

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554**

In the matter of:)	
)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991)	CG Docket No. 02-278
)	
American Teleservices Association, Inc. Petition for Declaratory Ruling with Respect to Certain Provisions of the New Jersey Consumer Fraud Act and the New Jersey Consumer Fraud Act and the New Jersey Administrative Code)	DA 04-3185
)	
cc Advertising Petition for Expedited Declaratory Ruling)	DA 04-3187
)	
Consumer Bankers Association Petition for Declaratory Ruling with Respect to Certain Provisions of the Indiana Revised Statutes and Administrative Code)	DA 04-3835
)	
Consumer Bankers Association Petition for Declaratory Ruling with Respect to Certain Provisions of the Wisconsin Statutes and Wisconsin Administrative Code)	DA 04-3836
)	
National City Mortgage Co. Petition for Expedited Declaratory Ruling with Respect to Certain Provisions of the Florida Statutes)	DA 04-3837
)	
TSA Stores, Inc. Petition for Declaratory Ruling with Respect to Certain Provisions of the Florida Laws and Regulations)	DA 05-342
)	
Petition for Declaratory Ruling Relating to Commission's Jurisdiction Over Interstate Telemarketing)	DA 05-1346
)	

**COMMENTS OF THE TENNESSEE REGULATORY AUTHORITY
OPPOSING TELEMARETERS' REQUESTS FOR FEDERAL PREEMPTION
OF STATE TELEMARETING LAW AS APPLIED TO INTERSTATE CALLS**

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I. Introduction and Summary

The Tennessee Regulatory Authority (“TRA”) files these comments with the Federal Communications Commission (“Commission”) in reference to the petitions, notices, and comments recently filed with the Commission regarding state and federal roles and the requests for federal preemption of the regulation of telemarketing (“do-not-call laws” or “regulations”). Telemarketers and their representative groups (collectively “Telemarketers”) have urged the Commission to preempt all state do-not-call laws that are more restrictive than the rules applicable under the Telephone Consumer Protection Act (“TCPA”), as implemented by the Commission (“Commission Rules”),¹ to the extent the state laws apply to interstate telemarketing.²

The TRA strongly opposes the Telemarketers’ requests and the argument that state laws should be preempted. The state laws protect consumers’ privacy interests, an area traditionally regulated by the states through their police powers.³

Do-not-call laws are designed to protect consumers from unwanted telemarketing calls.⁴ The calls “can be an intrusive invasion of privacy,”⁵ and “telemarketing lends itself to fraudulent and unethical practices.”⁶ Many states have been regulating these calls for years under their traditional police powers, which include restriction of unfair business practices and protection of residents’

¹ *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 (“In re TCPA”),* FCC 03-153, CG Docket No. 02-278, *Report and Order*, 18 FCC Rcd. 14,014 (July 3, 2003).

² In addition, the Joint Petitioners, Alliance Contact Services, *et al.* (“Joint Petitioners”), have requested a declaratory ruling that the FCC has exclusive regulatory jurisdiction over interstate telemarketing and states have no authority to regulate interstate telemarketing. *Petition for Declaratory Ruling that the FCC has Exclusive Regulatory Jurisdiction Over Interstate Telemarketing*, filed April 29, 2005 (“*Joint Petition*”).

³ *See, e.g., Katz v. United States*, 389 U.S. 347, 351, 88 S. Ct. 507, 511, 19 L. Ed. 2d 576, 581 (1967).

⁴ This is true of the federal law as well as the state laws. According to the Senate, the purposes of the Telephone Consumer Protection Act were to “protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls to the home and to facilitate interstate commerce by restricting certain uses of facsimile (tax) [sic] machines and automatic dialers.” S. Rep. No. 102-178, at 1 (1991).

⁵ Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2, 105 Stat. 2394 (1991).

⁶ Jay M. Zitter, J.D., Annotation, Validity, Construction, and Application of State Statute or Law Pertaining to Telephone Solicitation, 44 A.L.R.5th 619, 2a (1996)

consumer and privacy rights.⁷ Specifically, Tennessee has had an active Do-Not-Call program in place since January 1, 2000, which has served as a model for a number of other state programs.⁸

The Commission has been very successful in working with the Federal Trade Commission (“FTC”) to develop and implement the National Do-Not-Call Registry.⁹ The Registry and Commission Rules provide enhanced consumer protection against unwanted telemarketing calls, especially in states that have not enacted their own do-not-call laws. The federal system, however, does not and should not displace the systems states have implemented to protect and meet the needs of their citizens. For all the reasons set forth below, the TRA contends that the state telemarketing regulations are not subject to federal preemption and that the Commission should continue the collaborative state and federal regulation of interstate and intrastate telemarketing calls.¹⁰

II. States Have Jurisdiction To Regulate Interstate Telemarketing Calls Because The Regulations Do Not Restrict The Provision of Telephone or Communications Services.

The purpose of do-not-call regulations is to protect consumers from unwanted intrusions by telemarketers. The laws protect consumers’ rights to privacy and to be left alone. The laws also protect consumers from fraudulent and unethical business practices, which may be more prevalent in telemarketing than in other business methods.¹¹ Telemarketing laws do not regulate the rates, terms or conditions through which telephone or communications services may be offered in a state.

⁷ See, e.g., *In re TCPA*, CG Docket No. 02-278, DA 04-3890, *Annual Report on the National Do-Not-Call Registry*, 19 FCC Rcd. 24,002 (December 15, 2004) (“We acknowledge that the states have a long history of regulating telemarketing practices.”); See also *California v. ARC America Corp.*, 490 U.S. 93, 101, 109 S. Ct. 1661, 1665, 104 L. Ed. 2d 86, 94-95 (1989) (regulation against unfair business practices is an area traditionally left to the states); *Katz v. United States*, 389 U.S. 347, 350-351, 88 S. Ct. 507, 511, 19 L. Ed. 2d 576, 581 (1967) (individual states regulate person’s right to privacy and to be “let alone”).

⁸ In addition, the TRA provided expertise to the staff of the Federal Trade Commission (“FTC”) during the development and implementation of its program, which the FTC now operates in conjunction with the Commission.

⁹ The Commission and FTC also welcomed comments from the states and relied on the states in developing the National Do-Not-Call Registry.

¹⁰ For purposes of this Comment, the TRA has focused on telemarketing telephone calls to residential consumers, although our position applies equally to the other activities covered by the TCPA regulations, such as the transmittal of unsolicited facsimile advertisements.

¹¹ See, e.g., *Zitter*, *supra* note 4, at 2a. (“telemarketing lends itself to fraudulent and unethical practices”).

The Commission, the Telemarketers, and members of Congress have commented, in relation to telemarketing regulations, that the states have no jurisdiction over interstate calls under the Communications Act of 1934 (“Communications Act” or “Act”).¹² Based on that, the Telemarketers contend that the Commission should preempt all state telemarketing regulations as applied to interstate calls. The TRA agrees with the conclusion that states generally lack jurisdiction over interstate telephone calls. Yet that principle does not pertain to telemarketing regulations; the TCPA, though within the Communications Act, includes its own jurisdictional provisions and was enacted to address telemarketing, not communications services.

The Communications Act was designed “to create a ‘rapid, efficient, Nation-wide . . . communication service’ . . . providing uniform, efficient service.”¹³ Although the TCPA is within the Communications Act, its purpose, and those regulated by it, are very different. It was designed to “protect the privacy interests of residential telephone subscribers”¹⁴ and to address the problem of automated or prerecorded telephone calls.¹⁵ The TCPA does not regulate the providers of communications services. Instead it regulates individuals and entities that send unsolicited advertisements or make telephone solicitations to consumers.

As the Telemarketers assert, the Communications Act distinguishes between interstate and intrastate communications, and the Commission has jurisdiction over interstate services. The Commission thus has exclusive authority to establish the rates, terms and conditions under which interstate communications may be offered in a state.¹⁶ Telemarketing, however, is *not* the provision of telephone or communications services. Telemarketing regulations do not control the rates, terms

¹² See, e.g., *In re TCPA*, FCC 03-153, CG Docket No. 02-278, *Report and Order*, 18 FCC Rcd. 14,014, ¶ 83 (July 3, 2003) (“We recognize that states traditionally have had jurisdiction over only intrastate calls, while the Commission has had jurisdiction over interstate calls”); S. Rep. No. 102-178, at 3 (“States do not have jurisdiction over interstate calls”); Joint Petitioners, *Joint Petition* (April 29, 2005).

¹³ *National Ass’n of Regulatory Util. Comm’rs v. FCC*, 746 F.2d 1492, 1501 (D.C. Cir. 1984) (quoting 47 U.S.C. § 151 (1982)).

¹⁴ S. Rep. No. 102-178, at 1 (1991).

¹⁵ Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2, 105 Stat. 2394 (1991).

¹⁶ See, e.g., *In the Matter of Operator Services Providers of America Petition for Expedited Declaratory Ruling*, FCC 91-185, *Memorandum Opinion and Order*, 6 FCC Rcd. 4475, 4476-4477 (1991).

or conditions by which communications services may be offered. The Telemarketers disregard that difference and argue that telemarketing regulation is “a species of telecommunications regulations” and therefore subject to exclusive federal regulatory jurisdiction.¹⁷ They provide case references about the distinction between interstate and intrastate communications but none relate to telemarketing.

The cases cited by the Telemarketers highlight the difference between telemarketing regulations and rules governing the provision of communication services.¹⁸ Do-not-call laws relate to conduct and solicitations that reach into citizens’ homes, uninvited. Regulations of communications services, in contrast, relate to the rates, terms and conditions for providing communications services, along with the equipment used to provide those services.

The private and public interests associated with the two regulation types are not the same. For example, Congress had a very strong interest in creating one, efficient communication service with adequate facilities for the country.¹⁹ Congress thus created the Commission and gave it jurisdiction over all interstate and foreign communications.²⁰

Congress addressed different concerns through the TCPA. At least in part, Congress was responding to consumer “outrage over the proliferation of intrusive, nuisance calls to their homes

¹⁷ See *Joint Petition*, p. 3.

¹⁸ See, e.g., *State Corp. Comm’n v. FCC*, 787 F.2d 1421 (10th Cir. 1986) (allocation of equipment costs between interstate and intrastate services); *National Ass’n of Regulatory Util. Comm’rs v. FCC*, 746 F.2d 1492 (D.C. Cir. 1984) (regulation of Wide Area Telecommunications Services); *North Carolina Utils. Comm’n v. FCC*, 537 F.2d 787 (4th Cir. 1976) (interconnection of customer-provided telephone equipment with national telephone network); *AT&T Commc’ns v. Public Serv. Comm’n*, 625 F.Supp. 1204 (D.Wyo. 1985) (application of local disconnect service tariff to billings for interstate calls); *OSPA*, 6 FCC Rcd. 4475 (1991) (regulation of the rate, terms and conditions under which interstate operator services may be offered in the state); *In the Matter of American Telephone & Telegraph Co. and the Associated Bell System Cos., Interconnection with Specialized Carriers in Furnishing Interstate Foreign Exchange (FX) Service and Common Control Switching Arrangements (CCSA)*, FCC 75-1146, *Memorandum Opinion and Order*, 56 FCC 2d 14 (1975) (regulation of facilities used in an interstate transmission network).

¹⁹ 47 U.S.C.A. § 151 (2001).

²⁰ 47 U.S.C.A. § 152(a) (2001 & Supp. 2005).

from telemarketers.”²¹ Congress therefore created new legislation to address telemarketing. In doing so, Congress did not preempt state do-not-call laws, as set forth in 47 U.S.C. §227(e), titled “*State law not preempted.*”²² Instead Congress specified that states may impose more restrictive intrastate requirements and indicated that states could prohibit all telemarketing but nowhere stated that any state law governing intrastate *or* interstate telemarketing is preempted by the TCPA. Courts also have not recognized or established a distinction between states’ regulation of interstate and intrastate telemarketing calls. Instead, at least one court has upheld state do-not-call regulations against preemption challenges.²³

The Telemarketers argue that the Commission addressed similar issues in a previous docket, *In the Matter of Operator Services Provider of America Petition for Expedited Declaratory Ruling* (“*OSPA*”).²⁴ That case involved the regulation of operator service providers “*offering service in Tennessee.*”²⁵ The facts and issues in the *OSPA* matter thus are not analogous to the questions before the Commission now. Operator service is just that – a communications service available to consumers through the national telephone network. In *OSPA*, the Commission confirmed that Congress gave the Commission exclusive jurisdiction over “the rates, terms, and conditions of interstate operator services” and likewise “deprived the States of authority to regulate the rates or other terms and conditions under which interstate communications services may be offered in a state.”²⁶ The decision did not address states’ authority to regulate telemarketing activity, which is wholly distinguishable from the offering of

²¹ Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2, 105 Stat. 2394 (1991).

²² 47 U.S.C.A. § 227(e)(1) (2001).

²³ See *Van Bergen v. Minnesota*, 59 F.3d 1541 (8th Cir. 1995).

²⁴ *In the Matter of Operator Services Providers of America Petition for Expedited Declaratory Ruling*, FCC 91-185, *Memorandum Opinion and Order*, 6 FCC Rcd. 4475, 4476-4477 (1991) (“*OSPA*”).

²⁵ *Id.* (emphasis added).

²⁶ *Id.* at 4476, 4477.

communications services. As provided by the TCPA, state telemarketing regulations are not preempted.²⁷

III. Telemarketing Calls Intrude On Consumers' Privacy Interests, Which Traditionally Are Protected By The States Through Their Police Powers.

Telemarketing laws do not address telecommunications service providers or the provision of telecommunications services; instead, they regulate how and when a telemarketer may send an unsolicited advertisement or make a telephone solicitation to a consumer. The laws primarily restrict telephone contact with consumers who have asked that telemarketers not disrupt the peace and privacy in their homes. States have jurisdiction over this conduct through their traditional police powers, which give states "great latitude . . . to legislate as 'to the protection of the lives, limbs, health, comfort, and quiet of all persons.'"²⁸

A. Telemarketing calls intrude on the privacy of unwilling recipients.

The United States Supreme Court has recognized that an individual's privacy interest in the home is "entitled to extra deference."²⁹ The "right to be left alone" in the home "plainly outweighs the First Amendment rights of [a media] intruder."³⁰ In *Rowan v. United States Post Office Department*,³¹ the Supreme Court balanced consumer privacy concerns against vendors' freedom of speech and trade. The Court noted that it has "traditionally respected the right of a householder to bar, by order or notice, solicitors, hawkers, and peddlers from his property."³² The Court went on to

²⁷ 47 U.S.C.A. § 227(e) (2001).

²⁸ *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756, 105 S.Ct. 2380, 2398, 85 L. Ed. 2d 728, 751 (1985), overruled in part on other grounds by *Kentucky Assn'n of Health Plans, Inc. v. Miller*, 538 U.S. 329, 123 S. Ct. 1471, 155 L. Ed. 2d 468, (2003) (quoting *Slaughter-House Cases*, 16 Wall. 36, 62 (1873), quoting *Thorpe v. Rutland & Burlington R. Co.*, 27 Vt. 140, 149 (1855)).

²⁹ *FCC v. Pacifica Found.*, 438 U.S. 726, 731 n2, 98 S.Ct. 3026, 3031 fn2, 57 L.Ed.2d 1073, 1082 n2 (1978) (citation omitted).

³⁰ *Id.*, 438 U.S. at 748, 98 S.Ct. at 3040, 57 L.Ed.2d at 1093 (citation omitted).

³¹ *Rowan v. United States Post Office*, 397 U.S. 728, 90 S.Ct. 1484, 25 L.Ed.2d 736 (1970).

³² *Id.*, 397 U.S. at 737, 90 S.Ct. at 1490, 25 L.Ed.2d at 743 (citation omitted).

“categorically reject the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another.”³³

If this prohibition operates to impede the flow of even valid ideas, the answer is that no one has a right to press even “good” ideas on an unwilling recipient. That we are often “captives” outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere.³⁴

The Court also has recognized this right to be free of unwanted speech in many other settings.

The unwilling listener’s interest in avoiding unwanted communication has been repeatedly identified in our cases. It is an aspect of the broader “right to be let alone” that one of our wisest Justices characterized as “the most comprehensive of rights and the right most valued by civilized men.” *Olmstead v. United States*, 277 U.S. 438, 478, 48 S. Ct. 564, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting). The right to avoid unwelcome speech has special force in the privacy of the home.³⁵

These principles are directly applicable to the telemarketing debate. Telemarketers press their ideas on consumers who are unwilling recipients of unwanted solicitations, thus interfering with the consumers’ right to be left alone.³⁶

By registering on state do-not-call lists, consumers unequivocally express their desire to protect their privacy from telemarketing intrusions.³⁷ No matter how strict or lenient, state telemarketing laws do not prevent the Telemarketers from calling or contacting consumers who have *not* registered on the lists. The regulations protect the consumers who have asked for and expect the states to protect their privacy by restricting unwanted intrusions and unfair business practices. This protection is well within the traditional police power afforded to the states.

³³ *Id.*, 397 U.S. at 738, 90 S.Ct. at 1491, 25 L.Ed.2d at 744.

³⁴ *Id.* (citation omitted).

³⁵ *Hill v. Colorado*, 530 U.S. 703, 717, 120 S. Ct. 2480, 2489, 147 L. Ed. 2d 597, 612 (2000) (footnote omitted, citation omitted).

³⁶ “Many customers are outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers.” Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2, 105 Stat. 2394 (1991).

³⁷ Unlike other legislation, do-not-call laws have a built-in public referendum through the number of citizens registering to be included on the do-not-call list. In Tennessee, nearly two million numbers have been registered, showing strong support for such legislation.

B. Telemarketing calls cause harm in the recipient's home, regardless of whether the calls originate inside or outside the recipient's state.

Consumers who do not want to be interrupted by telemarketing calls may register with their state's do-not-call program, if available, or under the National Do-Not-Call Registry.³⁸ Many states, acting on behalf of their consumers, have enacted do-not-call regulations that differ from or are more restrictive than the Commission Rules. State do-not-call laws typically offer residents additional protection from unwanted privacy invasions and harmful business practices. The variety of state regulations reflects the diversity of protections required among the states' residents.

Telemarketers want the Commission to preempt all state telemarketing laws as applied to interstate calls. The Telemarketers argue that the Commission Rules authorize the development of one uniform set of federal telemarketing rules applicable to all interstate calls.³⁹ While such a system may be useful for the Telemarketers, the proposed change will be detrimental to the millions of consumers who have registered for protection. In Tennessee alone, 1.9 million phone numbers are registered, with 48% having registered through the state program.

The entire reason for any do-not-call program is that the consumers who register on do-not-call lists do not want to receive telemarketing calls. The place of origin of the call is immaterial; whether it comes from inside or outside the consumer's state, the call will be an intrusion on the consumer's privacy, and the consumer will be an unwilling recipient of an unwanted solicitation. The harm occurs in consumers' homes, when the consumers are subjected to the unwanted solicitations that disturb the privacy, sanctity and enjoyment of their homes.

With today's technologies, the distinction between interstate and intrastate calls is blurred. Calls sometimes are switched and routed through various networks and systems before reaching the

³⁸ The TCPA requires that state programs import into their do-not-call registers the portion of the National register applicable to their state. Tennessee has complied with this requirement.

³⁹ Technically, the Commission and the FTC have different regulations governing the National Do-Not-Call Registry. We understand they are working together to coordinate enforcement. U.S. Gov't Accountability Office, GAO-05-113, Report to Congressional Committees, Telemarketing: Implementation of the Do-Not-Call Registry (January 2005).

intended recipients.⁴⁰ These changes have not affected the primary questions for telemarketing regulation: where did the call terminate? Who was harmed and in what location? The call terminates and causes harm in one location, which is easy to determine and should be the situs of the violation.

When a telemarketer calls a consumer, the telemarketer intentionally reaches into the consumer's home, located in a specific state, to make a telephone solicitation. No matter where the call originated or traveled, the end result and the objectionable behavior occurs in the consumer's home and state. The State may regulate such conduct under its police power, and the Commission must not preempt state regulations designed to protect residents from these calls.

IV. States Traditionally Have Enacted Legislation For the Protection Of Their Residents, And State Do-Not-Call Regulations Protect Consumers, Are Founded On State Police Powers, And Should Apply To Interstate And Intrastate Calls.

The state do-not-call programs protect consumers through the states' police powers. The programs also apply to areas traditionally regulated by the states: protection of residents' privacy and right to be left alone, and protection against unfair business practices. Courts have recognized a "presumption against finding pre-emption of state law in areas traditionally regulated by the States."⁴¹ The TCPA includes no clear statement of preemption sufficient to override this presumption.

Preemption certainly is not necessary to achieve the purposes of do-not-call regulations: protection of consumers. The states and residents are not harmed by the state-specific regulation. To the contrary, states have been very effective in managing their do-not-call programs. The Telemarketers also will not be unduly harmed by the continuation of collaborative state and federal regulation. In this age of modern technology, the Telemarketers can readily identify those consumers

⁴⁰ See, e.g., *State ex rel. Utils. Comm'n v. Thrifty Call*, 154 N.C. App. 58, 67 (N.C. Ct. App., 2002) (quoting *Northwest Telco, Inc. v. Mountain States Telephone and Telegraph Co.*, 88 Pub. Util. Rep. 4th 462, 464, 1987 WL 258025 (Idaho Pub. Util. Comm'n 1987)). This trend will continue and grow with the widespread introduction of Voice over Internet Protocol (VoIP).

⁴¹ *California v. ARC America Corp.*, 490 U.S. 93, 101, 109 S. Ct. 1661, 1665, 104 L. Ed. 2d 86, 94-95 (1989) (citations omitted). See also *Cipollone v. Liggett Group*, 505 U.S. 504, 518, 112 S. Ct. 2618, 2618, 120 L. Ed. 2d 407, 424 (1992) ("we must construe these provisions in light of the presumption against the pre-emption of state police power regulations").

registered on state do-not-call lists and can become acquainted easily with each state's specific requirements and restrictions.

For these reasons, the Commission should not preempt state do-not-call regulations and should continue the collaboration between state and federal regulation over both interstate and intrastate calls.

A. Regulation of these issues rests with the states, which traditionally have protected residents through their police power.

States have used their police power to enact and implement do-not-call regulations. Although Congress has the authority to preempt state law, it did not expressly do so in the TCPA. Other factors indicate that Congress supplemented but did not displace state regulation of telemarketing. The state do-not-call programs therefore should not be preempted.

Our system of federalism includes a constitutionally mandated, yet delicate, balance of power.⁴² “We begin with the axiom that, under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause.”⁴³ “This federalist structure of joint sovereigns preserves to the people numerous advantages.”⁴⁴ “[I]t allows for more innovation and experimentation in government; and it makes government more responsive.”⁴⁵

“If Congress intends to alter the ‘usual constitutional balance between the States and the Federal Government,’ it must make its intention to do so ‘unmistakably clear in the language of the statute.’”⁴⁶ “This plain statement rule is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not

⁴² *Gregory v. Ashcroft*, 501 U.S. 452, 458, 111 S. Ct. 2395, 2399, 115 L. Ed. 2d 410, 422 (1991).

⁴³ *Tafflin v. Levitt*, 493 U.S. 455, 458, 110 S. Ct. 792, 795, 107 L. Ed. 2d 887, 894 (1990).

⁴⁴ *Gregory v. Ashcroft*, 501 U.S. at 458, 111 S. Ct. at 2399, 115 L. Ed. 2d at 422.

⁴⁵ *Id.*

⁴⁶ *Id.*, 501 U.S. at 460, 111 S. Ct. at 2401, 115 L. Ed. 2d at 424 (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242, 105 S. Ct. 3142, 3147, 87 L. Ed. 2d 171, 179 (1985)).

readily interfere.”⁴⁷ “When Congress legislates in a field traditionally occupied by the States, ‘we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.’”⁴⁸

Based on these standards, the Commission must not preempt state telemarketing regulations. The “protection of a person’s general right to privacy -- his right to be let alone by other people -- is, like the protection of his property and of his very life, left largely to the law of the individual States.”⁴⁹ Likewise, regulation against unfair business practices “is an area traditionally regulated by the States.”⁵⁰ States, therefore, should be free to continue their do-not-call programs. The federal program and the National Do-Not-Call Registry should continue as a complement and supplement to state regulations, as federal and state regulations have continued in other areas.⁵¹

B. Federal preemption of interstate telemarketing regulations will create a two-tiered regulatory scheme and may lead to consumer confusion.

The TCPA does not authorize federal preemption of state do-not-call regulations, and preemption would be an inappropriate interference with states’ police powers. The TCPA itself clearly specifies that states may impose more restrictive intrastate requirements.⁵² The Telemarketers argue that the TCPA allows state-specific regulation of intrastate calls only and that any restrictions on interstate calls should be preempted by the Commission to the extent the regulations differ from the TCPA.

⁴⁷ *Id.*, 501 U.S. at 461, 111 S. Ct. at 2401, 115 L. Ed. 2d at 424.

⁴⁸ *California v. ARC America Corp.*, 490 U.S. 93, 101, 109 S. Ct. 1661, 1665, 104 L. Ed. 2d 86, 94 (1989) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 1152, 91 L. Ed. 1447, 1459 (1947)). See also *Cipollone v. Liggett Group*, 505 U.S. 504, 518, 112 S. Ct. 2618, 2618, 120 L. Ed. 2d 407, 424 (1992) (“we must construe these provisions in light of the presumption against the pre-emption of state police power regulations”).

⁴⁹ *Katz v. United States*, 389 U.S. 347, 351, 88 S. Ct. 507, 511, 19 L. Ed. 2d 576, 581 (1967) (footnotes omitted).

⁵⁰ *California v. ARC America Corp.*, 490 U.S. at 101, 109 S. Ct. at 1665, 104 L. Ed. 2d at 94-95.

⁵¹ See, e.g., *Id.*, 490 U.S. at 102, 109 S. Ct. at 1665, 104 L. Ed. 2d at 95 (federal law supplemented state antitrust remedies); *United States v. Turkette*, 452 U.S. 576, 587 n9, 101 S. Ct. 2524, 2531 n9, 69 L. Ed. 2d 246, 257 n9 (1981) (continued state and federal regulation of crimes, with no preemption or restriction under RICO).

⁵² 47 U.S.C.A. §227(e)(1) (2001). The TCPA also specifies that states may prohibit telemarketing calls without distinguishing between interstate and intrastate calls. The section title - “State law not preempted” – further reflects that the TCPA does not preempt state regulations. *Id.*

If the Commission preempts state regulations regarding interstate telemarketing calls, the states will be forced into two-tiered regulation, to the detriment of the state regulatory agencies and, more importantly, local consumers. As the Commission has recognized, consumers may be confused by inconsistent restrictions on interstate and intrastate calls “as [consumers] are unlikely to be able to determine whether the [telemarketing] organization is making an intrastate or interstate call.”⁵³ Moreover, the consumer likely will turn to the state regulatory authority to enforce the do-not-call restrictions, whether the call originated from within or without the state.

The Telemarketers are asking for a change that will result in administrative complexities and convert alleged telemarketer confusion into actual consumer confusion. If confusion is a result of either regulatory scheme, then let the burden fall on the initiators of the unwanted telephone solicitation, not the recipients who have a right to expect that their privacy will be respected. For these reasons too, the Commission should maintain the current system of collaborative regulation among the Commission, the FTC, and the states.

V. The Balance Of Interests Requires Continuation Of State Regulations.

In addition to the states’ consumer protection powers, the balance of interests in this matter requires continuation of the collaborative state and federal regulation of interstate and intrastate telemarketing calls. The consumers have a much stronger underlying concern and much less ability to change their situation than the Telemarketers.

A. The Telemarketers can comply easily with both state and federal regulations, and their interests in federal preemption are pecuniary.

The Telemarketers complain that the state do-not-call laws are restrictive, will interfere with their business interests, “impose burdensome compliance costs,” and “will likely cause consumer

⁵³ *In re TCPA*, DA 03-2855, CG Docket No. 02-278, *Report on Regulatory Coordination*, 18 FCC Rcd. 18,558 (Sept. 8, 2003).

confusion.”⁵⁴ Again, these arguments distort the proper focus of the do-not-call regulations, which is the consumers’ interests and protection. Telemarketers, in pursuing pecuniary results, are arguing for ease and convenience at the expense of consumers’ express desire for and right to privacy.

The Telemarketers complain about burdensome compliance costs. Compliance costs, however, are a natural result of doing business in multiple states. The Telemarketers routinely must comply with a variety of state regulations. Whenever a company does business in a state, the company must learn and comply with the rules and regulations applicable to conducting business in that state. This practicable application of commerce is accepted and practiced in many other instances. Here, however, the Telemarketers ask the Commission to sanction special treatment and protection of their commercial activities. They want authority to reach into other states, cause unwanted consequences in those states, and evade application of the states’ applicable statutes and regulations. In sum, they want to limit privacy protections for the consumers, protections deemed appropriate by elected officials of the respective states.

What the Telemarketers now seek may ultimately not be useful to them if they prevail in this proceeding. Now, states with do-not-call lists compile valuable information, which telemarketers may obtain: the list of state residents who do not want to be contacted and the telemarketing exceptions the state residents are willing to tolerate, which are reflected in the state-enacted regulations. This allows telemarketers to refine their own lists of potential customers, which in turn can reduce the time Telemarketers waste calling uninterested consumers. The state-provided information thus helps telemarketers devote calling efforts to a more focused target market that is not opposed to telephone solicitations. It also may help telemarketers avoid alienating a potential or former customer who may consider a telemarketing call an invasion of his or her privacy regardless of the product or service being offered.

⁵⁴ American Teleservices Association, Inc., *Petition for Declaratory Ruling*, filed August 24, 2004, at ii. The Telemarketers fail to note that consumers certainly will be more confused if different laws apply to the calls they receive in their home, depending on whether the telemarketer calls from within or without the state.

B. Consumers, who want to protect their privacy interests, have very few options and almost no power to change telemarketers' ability to intrude into their homes.

In contrast to the Telemarketers' pecuniary interests, consumers who register on the do-not-call lists seek to enforce their privacy rights and have expressed their desire to be "left alone."⁵⁵ They want to protect the sanctuary of their homes, where they are not subjected to unwanted speech and noise. They do not want intrusive calls from telemarketers and through their actions have shown their support for do-not-call programs; the Tennessee Do-Not-Call Registry has nearly two million numbers, which Tennesseans have taken the time and effort to register and include in the program.

Without aggressive state regulation and enforcement of solicitation calls, consumers have almost no control over the intrusion of telemarketing on their lives. By comparison, the Telemarketers have almost complete control. If a telemarketer does not agree with a regulatory outcome, the telemarketer can modify its marketing practices and calling patterns (i.e. stop calling into a particular state) or bring its practices into alignment with applicable regulations.

This balance of equities demonstrates that the state and federal governments must continue working together in regulating both interstate and intrastate telemarketing calls.

VI. States Are Better Equipped To Respond Quickly To Allegations Of Telemarketing Violations And To Enforce The Do-Not-Call Laws.

The states currently investigate and enforce their own telemarketing regulations. States, therefore, have unique, extensive expertise in investigating and resolving allegations of telemarketing violations, in addition to the myriad of other consumer protection and fraud issues over which they traditionally have enforcement power. They also are familiar with the specific risks to and needs of their residents. States, thus, are better equipped to enforce do-not-call regulations.

⁵⁵ *Hill v. Colorado*, 530 U.S. at 717, 120 S. Ct. at 2489, 147 L. Ed. 2d at 612 (right to be let alone has been characterized as the most comprehensive and valued right); *FCC v. Pacifica Found.*, 438 U.S. at 748, 98 S.Ct. at 3040, 57 L.Ed.2d at 1093 (the right to be left alone in the home outweighs First Amendment rights of media intruders). See also *Katz v. United States*, 389 U.S. at 351, 88 S. Ct. at 511, 19 L. Ed. 2d at 581 (protection of right to be let alone is left largely to the individual states).

Federal regulation and enforcement against interstate telemarketers may not provide the same protection to consumers. Federal preemption raises additional questions of who will bear the expense of enforcing the regulations, and who will decide, and by what criteria, when to pursue enforcement actions in response to consumer complaints.⁵⁶ In addition, the federal government may have to address questions of proof regarding the origination of the telemarketing calls, which will become increasingly difficult to establish with the introduction of new technologies.⁵⁷

Based on this, the Commission should continue the current system of combined regulation among the states, the Commission, and the FTC.

A. States are well equipped to enforce do-not-call regulations.

States have been running their do-not-call programs efficiently and effectively for many years. Consumers have come to expect a high level of protection from these programs. Under a federally run program for interstate calls, consumers would expect the federal government to provide enforcement at least as rigorous as that of the states, with penalties comparable to those imposed by the states. Any other approach would harm the intended beneficiaries of the regulations, the consumers, and would reward the Telemarketers by reducing the timeliness and level of enforcement.

B. Tennessee has investigated and resolved more than 2,900 alleged telemarketing violations, and its experience helps demonstrate the states' expertise in enforcing telemarketing regulations.

Tennessee enacted its Do-Not-Call program on June 17, 1999.⁵⁸ The TRA took responsibility for the implementation and ongoing management of the program. Despite its limited staff and resources, the TRA has developed an enforcement system that is efficient and effective, promotes telemarketers' compliance with state and federal regulations, and maintains the highest level of protection for Tennessee's citizens.

⁵⁶ Currently, each state funds its own do-not-call program. Also, as explained in section VI(C), *infra*, the states are able to respond more quickly and fully to consumer complaints than the FTC or Commission.

⁵⁷ See, e.g., *State State ex rel. Utils. Comm'n v. Thrifty Call*, 154 N.C. App. 58, 67 (N.C. Ct. App., 2002) (calls sometimes are switched and routed through various networks and systems before reaching intended recipients).

⁵⁸ Tenn. Code Ann. § 65-4-401 to -408 (2004).

The enforcement phase of Tennessee's Do-Not-Call program began on August 1, 2000. Since then, the TRA has investigated, through personal contact with Tennessee consumers, each complaint it has received of a telemarketing activity that may be in violation of the Do-Not-Call program. Since the inception of the program, the TRA has efficiently investigated 2,930 complaints. Of these complaints, 2,039, or 69% of the total, involved out-of-state telemarketers.

The TRA also pursues formal enforcement actions against telemarketers when investigations reveal that such action is warranted. Of the twenty-eight enforcement actions completed at this time, fifteen actions, or 54%, have involved out-of-state telemarketers.⁵⁹ Statistical information compiled by the TRA indicates that these efforts have greatly reduced the number of unwanted telephone solicitation calls to Tennessee residents. Consumer complaints increased steadily in the first years of the program as Tennesseans registered their telephone numbers with the program and became aware of their rights. After only two years' of enforcement, complaints began decreasing, reaching a record low of 419 complaints for the year 2004,⁶⁰ while consumer participation continued increasing to include nearly two million telephone numbers on Tennessee's Do-Not-Call Register.

C. States can address consumers' complaints more quickly than the Commission.

Whenever possible, telemarketing regulation should be addressed at the state level. States are able to investigate and respond more readily to a consumers' individual complaint. States also can initiate investigations more quickly, rather than waiting for a certain number of complaints or other factors about a specific telemarketer before launching the investigation.⁶¹ This timing difference may be critically important for the individual consumers.⁶²

⁵⁹ This is evidence that states are fully capable of enforcing do-not-call restrictions against out-of-state telemarketing entities. It also defeats any argument to the contrary by the Telemarketers or proponents of federal preemption.

⁶⁰ The TRA received 524 consumer complaints in 2000, 652 in 2001, 678 in 2002, 518 in 2003 and 419 in 2004. As of this filing, the TRA has received less than 250 complaints in 2005.

⁶¹ In contrast, the "FTC and FCC do not take action on all consumer complaints." Instead, "they consider a number of factors when determining which alleged violations to pursue that include the type of violation alleged, the nature and amount of harm to consumers (e.g. invasion of privacy or financial harm), the potential that telemarketers will make future unlawful calls, and securing meaningful relief for affected consumers." U.S. Gov't Accountability

The TRA staff takes pride in its record of investigating, in a timely manner, each complaint that it receives under the Tennessee Do-Not-Call Program. Citizens need and want an agency that will respond quickly and effectively when they have a problem. The TRA provides a no-hassle reporting system that has produced results. The current enforcement scheme provides immediate, real-time information, which allows for swift and effective enforcement.

For example, in 2004, staff of a regional hospital notified TRA staff that the hospital was receiving prerecorded solicitation calls that were blocking the telephone lines and impairing the hospital's ability to make outgoing calls. These prerecorded solicitations, alleged violations of Tennessee's Do-Not-Call program, were creating a safety risk at the hospital. TRA staff immediately began an investigation. In less than one week, TRA staff had located the caller, informed the caller of the potential violation, and stopped the operation, thereby eliminating the safety concern at the hospital.⁶³ Such immediate response and resolution may not be achieved if the state programs are eliminated.⁶⁴

Consumers and telemarketers benefit from the efficient and effective action states take against telemarketers, both interstate and intrastate. For example, the TRA helped one out-of-state mortgage company that was engaging in telemarketing activities uncover employee fraud. The TRA had received a consumer complaint that the out-of-state telemarketer was making telephone solicitations to persons on the Tennessee Do-Not-Call Registry. The TRA promptly sent a "Notice

Office, GAO-05-113, Report to Congressional Committees, Telemarketing: Implementation of the Do-Not-Call Registry (January 2005), pp. 15-16.

⁶² A delay in the investigation often will cause additional, and perhaps irrevocable, harm to the consumers. For example, one consumer reported to the TRA that a telemarketer was calling repeatedly, would not understand or accept "no" in response to the solicitation, and refused to put the consumer on the company's internal do-not-call list. In another complaint, a telemarketer was using false and deceptive claims to acquire funds from an elderly consumer on the do-not-call list. Any delay in investigation would have been detrimental to these consumers.

⁶³ The TRA also received residential consumers complaints about the telemarketer and completed a full investigation and formal enforcement action. *See In re: Alleged Violations of the Tennessee Do-Not-Call Law, Tenn. Code Ann. 65-4-401 et seq. by Christopher Fischer d/b/a Satellite Solutions*, Docket No. 04-00234, *Order Approving Settlement Agreement* (December 1, 2004).

⁶⁴ As described in footnote 54, *supra*, the Commission and FTC do not immediately investigate or take action on every consumer complaint.

of Alleged Violation” to the mortgage company identified in the solicitation calls. The notice alerted the company to begin an investigation, which revealed a scheme by employees to defraud consumers and the company. The employees were apprehended trying to leave the country and the principal employee ultimately was convicted of five counts of wire fraud stemming from his scheme to embezzle almost ten million dollars.⁶⁵

In another example, the TRA joined with other states and the FTC in “Operation No Credit,” a joint law enforcement campaign targeting a wide range of credit-related frauds.⁶⁶ The TRA had obtained pertinent information through its investigation of Do-Not-Call complaints from Tennessee residents and was able to assist the FTC with this information. As a result of the campaign, the FTC entered a settlement agreement with Toronto-based telemarketers who were alleged to have targeted United States’ consumers for the fraudulent credit offers. The settlement required consumer redress and banned the telemarketers from selling or telemarketing credit-related goods or services.⁶⁷

D. State telemarketing regulation is better for the consumers and more economical than federal control.

“America’s prosperity requires restraining the spending appetite of the federal government,” and “taxpayer dollars must be spent wisely, or not at all.”⁶⁸ State telemarketing regulations do not require the use of federal funds or tax dollars. In contrast, exclusive enforcement of interstate telemarketing calls by the federal government, as requested by the Telemarketers, will require federal dollars and resources.

⁶⁵ *In re: Advantage Investors Mortgage for Alleged Violations of Tenn. Code Ann. 65-4-401 Et Seq. Do-Not-Call Sales Solicitation Law*, Docket No. 02-00902, *Order Approving Settlement Agreement* (November 14, 2002).

⁶⁶ See News Release, Federal Trade Commission, FTC, States Give “No Credit” to Finance-Related Scams in Latest Joint Law Enforcement Sweep, (September 5, 2002), available at <http://www.ftc.gov/opa/2002/09/opnocredit.htm>.

⁶⁷ See News Release, Federal Trade Commission, Canadian Telemarketers to Pay for Duping U.S. Consumers into Buying Bogus Credit-Related Products, available at <http://www.ftc.gov/opa/2003/09/firstbenefit.htm>; *Federal Trade Commission v. 1st Beneficial Credit Servs.*, Case No. 1:02CV1591, *Stipulated Final Order and Permanent Injunction* (U.S. D.Ct. N.D. Ohio), available at <http://www.ftc.gov/os/2003/09/firstbenefitstip.pdf>.

⁶⁸ President George W Bush, State of the Union Address (February 2, 2005), transcript available at <http://www.whitehouse.gov/news/releases/2005/02/20050202-11.html>.

Currently, state regulatory activities, such as investigations, enforcement actions, and settlements, relieve the federal government of a high percentage of telemarketing complaints. The states are responsible for the enforcement of their do-not-call programs. Many state programs have funding provisions that defray the regulatory and enforcement expenses of the programs. Tennessee, for example, requires that telephone solicitors pay an annual registration fee of five hundred dollars (\$500.00) to defray such costs.⁶⁹ Telemarketers are allowed access to Tennessee's Do-Not-Call Register only after they have properly registered.

If the Commission preempts state regulations as to interstate calls, the Telemarketers will have no reason to comply with state-specific regulations or to obtain state-specific lists, unless they have a physical presence in the state. The Commission will have to determine who will be responsible for enforcement of the TCPA, which then will be the only regulation on interstate telemarketing. Certainly, the Commission cannot expect the states to absorb the costs of such enforcement after losing the funding provided by the state-run programs.⁷⁰ The Commission will have to find significant federal funds or risk reduced enforcement and lost effectiveness of the do-not-call protections consumers have come to expect.

VII. Conclusion

The existing structure of cooperative federalism regarding this regulation among the states, the Commission, and the FTC is the best solution. It is the most economical option, achieves the objectives of telemarketing regulation, provides the best consumer protection, and does not unduly interfere with the Telemarketers' business interests. Moreover, the structure works, as reflected in the numerous comments filed by consumers asking that the Commission not preempt state regulations.

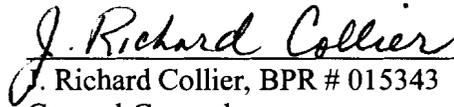
⁶⁹ Tenn. Code Ann. § 65-4-405(d) (2004).

⁷⁰ "[W]e may assume that Congress will not implicitly attempt to impose massive financial obligations on the States." *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17, 101 S. Ct. 1531, 1539, 67 L. Ed. 2d 694, 707 (1981).

The TRA has successfully enforced the Tennessee Do-Not-Call program for more than five years, beginning well before the federal scheme was implemented, without the use of state or federal tax dollars. Tennessee consumers have come to expect a high level of protection from unwanted telemarketing intrusions. More than 1.9 million telephone numbers are registered on Tennessee's Do-Not-Call Registry, and the citizens who registered those numbers have a right to expect that their privacy will be protected and violations will be enforced at the same high level now and in the future.

For these reasons, the TRA respectfully urges the Commission to deny the Telemarketers' petitions and their requests for federal preemption.

Respectfully submitted,



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