

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

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

**REPLY COMMENTS OF THE  
AMERICAN TELESERVICES ASSOCIATION**

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complete and thorough FCC analysis of the impact a national “do-not-call” registry will have on telemarketers’ speech and commercial viability. Such analysis is required under the TCPA and nothing in the Do-Not-Call Implementation Act, 2/ or its legislative history, 3/ suggest otherwise.

The great preponderance of commenters steer clear of the complexities of the necessary constitutional inquiry. Perhaps most notable among these are comments by the FTC, which does not even allude to – let alone thoughtfully address – the FCC’s duty to conduct a constitutional inquiry. The FTC comments here, which mirror the careless constitutional inquiry in its own rulemaking, make FCC analysis of the constitutional issues all the more imperative. Of the few comments that address constitutional issues at all, virtually all recognize the important interests at stake. Those who downplay these issues merely demonstrate why the FCC must approach the TCPA-required balancing with great care and due regard for telemarketers’ First Amendment rights.

The FNPRM comments also confirm other points ATA has advocated in this proceeding. They show that the record does not support FCC adoption of a national “do-not-call” registry. They also confirm the need for the Commission to clarify that, whatever telemarketing regulatory regime it ultimately adopts, those federal rules are the only ones that apply to interstate telemarketing, to the exclusion of state laws. Finally, the comments overwhelmingly support FCC retention of its definition of “established business relationship” even though the newly adopted FTC definition differs.

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2/ Pub. L. No. 108-10, 117 Stat. 557 (2003) (“Implementation Act”).

3/ *E.g.*, Do-Not-Call Implementation Act, H. Rep. 108-8, 108<sup>th</sup> Cong., 1<sup>st</sup> Sess (Feb. 11, 2003).

## I. THE FNPRM COMMENTS CONFIRM THE NEED FOR A COMPLETE AND SEARCHING CONSTITUTIONAL ANALYSIS AND PROPER BALANCING OF COMPETING INTERESTS

ATA agrees that “the FCC must be the voice of reason in this process” of assessing the feasibility, appropriateness and constitutionality of a national “do-not-call” registry. InfoCision Management, Inc. (“InfoCision”), FNPRM Comments – Economic Impact. Though the FTC claimed an “intention that the TSR be consistent with First Amendment principles,” *Amend TSR Order*, 68 Fed. Reg. at 4586, it incorporated a new national registry into the TSR after conducting only the slightest constitutional analysis. See *id.* at 4634-37. The FTC made no effort to ascertain whether or the extent to which the national registry it formulated would meaningfully protect consumer privacy. Nor did it examine whether less restrictive alternatives, including existing company-specific “do-not-call” rules, could satisfy consumer interests equally well or better. The FTC also gave scant attention to the impact a national registry would have on both telemarketers’ speech opportunities, and on their businesses.

This is hardly surprising, as it was this Commission, not the FTC, that was statutorily charged with considering whether to adopt a national registry, and only after careful balancing of the First Amendment and economic implications such regulations would entail. <sup>4/</sup> The fact that the Implementation Act requires the FCC to “maximize consistency” with the TSR amendments does not mean the Commission may sidestep the constitutional issues as did the FTC. Rather, its charge remains the same as it was

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<sup>4/</sup> See S. Rpt. 102-177, 102nd Cong., 1st Sess. (Oct. 8, 1991) at 6 (instructing FCC to “protect subscribers’ privacy rights without intruding unnecessarily and inappropriately on the First Amendment rights of the speaker”). See also 47 U.S.C. § 227(c) (codifying required balancing).

at the outset of this proceeding – to “remain mindful of constitutional standards applicable to governmental regulations” of telemarketing. NPRM, 17 FCC Rcd at 17468.

**A. The FCC Should Reject the FTC’s Unbalanced Approach to Regulating Teleservices**

The FTC’s comments on the FNPRM reflect a single-minded pursuit of a national “do-not-call” registry that this Commission is precluded from emulating by statutory and constitutional constraints. The FNPRM culminates a course of regulatory imperialism that started with the FTC’s “promise” nearly two years ago to adopt a national “do-not-call” registry, and to limit the reach of telemarketers nationwide. <sup>5/</sup> The FTC made this promise even though the TCPA charged this Commission with considering a national registry under specific factors that must be satisfied before such a regime could be adopted. The FTC also disregarded this Commission’s earlier findings that a national registry would be inappropriate under the strictures of the TCPA and the First Amendment. <sup>6/</sup> It was thus no surprise when the FTC announced the adoption of the national registry without considering any of the factors enunciated in the TCPA, and without giving due consideration to the impact it would have on telemarketers’ businesses or their First Amendment rights.

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<sup>5/</sup> See <http://www.ftc.gov/opa/2001/10/privacyagenda.htm>. See also Remarks of FTC Chairman Timothy J. Muris, Protecting Consumers’ Privacy: 2002 and Beyond, The Privacy 2001 Conference, Cleveland, Ohio (Oct. 4, 2001) (available at <http://www.ftc.gov/speeches/muris/privisp1002.htm>).

<sup>6/</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act*, 7 FCC Rcd 8752, 8781 (1992) (“*TCPA Report & Order*”) (company-specific rules “strike a reasonable balance between privacy rights, public safety interests, and commercial freedoms of speech and trade, which Congress cited as its paramount concerns in enacting the TCPA”). See also *id.* at 8757-66.

The FTC adopted the national registry even though it had no data indicating its prior rules were not working. In fact, its only official statements prior to the *Amended TSR Order* suggest otherwise. For example, in June 2000, the FTC's Assistant Director of Marketing Practices testified that "[o]nly about 1 in 10 of the [telemarketing] complaints that we have concern unwanted calls." <sup>7/</sup> Moreover, ATA recently learned, as a result of a request to the FTC under the Freedom of Information Act, that the FTC has had *zero cases* alleging violations of the company-specific provisions of the TSR. <sup>8/</sup> Nonetheless, the FTC prejudged the issue it was not statutorily empowered to address and adopted the more restrictive national "do-not-call" registry requirements into the Amended TSR.

The FTC's refusal to give proper credence to the role of other agencies or the reality and needs of the telemarketing industry has continued in the wake of the Amended TSR. Having usurped the FCC's role as the agency charged with considering whether adoption of a national registry is appropriate and can be supported on the facts, the FTC continues to have little respect for FCC obligations or authority. The FTC's comments on the FNPRM demonstrate this in a number of ways. First, the FTC filed its comments a week late, on May 12, 2003, though the reply period was only two weeks

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<sup>7/</sup> The Know Your Caller Act of 1999 and the Telemarketing Victim Protection Act of 1999: Hearing Before the Subcommittee on Telecommunications, Trade, and Consumer Protection of the House Committee on Commerce, 106th Cong. 106-117 (2002) (Statement of Eileen Harrington).

<sup>8/</sup> The FTC provided a document entitled "TSR Sweeps" that included a two-page "Summary of Cases Alleging Violations of the TSR" (copy attached as Exhibit A) which shows that, in 87 cases surveyed, none allege violations of 16 C.F.R. §§ 310.4(b)(1)(ii) or 310.4(b)(2)(i)-(iv).

long and there was little prospect of an extension of the comment cycle given the Implementation Act's mandate for expeditious completion of this proceeding.

More importantly, the substance of the FTC's comments on the FNPRM further reflect a lack of regard for the FCC processes – the FTC's comments essentially urge this Commission to forego any kind of independent analysis of the issues in this proceeding and to simply adopt wholesale the FTC's rules. Not a single mention is made of the balancing of telemarketer rights and interests against individual privacy under the TCPA that the Commission has made the touchstone of this proceeding. <sup>9/</sup> This not only shows complete disregard for the Commission's ability and duty to weigh the evidence before it and reach its own reasoned decisions, <sup>10/</sup> it would require complete abdication of the responsibility to conduct analyses required by the TCPA and the First Amendment.

**B. The Commission May Not Disregard Telemarketers' Constitutional Rights**

The Commission must not allow the FTC's refusal to address the constitutional issues at stake in this proceeding, or other commenters' hostility toward telemarketers, subvert the analysis required under the TCPA. There is no merit to any argument that the teleservices industry's claim to First Amendment protection are "bogus," or that it constitutes "misrepresentation" to argue to "the FCC and the courts

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<sup>9/</sup> NPRM, 17 FCC Rcd at 17461, 17468 (citing Section 2(9), Pub. L. No. 102-243).

<sup>10/</sup> *Teledesic LLC v. FCC*, 275 F.3d 75, 84 (D.C. Cir. 2001) (FCC must "articulate[ ] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made,'" and "give[ ] reasoned consideration to all of the relevant facts and issues") (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C.Cir.1970)).

that telemarketing is speech and has First Amendment protections.” See Comments of Joe Shields to Further Notice of Proposed Rulemaking (“Shields FNPRM Comments”) at 7. Indeed, the notion that the Amended TSR and the FCC’s rules implicate “not regulation of speech” but rather “regulation of a method of delivering speech,” *id.*, cannot be squared with the contrary position taken by Congress, 11/ the U.S. Supreme Court and other courts, 12/ this Commission, 13/ and even (albeit only by lip service) the FTC. 14/ While such arguments are clearly without merit, they illustrate the ease with which the speech rights of telemarketers are discounted by some. See Remarks of Chairman Timothy J. Muris, FTC Press Conference, Dec. 18, 2002 (stating, in announcing adoption of TSR amendments, that “charities and religions have First Amendment rights that others don’t”).

The Commission must reject the position advanced by some in this proceeding that improperly equates telemarketing with unlawful takings, vandalism, trespassing, theft, or similar activities. Shields FNPRM Comments at 7, 8 n.4 (citing *Phillips v. Washington Legal Found.*, 524 U.S. 156 (1988); *In re Michael M.*, 86

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11/ See S. Rpt. 102-177 (FCC must not “intrud[e] unnecessarily and inappropriately on the First Amendment rights” of telemarketers).

12/ See, e.g., *Madigan v. Telemarketing Assocs., Inc.*, \_\_\_ U.S. \_\_\_, 2003 WL 2011021 (May 5, 2003); *Moser v. FCC*, 46 F.3d 970, 973-75 (9th Cir. 1995) *Silverman v. Walkup*, 21 F.Supp.2d 775, 780 (E.D.Tenn.1998); *Desnick v. Department of Prof. Reg.*, 665 N.E.2d 1346, 1355-56 (Ill. 1996). *Cf. Cunningham v. Nevada*, 855 P.2d 125 (Nev. 1993) (telemarketing statute void for vagueness under Due Process Clause).

13/ NPRM, 17 FCC Rcd 17468, 17472, 17488; *TCPA Report & Order*, 7 FCC Rcd at 8781 (noting “commercial freedoms of speech and trade, which Congress cited as its paramount concerns in enacting the TCPA”).

14/ *Amended TSR Order* 68 Fed. Reg. at 4586) (discussing FTC’s “intention that the TSR be consistent with first amendment principles”). See also *id.* at 4634-367, 4650.

Cal.App.4th 718 (2001); *Texas v. Johnson*, 491 U.S. 397 (1989); *Dietman v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971)). The cases relied upon to draw such analogies are wholly inapposite. For example, *Phillips* involved the use of Interest on Lawyers Trust Account (“IOLTA”) funds in Texas. *Michael M.* involved a minor who defaced school property with racial epithets. *Johnson* involved the constitutionally protected right to burn the American flag. *Dietman* involved a reporter’s surreptitious use of a hidden miniature camera to capture and then publish images of an individual “engaged in the practice of healing with clay, minerals, and herbs – as practiced, simple quackery.” None of these cases have anything whatsoever to do with “legitimate telemarketing activities.” 15/

Claims by telemarketing opponents that telemarketers lack credibility, based on alleged statements by FTC staff, likewise cannot withstand scrutiny. Shields FNPRM Comments at 6-7. As a threshold matter, the levying of such charges by commenters who believe it is “misrepresentation” to claim telemarketers have First Amendment rights, despite universal recognition of those rights, see *supra* notes 11-14, speaks volumes. In any event, the accusations are patently false. It is claimed, for example, that FTC Assistant Director of Marketing Practices Eileen Harrington stated “[i]f telemarketers had adhered to the present rules, which give each company one shot at each customer and require them to honor all DNC requests, a national DNC list would not be under discussion.” Shields FNPRM Comments at 6. Harrington is also

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15/ Section 2(9), Pub. L. No. 102-243. The Commission must also reject efforts to misappropriate the phrase “domestic tranquility” in the Constitution’s Preamble. Shields FNPRM Comments at 9 n.6. That term, of course, refers to the preservation of societal order by enforcement of law throughout the nation, not “freedom from agitation” in the home. *Cf. Milazzo v. United States*, 578 F.Supp. 248, 253 (S.D. Cal. 1984) (“argument that ... paraphrases the Preamble to the Constitution” by claiming “threat to ‘domestic tranquility,’ ... chaos and ... disintegration of the United States ... does not merit reply”).

alleged to have stated that the teleservices industry “since 1995 has had a chance to make a company-specific do-not-call system work” but “was given more than an inch and has taken more than a mile.” *Id.* at 7. Whatever the basis of these opinions may be, they are belied by Ms. Harrington’s own testimony before Congress that unwanted phone calls pose only a minor problem. <sup>16/</sup> They are also at odds with the FTC’s own records that reveal not a single company-specific “do-not-call” enforcement action. See Exh. A. Such arguments are based on an emotional overreaction to telemarketing and not on the facts. As comments filed by even some of the more vociferous “do-not-call” list advocates demonstrate, there is no “epidemic” of telemarketing that requires a regulatory response. <sup>17/</sup>

**C. The Record Does Not Support FCC Adoption of a National “Do-Not-Call” Registry or Incorporation of the FTC’s Registry By Reference Into the FCC Rules**

The antipathy to First Amendment rights evinced by the FTC and other commenters in this proceeding provides additional justification for the FCC to take careful note of the fact that, to date, there has been no meaningful balancing of interests or constitutional inquiry. Some commenters argue that “[t]he more significant requirements laid out in Section 227(c)(3) ... have already been addressed through the FTC action.” Comments of the Software & Information Industry Association (“SIIA”) on the Further Notice of Proposed Rulemaking at 4. Whatever the merits of that assertion,

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<sup>16/</sup> See *supra* note 7.

<sup>17/</sup> See ATA Reply Comments at 5-7 & n.11. See also *id.* at 13-14 (analysis of TCPA-related complaints filed with FCC showed almost three quarters relate to issues other than “do-not-call” problems, with false-positives likely inflating the number of “do-not-call” issues, and only two out of 205 TCPA-related citations by Enforcement Bureau involved alleged failures to honor a “do-not-call” request).

it is clear the requirements of Section 227(c)(1), which are paramount given their intent to preserve constitutional rights, have clearly not been addressed by the FTC. *Accord* MBNA FNPRM Comments at 5 (“The FTC did not adopt an approach in its proceeding that showed any particular concern for the commercial speech rights or economic well being of the telemarketing industry.”); Interactive Teleservices Corporation (“ITC”) FNPRM Comments at ¶ 5 (“recent revisions to the [TSR] ... were promulgated without analysis of the economic impact and without balancing the need not to unduly burden legitimate businesses”).

ATA submits that, if the Commission conducts the required balancing and constitutional inquiry, it cannot reach any conclusion other than that adoption of a national “do-not-call” registry is unjustified. ATA disagrees that “the FTC’s action has superceded any benefits [of] a decentralized [company-specific] approach.” SIIA FNPRM Comments at 2. Quite the contrary, there has never been *any* showing – by this Commission or the FTC – that the company-specific approach does not work. See *supra* note 17. In fact, in the more than ten years since company-specific rules were first imposed, the FCC has issued only one public enforcement decision arising out of a company-specific “do-not-call” violation. See *Consumer.Net v. AT&T Corp.*, 15 FCC Rcd 281 (1999). Even then only two telephone solicitations in violation of a prior do-not-call request and a single failure to provide a do-not-call policy upon demand were found. *Id.*, at 288-89, 295-99 (1999). And, as noted, the FTC has had *zero cases* alleging violations of the company-specific provisions of the TSR. See Exh. A.

This absence of agency action does more than beg the question whether consumers know what their rights are vis-à-vis telemarketing and how to exercise

them, 18/ it is a matter of constitutional significance. As ATA has pointed out, the government has the burden of showing that adoption of a national “do-not-call” registry, which is a more restrictive regulation of protected speech than existing rules, is necessitated by, and in fact advances, a substantial government interest. 19/ That the FCC and FTC have engaged in little more than token enforcement of the company-specific rules shows not just that there is no way to know if there has been a “failure of the company-specific [“do-not-call”] program,” 20/ it makes the task of demonstrating the necessity and likely effectiveness of new rules that much more difficult.

The lack of enforcement also gives lie to claims such as that by the TRA, which states – without any proffer of evidence, or even mention of state enforcement efforts – that “some telemarketers will search for and use any legal loophole to escape having to comply with [“do-not-call”] regulations.” TRA at 7. See *also* City of Chicago FNPRM Comments at 7 (referencing “City’s experience with consumer complaints” but

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18/ Even those favoring a national “do-not-call” registry indicate that meaningful enforcement is a critical component of any regulatory regime. See New Jersey Division of Ratepayer Advocate FNPRM Comments at 2 ¶ 3; Shields FNPRM Comments at 3 (deeming enforcement “critical” to successful rules). Consumer education – an option neither the FTC nor this Commission tried before plowing ahead with proposals for new rules – is also vitally important. See *also* 149 Cong. Rec. H407-03, H411 (debate on Implementation Act indicating that “[m]ore than 90 percent of the reported ‘violations’ of [Missouri’s telemarketing] law are not illegal”).

19/ ATA Comments at 57-59, 76-82 (citing, *inter alia*, *Utah Licensed Beverage Ass’n v. Leavitt*, 256 F.3d 1061, 1069 (10th Cir. 2001); *Time Warner Entm’t Co. v. FCC*, 240 F.3d 1126, 1129-30 (D.C. Cir. 2001)). See *also* ITC FNPRM Comments (“FTC has failed to demonstrate a substantial government interest through factual data of any type” and has not “explained why other methods of dealing with these issues that do not involve the federal government in restricting free speech are not satisfactory”).

20/ FNPRM Comments of the Tennessee Regulatory Authority (“TRA”) at 5. *Cf. Fax.Com, Inc.*, 17 FCC Rcd 15927, 15945 (2002) (separate statement of Comm’r K. Abernathy) (stressing importance of “stringent enforcement” against TCPA violations).

offering no evidence or specifics thereof). As ATA has noted, the teleservices industry supported company-specific “do-not-call” rules and requires its members to comply. See ATA Comments at 3-4. See also Teleperformance USA FNPRM Comments ¶ 5 (“Every legitimate company in the teleservices industry rigorously applies the DMA DNC list, state DNC lists and individual company DNC lists.”). To the extent there are scoff-laws, they are no more likely to honor a national “do-not-call” registry than they are company-specific “do-not-call” rules. See ITC FNPRM Comments (“The Do-Not-Call Registry will not protect consumers from the dishonest, unprofessional, sleazy telemarketers that cause most of the problems[.] Only the law-abiding firms will be hurt.”). As ITC correctly notes “[t]here has been no analysis by the FTC of who is causing the problems today.” *Id.*

Accordingly, ATA commends the position of commenters such as the National Association of Insurance and Financial Advisors (“NAIFA”), who suggest that the FCC “gauge ... experience under the FTC rules prior to extending them.” NAIFA FNPRM Comments at 3. This suggestion has merit not only as a matter of practicality, but in the context of the constitutional issues this Commission faces as well. Indeed, the FTC rules are subject to constitutional and other challenges in multiple lawsuits around the country. <sup>21/</sup> Rather than being in a rush to adopt similar rules – an outcome not mandated by the Implementation Act, which merely requires termination of this proceeding, not adoption of rules paralleling the FTC’s – the Commission would be well

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<sup>21/</sup> See *Mainstream Mktg. Servs., Inc. v. FTC*, No. 03-N-0184 (D. Col. filed Jan. 29, 2003); *U.S. Security v. FTC*, No. CIV-03-122-W (W.D. Okla. filed Jan. 29, 2003); *National Fed’n of the Blind v. FTC*, No. JFM 03 CV 963 (D. Md. filed April 2, 2003).

served by awaiting the outcome of those challenges. 22/ Doing so would not only prevent FCC adoption of regulations to complement FTC rules that are subsequently vacated, it will allow the Commission to perhaps point to a more meaningful record than currently exists for purposes of meeting its constitutional burden.

**D. The Harm to Legitimate Telemarketing Arising from the FTC Rules Precludes FCC Adoption of Parallel Rules Under the TCPA**

Even apart from constitutional problems arising from the lack of enforcement of existing rules and/or the inability to determine if they, or other less restrictive alternatives might adequately serve government interests here, the balance of legitimate telemarketing against consumer privacy precludes adoption of a national “do-not-call” registry under the TCPA. The FNPRM comments reflect the devastating impact such a registry will have on the telemarketing industry, as ATA predicted. See ATA Reply Comments at 26-30. For example, one of the nation’s top ten teleservices agencies states that “[t]he FTC rules alone have reversed ... historical growth trends of constant ... expansion over the past ten years.” Teleperformance USA *FNPRM* Comments – Key Facts. The company reports “adjusted business planning for 2003 and beyond on the basis of reductions in activity between 30-60%.” *Id.* It also states that it is “currently contracting [its] resources due to direct and anticipated impact of the FTC rules,” and indicates that once the FTC rules take full effect “as many as 6,000 employees could have their jobs impacted.” *Id.*

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22/ Cf. DMA FNPRM Comments at 5 (“Commission should not assume that either Congress or the FTC have foreclosed the possibility of the FTC further revising its rules to reflect more rational and reasonable [FCC] standards”). See *also* H. Rep. 108-8 at 5 (expressing “commit[ment] to holding hearings during 108th Congress to better understand how ... different do-not-call regulatory regimes can best be coordinated”).

Perhaps most ominously, Teleperformance USA has already closed four call centers accounting for 850 jobs, and reduced activity at three others accounting for 650 jobs. *Id.* Notably, this effect was predicted in debates on the Implementation Act, where one member of Congress opined that “the [FTC’s] Do-Not-Call List ... is far too damaging to an industry that employs tens of thousands of workers all across this country.” 149 Cong. Rec. E344-02 (statement of Rep. Strickland). Congressman Strickland also expressed further concerns, stating that:

I do not believe that enough consideration has been given to the economic impact that the FTC’s proposed registry will have on many communities across the United States. The FTC has indeed investigated the impact of telemarketing on consumers. But I am concerned that adequate attention has not been given to the importance of telemarketing jobs, especially to economically distressed communities.

*Id.* (emphasis added). He went on to note “some of the provisions of the FTC rule do not pass the common sense test,” but expressed “doubt” that such issues “will receive much attention as this bill is rushed through the legislative process.” *Id.*

This prediction came to pass, as Congress duplicated the FTC’s rush to judgment. The FTC rules’ detrimental impact on “legitimate telemarketing,” predicted by ATA and in Congress, and already experienced by industry participants, weighs heavily – in fact, prohibitively – against FCC adoption of more restrictive regulations, regardless of the Implementation Act. See H. Rep. 108-8 at 4 (“because the FCC is bound by the TCPA, it is impossible for [it] to adopt rules identical to the FTC’s”). The Commission’s actions in this proceeding, and the manner in which it carries out its obligations under both the TCPA and the Implementation Act, will likely be the last chance for these concerns to be given due consideration.

## II. THE FNPRM COMMENTS REINFORCE THAT, WHATEVER “DO-NOT-CALL” APPROACH THE FCC ADOPTS, IT MUST CLARIFY ITS EXCLUSIVE JURISDICTION OVER INTERSTATE TELEMARKETING

If there is any point on which there is almost universal agreement in the wake of FTC amendments to its TSR, it is that the FCC must confirm exclusive federal jurisdiction over interstate telemarketing. ATA has specifically noted the “proliferation of state telemarketing laws since implementation of the TCPA requires that the Commission clarify the allowable scope of state authority.” ATA Comments at 104-106. See *also* ATA Reply Comments at 54-56. The comments on the FNPRM reinforce the need for – and desirability of – a strong FCC statement definitively clarifying that states lack jurisdiction over interstate telemarketing calls. See, *e.g.*, InfoCision FNPRM Comments at 2 (“FCC should clarify its exclusive jurisdiction over interstate telephone calls”).

Commenters with nationwide telemarketing interests confirm that “[s]ome states (though not all) are ... enforcing their [telemarketing] laws against out-of-state telemarketers despite the FCC’s exclusive jurisdiction over interstate telephone communications, including telemarketing.” MBNA FNPRM Comments at 3. ATA agrees that “[i]n order to promote the statutory end of maximizing consistency and uniformity,” the Commission must bar “any state regulation of interstate telephone solicitations.” DirecTV FNPRM Comments at 3. As one commenter noted:

The state attorneys general already assert that their enforcement of state do-not-call laws extends to interstate calls received in their respective states under long arm jurisdiction. Such enforcement actions based on state laws over interstate telemarketing will undoubtedly disrupt the regulatory regime envisioned by the TCPA[.]

Metris Companies, Inc., FNPRM Comments at 4. See *also* Bank One Corporation (“Bank One”) FNPRM Comments at 5 (“state authorities ... often improperly include[ ]

businesses conducting interstate telemarketing in state enforcement actions”). The passage of the Implementation Act makes FCC resolution of this situation all the more imperative. Indeed, the House Report notes the need for federal “efforts to work with the states to ensure a harmonized approach” while citing “concern[s] that consumers and businesses could continue to face conflicting and confusing regulatory approaches.” H. Rep. 108-8 at 4. Nevertheless, none of the states appears in any particular hurry to modify their laws, or enforcement of them, in the wake of the Amended TSR, and some have even adopted new laws even in the few months since the FTC acted. See, e.g., A.B. 727, 2003 Leg. Assem. (N.J. 2003); H.B. 424, 58th Leg. Assem. (Mont. 2003); S.B. 573, 46th Legislature, 1st Regular Session (N.M. 2003).

The exercise of exclusive FCC jurisdiction over interstate telemarketing is supported by the TCPA and its legislative history. Bank One is correct that “Congress has conferred upon the FCC exclusive jurisdiction over interstate telemarketing.” Bank One FNPRM Comments at 2. As InfoCision notes, Congress was quite clear that “States do not have jurisdiction over interstate calls.” InfoCision at 3 (quoting S. Rpt. 102-177 at 3). See also MBNA FNPRM Comments at 7 (“state law requirements must be intrastate in scope” and “cannot be applied to, or enforced against, interstate telemarketing”) (discussing 47 U.S.C. § 227(e)). Indeed, under the “general preemptive effect of the Communications Act of 1934, state regulation of interstate communications, including interstate communications initiated for telemarketing purposes, is preempted.” Nextel Communications, Inc. (“Nextel”), FNPRM Comments at 9 n.23 (quoting 137 CONG. REC. S18781 (Nov. 27, 1991)).

The Commission should thus affirm the staff letter that explains the Communications Act grants the FCC exclusive jurisdiction over interstate (and foreign) communications, and correctly set forth the respective authority granted to the FCC and the states. Letter from Geraldine A. Matise, FCC, to Ronald A. Guns, Maryland House of Delegates, dated January 26, 1998 (cited in NPRM, 17 FCC Rcd at 17496 n.220). See also ATA Comments at 104-105. It is significant in this regard that, unlike the comments received in response to the NPRM, the state commenters have been notably silent regarding their claims of authority over interstate telemarketing in the wake of the Implementation Act. Compare ATA Reply Comments (citing National Association of Attorneys General Comments at 12-14 New York State Consumer Protection Board, *Other Than Do-Not-Call* Comments at 18, 21; National Association of State Utility Consumer Advocates Comments at 14; Texas Office of Public Utility Counsel Comments at 10). A clear statement of federal supremacy over interstate telemarketing is wholly consistent with the FTC's approach, see *Amended TSR Order*, 68 Fed. Reg. at 4655 ("intrastate calls [are] excluded from the [TSR]'s coverage"), so given the impetus for a unified federal approach provided by the Implementation Act, the Commission should bring this issue to a final, definitive resolution in the instant proceeding.

### **III. COMMENTS ON THE FNPRM OVERWHELMINGLY SUPPORT ATA'S INITIAL RECOMMENDATION THAT THE FCC RETAIN ITS EXISTING DEFINITION OF "ESTABLISHED BUSINESS RELATIONSHIP"**

ATA concurs with commenters advocating that the FCC retain its own definition of "established business relationship" rather than considering adoption of the FTC's formulation. *E.g.*, NAA FNPRM Comments at 5-6; ACLI FNPRM Comments at 4-5; Intuit FNPRM Comments at 4-5; MBA FNPRM Comments at 4-6. See also ATA

Comments Section IV.B (“Commission should retain the current definition of “established business relationship”). Many of these comments reinforce the fallacy of the FTC’s approach, which ATA has challenged in seeking judicial review of the Amended TSR. 23/ As one commenter points out, the FTC’s definition ignores that fact that some business relationships can last for many years, though the customer may go more than a year, or 18 months, or longer before making subsequent purchases. See SIIA at 5 (“artificial, temporal restrictions unfairly disadvantage[ ] certain types of companies”). See also 149 Cong. Rec. E246-01 (statement of Rep. Eshoo) (stating concern that “current FTC rules place an 18-month limitation on prior relationships, but some industries ... may have upgrades that occur outside this time frame.”). The FTC’s rule, which cuts off the relationship after 18 months regardless of the type of goods or services involved, is arbitrary and capricious because it bears no connection to consumer expectations or business realities. This Commission should not replicate that error. 24/

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23/ See *supra* note 21.

24/ ATA also agrees that, in the event the Commission believes it can overcome the obstacles to a national “do-not-call” registry and in fact adopts such a regime, it should, like the FTC, make its “established business relationship” provision an exception to the national registry requirement. See, e.g., Scholastic, Inc. at 4; Nextel at 3-5; Intuit at 4-5; American Community Bankers at 3. Doing so will parallel both the FTC’s approach that allows companies to call existing customers even if they are on the registry, while at the same time barring reliance on that exception when a customer terminates a relationship by making a company-specific “do-not-call” request, and prior FCC treatment of the exception. See *TCPA Report & Order*, 7 FCC Rcd at 8770 n.63.

## CONCLUSION

For the foregoing reasons, ATA respectfully submits that the Commission should implement the statutory charge to “maximize consistency” with the FTC’s Amended TSR by retaining the existing FCC company-specific “do-not-call” approach.

Respectfully submitted,

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## **Exhibit A**

## SUMMARY OF CASES ALLEGING VIOLATIONS OF THE TSR

Total Number of Cases: 87

PROVISION OF TSR ALLEGED	NUMBER OF CASES	PERCENTAGE
3(a)(1)(i)	14	16.1
3(a)(1)(ii)	16	18.4
3(a)(1)(iii)	7	8
3(a)(1)(iv)	9	10.3
3(a)(1)(v)	2	2.3
3(a)(2)(i)	8	9.2
3(a)(2)(ii)	6	6.9
3(a)(2)(iii)	22	25.3
3(a)(2)(iv)	6	6.9
3(a)(2)(v)	10	11.5
3(a)(2)(vi)	5	5.7
3(a)(2)(vii)	2	2.3
3(a)(3)(i)	3	3.4
3(a)(3)(ii)	3	3.4
3(a)(3)(iii)	3	3.4
3(a)(4)	45	51.7
3(b)	10	11.5
3(c)(1)	1	1.1
3(c)(2)	2	2.3
3(c)(3)	2	2.3
4(a)(1)	7	8
4(a)(2)(i)	3	3.4
4(a)(2)(ii)	3	3.4
4(a)(3)	2	2.3

4(a)(4)	24	27.6
4(b)(1)(i)	0	0
4(b)(1)(ii)	0	0
4(b)(2)(i)	0	0
4(b)(2)(ii)	0	0
4(b)(2)(iii)	0	0
4(b)(2)(iv)	0	0
4(c)	1	1.1
4(d)(1)	9	10.3
4(d)(2)	22	25.3
4(d)(3)	3	3.4
4(d)(4)	1	1.1
5(a)(1)	0	0
5(a)(2)	0	0
5(a)(3)	0	0
5(a)(4)	0	0
5(a)(5)	1	1.1
5(b)	0	0
5(c)	0	0
5(d)	0	0