Consumer Fraud and Abuse Prevention Act. While the FTC did not await further indications about the plans of its sister agency, its decision does not seem to claim that the FCC can or should preempt state requirements in application to interstate calls subject to the TSR. The FTC also did not address the states' claim that their DNC requirements apply to interstate calls. Although, in unofficial pronouncements, the FTC expresses the "hope" that it will secure the cooperation of the states, it is difficult to reconcile that "hope" with the positions the states have taken before the FTC and this Commission. While they are wrong on both counts, the states uniformly claim that their DNC requirements apply extraterritorially and that neither federal agency should preempt state requirements. Thus, under the FTC's program, the best that consumers and marketers can hope for is a total of 51 or more different DNC requirements that almost certainly will be technologically incompatible with one another (as they are now), and substantively different, too. This flies in the face of Congressional intent in authorizing a national DNC list.

The FTC is well aware of the other jurisdictional "gap" in its national do-not-call program. The Telemarketing Sales Rule simply does not apply to entities beyond the FTC's jurisdiction. The FTC seeks, in part, to resolve this problem by asserting that it may regulate the agents of these exempt entities – the telemarketing service bureaus –

that make calls on behalf of exempt entities other than charitable organizations.[18] It is probably unnecessary for the FCC *to* pass upon the legality of this somewhat extraordinary proposition. The FCC cannot, however, ignore the fact that the FTC's assertion of jurisdiction over agents when it lacks jurisdiction over their principals is in irreconcilable conflict with this agency's determination that, since the TCPA does not apply to tax exempt entitics, the FCC's rules do not apply to agents acting on behalf of such entities."'

Recognizing the potential for conflict, the FTC has concluded that its DNC rcgimc docs not apply lo either charitable organizations or their agents. The FTC nonetheless insists that in the case of commercial entities over which it has no jurisdiction – such as telephone companies and certain financial institutions – it may hold the agent accountable and subject the agent to substantial sanctions, including civil penalties, even when it has utterly no authority to regulate the activities of the principal. At best, this invites litigation.

Moreover, even if one accepts the FTC's view many large organizations engaged in telemarketing, on their own behalf, would remain exempt. For example, telephone carriers that conduct their own telemarketing would not be covered. This disparity in regulatory treatment will create an uneven playing field and competitive distortions that must not be permitted to take hold.

This gap in FTC jurisdiction necessarily means that its regulatory regime does not satisfy a fundamental dictate of the TCPA. Subsection (c)(3)(F) specifically prohibits "any person" from making or transmitting a telephone solicitation to the telephone

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18 Telemarketing Sales Rule, Final Amended Rule and Statement **of** Basis and Purpose, 68 Fed. Reg. 4580,4631 (2003) (to be codified at 16 C.F.R. Pt. 310), (hereinafter "SBP at ——".

number of any subscriber included in the national database. That is, the **TCPA** will not countenance a regulatory regime that applies directly to some persons but only to the agents of others. Thus, with the exception of tax-exempt organizations that are specifically exempted by the TCPA, Congress intended that there be no gap in the coverage of a single national DNC list and that all commercial entities engaged in the promotion of goods and services through telemarketing he obligated to honor it.

In informal pronouncements, the FTC suggests that this hole in its plan is not substantial, asserting that through some combination of its direct jurisdiction, its attempt to reach agents of exempt entities, and perhaps this Commission's powers, its rules will apply to virtually 80% of the industries that engage in telemarketing.[20] There is no record evidence for this before the FTC or this agency. While we have not had the opportunity to compile empirical data, experience and common sense suggest that the FTC's estimate is wrong. The fact is that the exempt entities tend to be large business enterprises, particularly in the banking and telecommunications fields, which make extensive use of the telephone as a marketing media. For reasons of economy and greater control over content, large enterprises tend to do their core marketing in-house. We would not be surprised if, in fact, the FTC's DNC regime reaches only 30-40% of the market.

At all events, whatever the Commission may think of the FTC's theories about its own jurisdiction or the data (or lack of it) on which that agency apparently relies, this Commission cannot authorize a national do-not-call program that does not meet the

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19 See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CC Docket No. 92-90, Memorandum Opinion and Order, 10 FCC Rcd. 12391, 12397, para. 13(1995).

20 FTC Briefing and Questioning Session: Do Not Call List Authorization: Hearings before the House Energy and Commerce Committee, 108th Cong. (2003) (testimony of Timothy Muris, Chairman, FTC).

requirements of the TCPA. Because the FTC's regime does not apply to "any person," the Commission must find it unlawful.

The FTC offers one final remedy to this problem. It informally suggests that the FCC can solve the FTC's jurisdictional problem by simply "filling the gaps." The suggestion is extra-legal; the remedy is palpably unlawful under the terms and purposes of the TCPA. This Commission may not simply direct the broader group of entities subject to its jurisdiction to comply with the FTC's list. As we have stated, this would put the FCC in the unacceptable role of judging compliance with its rules based on whether an entity has complied with another agency's requirements. The enforcement processes and the sanctions of these two agencies are also very different. These differences virtually guarantee inconsistent results giving rise to Due Process and Equal Protection issues. It simply cannot be that a violation of the TSR committed by a service bureau could be subject to a civil penalty of $11,000 per violation, whereas the same conduct by the exempt client of the bureau is not actionable because the client's conduct satisfies the safe harbor standards of the TCPA.[21] Moreover, the substantive standards under the TCPA and the Telemarketing and Consumer Fraud and Abuse Prevention Act ("Telemarketing Act") are not consistent. The two statutes – and as a consequence, the agencies' rules – do not define the term "telephone solicitation" or "telemarketing" in the same way. The FTC's newly-minted definition of an established business relationship is not consistent with the standards set out in the TCPA or its legislative history or, for that matter, the definitions followed by the overwhelming majority of states' laws, which are congruent with the TCPA.

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21 15 U.S.C. § 45(m)(1)(A); 16 C.F.R. § 1.98.

The TCPA and its legislative history contain Congress's only expressions of its goals and expectations regarding the implementation of a national DNC registry and must be respected in any effort to establish such a list. In the TCPA, Congress instructed the FCC to consider 12 criteria in establishing a nationwide DNC database.[22] As we have shown, the FTC's program to establish a DNC registry entirely fails some of these criteria. The TCPA contains other requirements for approval of a national DNC that are equally important to Its success that are not and cannot be satisfied by the FTC's program.

The TCPA requires that the regulations establishing a DNC database must require common carriers providing telephone exchange service to notify their subscribers that they can be included on the national DNC. And the regulations must specify the methods that carriers are to use to notify subscribers about their rights to submit or revoke a request to be included in the DNC database. The first of these rules is designed to promote consumer awareness; the second, to promote compliance.[23] The TCPA also requires that the rules obligate carriers to notify their customers engaged in telemarketing about DNC requirements.[24] The FTC did not and cannot address these requirements because it has no power to regulate common carriers. The FCC can impose these publicity requirements on carriers if, but only if, it independently adopts a national list.

The TCPA also requires that the regulations specify how marketers will obtain access to the system and the costs they will incur to do so; how states will obtain access to the database; the methods to be used for updating the list; and how subscribers'

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[22] 47 U.S.C. § 227(c)(3)

[23] Id. §§ 227(c)(3)(B) and (C)

[24] Id. § 227(c)(3)(L).

privacy rights will be protected.[25] The Commission is also required to take into account the needs of different types of markcters, including the special burdens on small businesses, local versus regional or national marketers, and the like.'"

To the extent that the FTC's program addresses these issues at all, it does so incompletely or unsatisfactorily. Obviously, the ability of marketers to obtain access to the database is central Io the success of the program. The FTC, however, states that it expects service bureaus or others that subscribe to the registry in order to obtain DNC data on behalf of someone else, to identify their clients (i.e., the sellers for whom they get the data and place calls).[27] This means that every time a service bureau acquires a new client, it is going to have to update its "registration," and the FTC might conceivably intend that service bureaus have to "de list" clients each time a marketing campaign ends.

Apart from the unreasonable burden this would entail, there is a tension between the FTC's registration requirement and the TCPA's expectation that entities required to comply with the national DNC requirement will have easy access to the data in order to make compliance possible. Similarly, the FTC has taken into account the needs of different types of marketers only by default and in ways which will defeat both consumer and marketer expectations. The TCPA requires the FCC to consider the need for "different methods and procedures" for "local telephone solicitations" and "holders of second-class mail permits."[28] The FTC's regime effectively exempts **all** "local telephone solicitations" in states that have no DNC statute because such calls are intrastate and, therefore, the FTC's "national" registry will have no force. Similarly, many states categorically exempt newspapers and some also exempt magazines, but the FTC's rules

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25 Id. §§ 227(c)(3)(G), (I), (J) and (K)
26 Id. § 227(c)(4).
27 SBP at 4640.

do not. The FTC's regime thus fails to take into account Congress's recognition that certain constitutionally-protected industries and "local businesses" may require separate treatment, but were not intended lo be left entirely unregulated.

Last, but by no means least, the FTC has made no meaningful assessment of the cost ofcstablishing its national list or the ongoing cost ofmaintaining and supporting it. In its original Notice of Proposed Rulemaking, the FTC estimated the cost to be $5 million; the estimate has more than tripled in the intervening ten months (without any apparent change in the basic construct of the list). And the estimate completely excludes any assessment of the day-to-day ongoing costs of maintaining or updating the registry.

In sum, the FTC's regulations contain virtually none of the specificity that the TCPA requires. Its accompanying SBP offers only incomplete, general, and vague references to how the FTC anticipates, plans, or hopes the system will work. We cannot overstate the need for this Commission to intervene and take primary responsibility for developing the national DNC program before the situation deteriorates further. Gaps in FTC jurisdiction, questions about financial support for its database, the complexities inherent in inconsistent, overlapping, multi-jurisdictional DNC standards, and the inadequacies – both legal and pragmatic – of the FTC's program present an unworkable situation that will threaten the viability of the concept in the first instance. This Commission can solve these problems, with decisive and authoritative resolve to assume responsibility for the creation of a national DNC registry.

C. OTHER IMPLEMENTATION ISSUES

A wide range of commenters have offered their views about various aspects of implementing a national DNC registry, in equally varied levels of detail and

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28 Id. § 227(c)(1)(C).

comprehensiveness. We submit, however, that the Commission should defer consideration of most of these topics to a second proceeding, or second stage of this proceeding. At this stage, the Commission should simply adopt a foundation and basic design for a DNC registry, and address the "mechanics" of its operation separately.

The DMA proposed a "Sum of the States" approach as a framework for establishing a national DNC database, and outlined its essential elements and benefits in our initial comments. The DMA has, in fact, been operating a national list for more than 15 years. We indicated in our initial comments that the DMA is prepared to serve as the administrator of the national list established under the TCPA. Once the Commission announces the basic framework, we are prepared within days to submit to the Commission a detailed plan showing exactly how we would implement a Sum of the States list under The DMA's administration, and we are convinced that we could make such a list operational within 45 days after the FCC's decision in the second phase of this proceeding.

PART 11 – REPLY COMMENTS REGARDING PREDICTIVE DIALERS AND CALL ABANDONMENT

A. JURISDICTIONAL ISSUES

The DMA can support reasonable limits on the use of predictive dialers and answering machine detection ("AMD"). We do not challenge the conceptual predicate for the FTC's solution to these problems. Reasonable and workable limits on abandoned calls and "dead air" should alleviate consumer annoyance and concerns. The problem, however, is that the FTC rule is neither reasonable nor workable.[29]

[29] The FTC also ignores a significant problem that results from the use of predictive dialers with AMD. As we discussed in our initial comments, the use of answering machine detection for purposes of deliberately avoiding a live consumer in order to leave a message with an answering

Neither the states nor the FTC address the question of how to establish a uniform national standard. The states did not address in their initial comments whether they have jurisdiction lo regulate predictive dialers. California, at least, plainly thinks it has such authority since it is in the process of finalizing regulations to govern the use of predictive dialers and call abandonment rates.'" Perhaps the others concede that they lack such power, but we do not assume that is the case. Thus, the Commission must, as we explained in our initial comments, make clear that its standards preempt state standards. Predictive dialers are customer premises equipment ("CPE"), and thus beyond the states' power to regulate pursuant to the Communications Act of 1934 and longstanding Commission rules and orders. These policies apply because predictive dialers are used inlcrchangcably and inseparably for both inter- and intrastate communications, and are not susceptible to a segregated regulatory framework that would govern inter- and intrastate uses separately. Furthermore, the TCPA expressly requires the Commission to preempt state standards purporting to regulate technical and operational standards, and that preemption authority extends to standards governing the operation of predictive dialers. Thus, the Commission may – and indeed must – preempt state regulation of predictive dialers **and,** in particular, call abandonment rates.

Equally troubling is the FTC's presumptive assertion of authority over predictive dialers. Abandoned calls can occur even without the use of dialing equipment if the call is terminated by the marketer before the consumer answers. But the real problem of abandoned calls only arises when dialing equipment – predictive dialers – is used.

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service or device should be prohibited entirely. Curiously, the FTC does not address ***this*** issue at all. This suggests a fundamental misunderstanding of uses and **misuses of** AMD.

[10] Order Instituting Rulemaking on the Commission's Own Motion to Establish an Appropriate Error Rate for Connections Made by an Automatic Dialing Device Pursuant to Section 2875.5 of the Public Utilities Code, Decision, D.02-06-072 (Released June 27, 2002).

Predictive dialers are unmistakably subject to this agency's exclusive jurisdiction to regulate interstate communications and ancillary matters, including CPE. The FTC's only explanation for usurping of this agency's power, relegated to a footnote in its SBP, is that the "harm" to consumers from call abandonment is "very real," and a conclusory remark that its regulation of abandoned calls "falls squarely within the FTC's authority to regulate abusive telemarketing acts or practices.""

The FTC's justification for its rule may help explain why a reasonable rule is required. It does not explain who should administer it or what the standard should be. The Commission must not let the possibility of conflict with the FTC or states' rules or policies stand as an obstacle to the fulfillment of its duties under the Communications Act. Indeed, it is the certainty of conflict that compels this agency to exercise its exclusive authority. Marketers simply cannot be expected to comply with inconsistent limits and record-keeping requirements; any regulatory regime that invites these results raises grave Commerce clause issues. The FCC should preempt any state efforts to regulate abandoned calls and clarify that the FTC has no authority to regulate CPE, including the operation of predictive dialers.

B. FORMULATION OF A REASONABLE NATIONAL ABANDONMENT RATE STANDARD

Although The DMA categorically rejects the FTC's characterization of abandoned calls as "abusive," or causing "very real" harm to consumers, we have acknowledged both before the FTC and this Commission that a reasonable call abandonment standard is a legitimate exercise in governmental protection of consumer interests. Our initial comments address appropriate standards, but the new TSR raises three additional issues.

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[31] **SBP at 4643 n.** 739.

First, the FTC standard treats as "abandoned" any call which is not connected to **a** sales representative within two seconds of the person's completed greeting. This effectively precludes the use of AMD for any purpose. AMD serves perfectly legitimate business purposes causing negligible harm to consumers, but current technology simply will not ensure that "dead air" lasts less than five seconds. That is the standard that should he adopted. The TCPA allows the FCC to consider future technology, but neither the Telemarketing Act nor the TCPA allow the FTC or FCC, respectively, to coerce or prod technological advancements or establish standards that cannot be achieved given the present state of the art.[32] At the very least, marketers and equipment manufacturers are entitled to some explanation -- which the FTC does not provide – as to why two seconds from the end of the called party's greeting is the appropriate trigger for the definition and why the additional three seconds specified in the statutes of some states, and long a part of The DMA's guidelines, is inappropriate.

Second, although we do not quarrel with the 3% call abandonment limit suggested by the FTC, there is no explanation of why that limit applies on a daily, rather than monthly, basis. We may speculate that the FTC has specified a daily standard in an effort to reduce the number of repeatedly abandoning calls. If that is what the daily standard is intended to redress, there is a much simpler and more straightforward solution. The DMA guidelines provide that a marketer may not abandon the same telephone number twice within a 48-hour period or within a 30-day campaign. Ironically, the FTC's approach threatens more frequent abandoned calls at the same number because it would permit the same number to be abandoned without restriction within the same 24-hour

[32] Cf. Electronic Indus. Consumer Elec. **Group** v. FCC, **636 F.2d *689*** (DC Cir. 1980).

period or the 30-day campaign, so long as the requirements of the safe harbor are satisfied.

Third, it is profoundly unclear why the FTC has adopted a complicated and potentially unworkable zero tolerance/safe harbor approach: Zero tolerance is a laudable business objective, hut it is technologically unattainable at present without destructive consequences to legitimate marketers. The practical effect is that the FTC rule will he illusory from a consumer standpoint and fraught with problems from a marketer's standpoint. The FCC should simply adopt a straightforward rule that defines the percentage of calls that may be lawfully abandoned; as technology improves, the threshold can always be revisited.

C. FTC "SAFE HARBOR" ISSUES

The FTC's "safe harbor" raises special problems in relation to the TCPA. Under the TCPA and this Commission's implementing rules, it is unlawful for any person to initiate a call for a commercial purpose and deliver a prerecorded message without the called party's prior express consent unless the message does not contain an "unsolicited advertisement."[33] The FTC rule requires marketers to deliver a pre-recorded "message" to qualify for the "safe harbor" from its prohibition on call abandonment. The FTC correctly notes that its rules do not affect application of the TCPA, and marketers must somehow comply with both. The DMA is concerned that it might be – or, depending on the outcome in this proceeding, might become – impossible to comply with both.

It is not clear whether marketers may, under the TCPA rules, lawfully play a recorded message pursuant to this element of the FTC's safe harbor that (1) asks the

[33] 47 U.S.C. § 227(b)(1); 47 C.F.R. §§ 64.1200(a)(2), (c). Of course, prerecorded message calls to, inter alia, emergency telephone lines, hospitals and the like, and wireless phones are also prohibited. We do not address those calls in this discussion.

consumer to hold for a sales representative or if they must disconnect the call after playing the recorded message stating the seller's name and number or (2) say anything in addition to the seller's name and number. In addition, the FTC amended the TSR against the backdrop of the current TCPA regulations, which also permit a person to play a prerecorded message in calls (1) to a person with whom the caller has an established business relationship, (2) by tax exempt non-profit organizations, and (3) that are otherwise not made for a commercial purpose.[34] If the FCC modifies these rules, or the definition of an established business relationship, it would alter the foundation on which the FTC safe harbor is constructed. The FTC did not speak to these issues in its SBP and, because they implicate the TCPA and FCC rules, they are in fact matters within the jurisdiction of this agency.

The interaction between the TCPA and the FTC's rules provides compelling evidence of the need for this agency, and not the FTC, to establish coherent, national limits on call abandonment, which are applicable to any business using predictive dialers and not just businesses that are within the FTC's jurisdiction. As we have stated, The DMA believes that the FTC's "safe harbor" approach should be abandoned altogether. The FCC should instead adopt a simple and straightforward 3% cap on call abandonment. Essentially, what the FTC has done is take a business goal – a zero abandonment rate – and adopt it as a national legal standard by prohibiting any abandoned call.[35] Recognizing, however, that the standard is unattainable and that imposing it would raise a vanety of legal issues, the FTC concocted a safe harbor[36] that leads by an unnecessarily

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34 *47* C.F.R. § ***64***.1200(c).

35 16C.F.R.§§ 310.4(b)(1)(iv)

36 Id. §310.4(b)(4).

tortured route to the same 3% standard that The DMA advocated in its initial comments in this proceeding.

At the very least, if this agency defers to the safe harbor approach, it must harmonize the provisions of the TCPA and its rules governing prerecorded calls with the concept of using a prerecorded message as a part of such a safe harbor.

First, the Commission should clarify that it is not a violation of the TCPA to play a recorded message stating only the seller's name and telephone number if a sales representative is not available to take a call. We also maintain that marketers should be permitted, but not required, to state the name of the service bureau in addition to, but not in lieu of, the name of the seller. Merely stating a name and number does not constitute "advertising the commericial availability or quality of any property, goods, or services" and, therefore, should not be deemed an ''unsolicited advertisement."

Second, we believe that the Commission should expressly permit – but not require – marketers to go beyond this and explain briefly the basic purpose of the call. A brief explanation of the purpose of the call (e.g., to sell goods or services) is not the same as making representations that actually advertise those goods or services, which comprise the true sales portion of a telemarketing call. In any event, disclosing the purpose of the call is consistent with the FTC postulate that marketers must promptly convey this information.[37] Since, inter alia, the FTC mandates this disclosure in calls subject to its regulations that are handled by a sales representative, we trust that this Commission would agree that making the same disclosure voluntarily in a "safe harbor recorded message" pursuant to the TSR would not adversely affect consumers' privacy. Moreover, the disclosure could provide context for the name and number that marketers

[37] 16 C.F.R. § 310.4(d).

must provide to satisfy the FTC's safe harbor criteria. In some cases a marketer's name will be all that is necessary to provide that context; in other situations, marketers and consumers might find it helpful if the message says more about the reason for the call.

The Commission should not require marketers to make these disclosures. As the FTC explained, requiring all of the up-front disclosures that the TSR otherwise requires would be unduly burdensome in "abandoned" call scenarios. But, the Commission should provide flexibility to accommodate those marketers who voluntarily wish to provide a bit more information than simply the name and number of the seller.

Third, the Commission should clarify that marketers may also ask the called party to remain on the line to speak to a representative if one can be made available. It appears from the FTC's SBP that marketers can qualify for the safe harbor (assuming they meet the other requirements) if they terminate a call after playing the recorded message; whether they may, in the alternative, ask consumers to stay on the line appears to turn on whether or not the FCC would deem such a request to be an unsolicited advertisement. We submit that it would not harm consumers' privacy to allow marketers to request, as part of the recorded message, that the called party remain on the line if the marketer wants to enable a sales representative to handle the call when one becomes available. Consumers would obviously be free to hang up if they wish, but marketers who are able to make a representative available should be able to let consumers know that they can wait to speak with someone. In fact, some consumers might prefer that option if they want to ask that seller not to call them in the future.

Fourth, the Commission should retain the exemptions allowing prerecorded message calls not only with the called party's prior express consent,[38] but also when the caller has an established business relationship with the called party, the caller is a tax exempt non-profit organization, the call is otherwise not made for a commercial purpose, or other commericial calls that do not contain an unsolicited advertisement

It is nol enough to "reconcile" these provisions with the FTC's safe harbor rule The FTC, without record evidence and virtually no discussion, has in effect prohibited virtually all uses of prerecorded messages, including those explicitly permitted under the TCPA and this Commission's regulations. According to the FTC, a call is abandoned when it is not connected "to a sales representative."[39] The FTC stated that:

> The 'recorded message' component of the safe harbor must be read in tandem with the prohibition of abandoned calls, under which telemarketers must connect calls to a sales representative within two seconds of the consumer's completed greeting to avoid a violation of the Rule. Clearly, telemarketers cannot avoid liability by connecting calls to a recorded solicitation message rather than a sales representative. The Rule distinguishes between calls handled by a sales representative and those handled by an automated dialing-announcing device. The Rule specifies that telemarketers must connect calls to a sales representative rather than a recorded message.[40]

Thus, a telephone solicitation that would deliver the *entire solicitation* through a recorded message would be deemed "abandoned" under the TSR because such calls are never connected "to a sales representative." **As** a result, the FTC's amendments prohibit marketers from playing a recorded message, even when permitted to do *so* under the TCPA and FCC rules. The FTC's definition also means that a marketing campaign that only involves prerecorded solicitations would also inevitably exceed

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38 Section 227(b)(1)(B) of the TCPA expressly permits prerecorded message calls made with the called party's prior express consent as long **as** they are not placed to the kinds of telephone lines, such **as** emergency lines, set forth in subsection 227(b)(1)(A).

39 16 C.F.R. §310.4(b)(1)(iv).

the 3% limit on call abandonment because every call would be deemed abandoned. The FTC's safe harbor is, therefore, in absolute conflict with the TCPA provisions concerning permissible uses of prerecorded messages, and the TCPA forbids this Commission from flatly banning all such calls.

Congress gave the FCC exclusive authority over interstate communications and ancillary matters such as CPE precisely to avoid this kind of direct conflict and confusion concerning the use and development of the interstate communications network. At the very least, if the Commission elects to follow the "safe harbor" approach articulated by the FTC, the Commission should make clear that marketers may include any otherwise lawful solicitation message that they wish in a recorded message they play if the call is made (1) with the called party's prior express consent; (2) when the caller has an established business relationship with the called party; *(3)* or the caller is a tax exempt non-profit organization and that such calls are not abandoned.

The DMA believes that delivering the four categories of prerecorded messages that we describe above should be permitted under the text of the current FCC regulations and the Commission need only clarify that these practices are permitted. In any event, however, the TCPA authorizes the Commission to exempt, from the prohibition on calls to deliver prerecorded messages, calls that are not made for a commercial purpose, as well as commercial calls that will not adversely affect consumers' privacy rights and do not include an unsolicited advertisement.[41] Therefore, to the extent necessary, the Commission must modify its rules to ensure that they permit the kinds of messages we describe above, and thereby enable marketers to avail themselves of a safe harbor if that

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[40] SBP at **4644.**

[41] **47** U.S.C. § 227(b)(2)(B).

is the approach the FCC elects to take in the exercise of its exclusive jurisdiction over the use ofpredictive dialers

PART III - REPLY COMMENTS REGARDING CURRENT RULE

A. DEFINITION OF "ESTABLISHED BUSINESS RELATIONSHIP"

1. Temporal or Subject Matter Limitations

A number of commenlers argue that the Commission should limit the duration of an "established business relationship" (or "EBR").[42] In addition, the FTC, for the first time, defined an EBR and included temporal limits. Specifically, the FTC created a DNC registry, hut exempted calls to consumers with whom the marketer has an established business rclationship. Thus, for DNC purposes the FTC limited all EBR calls to those made within either 18 months of a purchase, rental, lease, or other financial transaction, or within 3 months of an inquiry or application.[43]

This Commission should not narrow its current definition. The FCC's regulations are constrained by the provisions of the Telephone Consumer Protection Act of 1991 ("TCPA"), which expressly exempts EBR calls from certain obligations and imposes no temporal or other limits on such relationships.[44] The TCPA does not limit EBRs, and neither should this Commission's regulations.

The FTC notes that the legislative history of the TCPA indicates that Congress believed that calls made pursuant to the EBR exemption should be placed within a "reasonable" period of time.[45] Congress, however, did not prescribe – or describe – a "reasonable" period. The fact that Congress desired that the lag between the time a marketer forms a relationship with someone and the time the marketer calls based on that

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42 See **NASUCA** Comments **at 17.**

43 **16** C.F.R. § 310.2(n); SBP at 4593.

44 **47 U.S.C.**§ 227(a)(3). See also 47 C.F.R. § 64.1200(f)(4).

relationship be reasonable does not mean that a bright-line limit on the duration of an EBR is necessary, appropriate, or permitted. The TCPA itself does not limit an EBR. Thus, notwithstanding discussion in the House Committee Report about the duration of EBRs, Congress quite obviously decided not to set time limits on them.

Congress declined to specify a temporal limit on the duration of an EBR for a sound reason: It is impossible to fashion a single standard applicable to all marketers that is reasoned and reasonable. The FTC claims that state laws on the subject support its conclusion, citing twelve states that impose some limit on the duration of an EBR. This claim is incomplete: If state laws offer any helpful insight they support the view that temporal limits are not appropriate; even more states – fourteen of them – do not limit the duration of an EBR. Furthermore, even those states that do have limits apparently do not agree on an appropriate duration.

It is no surprise that slates do not agree, and Congress found good reason not to limit EBRs: What is "reasonable" in application to one marketer may not be "reasonable" for another. Indeed, what is reasonable for a marketer with respect to one customer also might not be reasonable with respect to another customer of the same marketer. In some industries (e.g., telephone service), the EBR specified by the FTC is really unlimited; in other industries (e.g, prepaid publications), it is too short; in still other industries (e.g., book or record clubs, where consumers may exercise their right not to purchase for long periods without loss of membership), it is profoundly unclear exactly what the FTC's temporal limits mean. There is simply no way to foresee the multitude of scenarios that might arise and properly accommodate all of them. In short, Congress declined to limit

[45] SBP at 4591.

an EBR because one standard is not appropriate for everyone. The FCC, therefore, should retain its EBR exemption without temporal limitations

Some commenters also contend that calls made pursuant to an established business relationship should be limited to those soliciting purchases of "related" goods or services.[46] We again stress that there is nothing in the TCPA that suggests a solicitation must be or should be "related" to the transaction or inquiry upon which an EBR is based. Moreover, as we discussed in detail in our initial comments, it is not possible to craft a workable test of "relatedness." The FTC did not try to fashion such a test, and neither should this agency.

2. Application to Affiliates

The Commission should also retain its current rule regarding the application of a DNC request to affiliated entities. The FTC addressed the issue of affiliates in the context of discussing its EBR exemption from the new DNC-registry screening requirement. Thus, it viewed the question as whether or not an EBR extends to affiliates. The FCC has addressed the application of DNC requests to affiliates in its regulations separately. Yet, in this area, at least, the FCC and FTC appear to be applying essentially the same test.

The FCC regulations provide that a subscriber DNC request submitted to one entity will not apply to affiliated entities "unless the consumer reasonably would expect them to be included given the identification of the caller and the product being advertised."[47] The FTC's new standard provides that an affiliate will be included within an EBR (i.e., permitted to make a call to the same extent as an "initial" entity with a

[46] See Comments of the Public Utilities Commission of Ohio filed with the FCC dated November 22,2002 at 15; Comments of Hunton & Williams tiled with the FCC dated November 25, 2002 at 6-7.

relationship with the consumer), if "the consumer would reasonably expect [the affiliate] to be included given the nature and type of goods or services offered and the identity of the affiliate." Thus, while stated somewhat differently, the two agencies would apply the same test in ascertaining whether an affiliate is subject to a DNC request. To help promote consistency, this Commission should retain its current rule without change.

B. CALLER IDENTIFICATION ISSUES

Not surprisingly, some commenters in this proceeding advocate rules that would require tclemarketers to transmit caller identification information, while others oppose it. The FTC decided to require tclemarketers to transmit a telephone number that enables the consumer to identify the caller, but allowed a 12-month grace period before the requirement becomes effective.[48] The DMA believes that mandatory transmission of caller identification data shows promise as a means to bolster DNC requirements, and help alleviate consumer concerns relating to abandoned calls. (For instance, a consumer would not need to be afraid that an abandoned signals that the consumer is being "stalked" if they knew right away that a marketer was calling). Nonetheless, The DMA believes that the value of mandatory caller identitication requirements – and the specifics of any such requirements – require further study before they may reasonably be implemented.

This agency not only possesses the requisite expertise in the issues that attend such requirements and the capacities and limits of the carrier facilities that enable caller identification, but also has a more comprehensive view of the larger issues of how caller identification requirements might fit into the regulation of the communications network as a whole. The FTC essentially ignored these issues, apparently concluding that because

[47] 47 C.F.R. § 64.1200(e)(2)(v)

one or two large service bureaus have devised a method to pass some kind of telephone number at some level, then virtually every other marketer ought to be able to make it work, too. The FTC did not, in our view, adequately address the ramifications of the fact that SS7 technology is not fully deployed nationwide or the expenses that might be involved in transmitting caller identification.

The FTC also appears, once again, to have ventured into areas that fall under this agency's jurisdiction. This Commission, of course, already has rules governing caller identification service.[49] In addition, the FTC purports to require that a telemarketer ensure that its "telephone company is equipped to transmit Caller ID information" in order to avoid liability if caller identification data is, for some reason, not transmitted. The acts and practices of common carriers, including the services that they do or do not make available and the terms on which they make them available, are wholly outside the FTC's jurisdiction.[50] By requiring marketers to discriminate among carriers based on service offering, the FTC is effectively regulating competition among carriers. Such action must not be permitted.

In light of the Commission's broad responsibilities for regulating the interstate communications network, it should conduct a more thorough and careful review of these issues before mandating that telephone solicitors transmit caller identification information of any kind. Fortunately, since the FTC has delayed implementation, this matter could be severed from the current proceeding and addressed separately, perhaps initially through a joint FTC/FCC Workshop.

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48 16 C.F.R.§ 310.4(a)(7); SBP at4623

49 47 C.F.R.§§1600-1604.

50 15 U.S.C.§§ 45 and 46.

C. COMPANY-SPECIFIC DO-NOT-CALL REQUIREMENTS

A number of comnienters advocate adding new requirements to the current rules, purportedly to enhance the efficacy of company-specific do-not-call (DNC) lists. For example, some support the idea of requiring marketers to establish and maintain an Internet website lo enable consumers to submit a (DNC) request online, to maintain a toll-free telephone number for that purpose, or to confirm a consumer's DNC request with some sort of written acknowledgment." The DMA opposes these ideas, particularly if marketers are going to be required to subscribe to a national DNC list.

The Commission is, as it has recognized, obliged to *balance* the interests of consumers and industry.[52] These "enhancements" would impose costly, unnecessary, and redundant obligations on legitimate business that are not outweighed by the benefit – if any -- that they would provide consumers who want to be on a DNC list

With respect to the idea of providing a toll-free number, we note that the Commission's current rules already require telemarketers to provide a telephone number or address where consumers can contact the person or entity on whose behalf a call is made. Thus, marketers are already supplying a point ofcontact for consumers to submit a DNC request. Many companies currently provide a toll-free number; those who do not tend to be smaller and, accordingly, less able to absorb the cost of a toll-free number. In addition, most consumers also lodge DNC requests with marketers during the course of a telephone solicitation rather than at some other time. The cost of even a long-distance call that consumes the short time needed to submit a DNC request is *de minimis.*

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51 See e.g., **NAAG** Comments at 40; Comments of the Electronic Privacy Information Center filed with the FCC dated December 9.2002, at 15; Comments of the New York State Consumer Protection Board filed with the FCC dated November 22, 2002, at 11-13.

52 Rules and Regulations Implementing the Telephone Consumer Protection Act *of* 1991, Notice of Proposed Rulemaking and Memorandum Opinion and Order, FCC 02-250 (released September 18, 2002) at ¶1, n.5.

Therefore, we believe it is reasonable to permit companies to rely on a local or toll call for consumer contacts.

Some people tend to think of the Internet as a "free" means of communicating with consumers. It is not. The proper development and maintenance of a website – especially one that will gather personally-identifiable data from consumers – is a task that demands a high level of planning, technical skill, and careful implementation. That, in turn, takes time and other resources. It costs money and requires specialized expertise. Moreover, apart from the expense, the maintenance of a website – and protection of consumers' personal data - are tasks that not all marketers are equipped to handle well. In the same vein, it would be extremely expensive to confirm each DNC request with an acknowledgement. Marketers would not only have to prepare and print confirmatory correspondence and pay for postage, but also would have to develop maintain systems - apart form the DNC list itself– to track whether (and when) they sent a confirmatory letter.

The record in this proceeding simply does not support a decision to impose these burdens. Commenters that support these ideas offer only conclusory assertions that these measures would be beneficial, and do not cite any sound evidence that they are necessary. Furthermore, none of these purported "enhancements" would accomplish any consumer benefit that the Commission could not achieve – and achieve more effectively – by establishing a national DNC list. Of course, the FTC has now determined to establish a national DNC list.[53] The DMA believes that there is value in maintaining company-specific DNC lists even if there is a nationwide DNC registry, to allow consumers greater flexibility to pick and choose which companies can market to them by telephone, and to

[51] SBP at 4629.

enable existing customers to elect not to receive future calls. There is, however, absolutely no reason to saddle marketers with the burdens associated with setting **up** websites and sending written confirmations - which we believe are in any event excessive and unwarranted – to bolster **a** DNC option that would serve a far more limited purpose than it does today. The Commission should not add these or other requirements *to* its regulations.

Respectfully submitted,

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