

“customer” and “donor.”¹²² The Rule uses these more targeted terms to capture the varied nature of transactions between sellers or telemarketers and individuals who are, or may be, required to pay for something as the result of a telemarketing solicitation. Thus, it is the intent of the Commission that the term “donor” as used in the Rule encompass not only those who have agreed to make a charitable contribution, but also any person who is solicited to do so, to be consistent with its use of the term “customer.” Therefore, the Commission has determined that the term “donor” is necessary and appropriate, and has retained the definition of “donor” in the amended Rule without modification.

§ 310.2(n) — Established business relationship

The Commission has determined to add to the Rule a definition of “established business relationship.” This new definition comes into play in § 310.4(b)(1)(iii), which now exempts from the national “do-not-call” registry calls from sellers with whom the consumer has an “established business relationship” (unless that consumer has asked to be placed on that seller’s company-specific “do-not-call” list). This definition limits the exemption to relationships formed by the consumer’s purchase, rental, or lease of goods or services from, or financial transaction with, the seller within eighteen months of the telephone call (or, in the case of inquiries or applications, within three months of the call).

Industry comments were nearly unanimous in emphasizing that it is essential that sellers be able to call their existing customers.¹²³ Although the initial comments from consumer groups opposed an exemption for “established business relationships,”¹²⁴ their

statements during the June 2002 Forum and in their supplemental comments expressed the view that such an exemption would be acceptable, as long as it was narrowly-tailored and limited to current, ongoing relationships.¹²⁵ Moreover, state law enforcement representatives’ comments on their experience with state “do-not-call” laws that have an exemption for “established business relationships” suggest that this type of exemption is consistent with consumer expectations.¹²⁶ While the Commission is persuaded that an “established business relationship” exemption is necessary and appropriate, it believes that the exemption must be narrowly crafted and clearly defined to avoid a potential loophole that could

difficulty in defining a “pre-existing business relationship” without creating significant loopholes in the protections provided by the national “do-not-call” registry (described in the discussion of amended Rule § 310.4(b)(1)(iii) below). See NCL-NPRM at 10. Furthermore, they did not agree with industry’s argument that consumers want to hear from companies with whom they have an existing relationship. NCL stated that the fact that a consumer may have had a relationship with a company does not necessarily mean that he or she wishes to receive calls, or to continue to receive calls, from that company. NCL-NPRM at 10. Consumer advocates believed the FTC had taken the right approach: the burden should lie with the seller to show specific consent to receive calls. NCL-NPRM at 10; EPIC-NPRM at 20-21; PRC-NPRM at 2.

¹²² June 2002 Tr. I at 110 (NCL) (“This would have to be . . . really narrowly defined in order to protect consumers so that if somebody had something that was ongoing . . . that would be in a different category.”). See also AARP-Supp. at 3 (“AARP recognizes that there may be an expectation by consumers that they will be in contact with businesses with whom they have current, ongoing, voluntary relationship; calls from such businesses are not necessarily unwanted or unsolicited. Calls made from a business with which consumers had a prior relationship are a different matter altogether. In situations where the consumer has chosen not to continue a business relationship, it cannot be presumed they wish to be solicited by that business again. Therefore, AARP believes that any exemption for an existing business relationship must be limited to those situations where the relationship is current, ongoing, voluntary, involves an exchange of consideration, and has not been terminated by either party.”).

¹²³ June 2002 Tr. I at 110-19. See also June 2002 Tr. I at 119-22, in which participants discussed an AARP survey conducted in conjunction with the Missouri Attorney General’s Office, which showed that three-fourths of consumers did not feel an established business relationship was justified. However, representatives from the Missouri Attorney General’s Office explained that the results were less a measure of consumer condemnation of such an exemption, than an indication that consumers were receiving calls from businesses with whom they did not perceive that they had such a relationship. According to the Missouri representatives, businesses took a broader view of the relationship than did consumers. As noted in more detail below, consumers appear to be comfortable with an exemption for “established business relationships” once its parameters are explained to them.

defeat the purpose of the national “do-not-call” registry.

In adopting the “do-not-call” provisions of the original Rule, the Commission considered, among other things, the approach taken by Congress and the FCC in the TCPA and its implementing regulations.¹²⁷ In crafting an “established business relationship” definition, it is useful again to consider the TCPA, which specifically exempts calls “to any person with whom the caller has an established business relationship.”¹²⁸ The House Report on the TCPA’s “established business relationship” exemption confirms that Congress intended for the reasonable expectation of the consumer to be the touchstone of the exemption:

In the Committee’s view, an “established business relationship” also could be based upon any prior transaction, negotiation, or inquiry between the called party and the business entity that has occurred during a reasonable period of time. . . . By requiring this type of relationship, the Committee expects that otherwise objecting consumers would be less annoyed and surprised by this type of unsolicited call since the consumer would have a recently established interest in the specific products or services. . . . In sum, the Committee believes the test to be applied must be grounded in the consumer’s expectation of receiving the call.¹²⁹

When it promulgated its rules pursuant to the TCPA, the FCC included the following definition of “established business relationship” with regard to its company-specific “do-not-call” requirements:

The term *established business relationship* means a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.¹³⁰

Consideration of state approaches to the “established business relationship”

¹²⁷ 60 FR at 43855.

¹²⁸ 47 U.S.C. 227(a)(3)(B). The legislative history of the TCPA shows that Congress exempted “established business relationship” calls “so as not to foreclose the capacity of businesses to place calls that build upon, follow-up, or renew, within a reasonable period of time, what had once been an existing customer relationship.” H.R. REP. NO. 102-317 at 13 (1991). Throughout the House Report discussing the exemption for “established business relationship,” the point is stressed that the exemption is intended to reach only those relationships that are *current or recent*. The Report consistently refers to an “established business relationship” in terms of “the existence of the relationship at the time of the solicitation, or within a reasonable time prior to it.” *Id.* at 13-15. (emphasis added).

¹²⁹ *Id.* at 14, 15.

¹³⁰ 47 CFR 64.1200(f)(4).

¹²² The term “consumer” is defined generally as “one that utilizes economic goods.” Merriam-Webster’s Collegiate Dictionary, at: <http://www.merriamwebster.com/cgi-bin/dictionary#>. This broader term is used in the Rule in the definition of “established business relationship,” § 310.2(n), and in the provision banning the transfer of unencrypted account numbers, § 310.4(a)(5). In each of these instances, the Commission has consciously used the broader term “consumer” to effect broader Rule coverage.

¹²³ See, e.g., AFSA-NPRM at 13-14; AmEx-NPRM at 3; ANA-NPRM at 5; ARDA-NPRM at 17; ATA-NPRM at 29; BofA-NPRM at 4; Best Buy-NPRM at 1; DialAmerica-NPRM at 12; DMA-NPRM at 33-34; DSA-NPRM at 7-8; ERA-NPRM at 36-37; Gottschalks-NPRM at 1; NCTA-NPRM at 6; NRF-NPRM at 13; PMA-NPRM at 28; Roundtable-NPRM at 5; SIIA-NPRM at 2-3; Time-NPRM at 6-7; VISA-NPRM at 3. See also, e.g., ARDA-Supp. at 1; ICTA-Supp. at 2.

¹²⁴ See, e.g., EPIC-NPRM at 20-21; NCL-NPRM at 10. Among other things, consumer advocates opposed such an exemption because of the