

exemption is also instructive. Most state "do-not-call" laws have some form of exemption for "established business relationships," and several of these are modeled on the language of the FCC's exemption.¹³¹ However, there is an important difference between the FCC approach and that of many of the states, in that many state law exemptions circumscribe the scope of an "established business relationship" by specifying the amount of time after a particular event (like a purchase) during which such a relationship may be deemed to exist.¹³² The Commission believes that this approach is more in keeping with consumer expectations than an open-ended exemption. As discussed in more detail below, many consumers favor an exemption for companies with whom they have an established relationship. Consumers also might reasonably expect sellers with whom they have recently dealt to call them, and they may be willing to accept these calls. A purchase from a seller ten years ago, however, would not likely be a basis for the consumer to expect or welcome solicitation calls from that seller.

In addition, specific time limits for an "established business relationship" are particularly appropriate for a general "do-not-call" registry such as the one to be maintained by the Commission, as opposed to the company-specific "do-not-call" lists for which the FCC definition was crafted. The Commission believes that an "established business relationship" exemption in a national list applying to many sellers and telemarketers should be carefully and narrowly crafted to ensure that appropriate companies are covered while excluding those from whom consumers would not expect to receive calls. A specific time limit balances the privacy needs of consumers and the need of businesses to contact their current customers.

Comments received in response to the NPRM stress the importance of extending such an exemption to current, existing relationships and prior relationships that occurred within a

reasonable period of time.¹³³ Throughout the comments from industry stressing the need for an "established business relationship" exemption, a consistent theme is that *such an exemption is necessary for "existing customers" or someone with whom sellers "currently do business,"* and there seems to be a common understanding regarding what constitutes an "existing" relationship.¹³⁴ There is less consensus when it comes to the issue of how long a business relationship lasts *following* a transaction between a seller and consumer. Many states have attempted to provide some clarity regarding how long after dealings between a consumer and seller have ceased that a residual "established business relationship" could be deemed still to exist.

Twelve of the states that have an "established business relationship" exemption limit it to a specific time period after a transaction has occurred, ranging from six months to 36 months.¹³⁵ Industry commenters suggested various time periods to limit the exemption. Several suggested 24 to 36 months, while others stated that a shorter period (12 months) would be more appropriate.¹³⁶ The Commission

¹³³ The comments received on "established business relationship" came primarily from the business community. On the other hand, there was little comment from consumer advocates and state regulators on how such an exemption would be formulated because the proposed Rule did not include an "established business relationship" exemption. However, the NPRM did ask about the effect on companies and charitable organizations with whom consumers had a pre-existing business or philanthropic relationship of the proposal to allow companies to call consumers on the "do-not-call" registry if they had given their express verifiable authorization to call (67 FR at 4539, question 9). As discussed in more detail above in note 124, those few consumer advocates who did mention such an exemption were opposed to it.

¹³⁴ See, e.g., ABA-NPRM at 10; Community Bankers-NPRM at 2; AmEx-NPRM at 3; ANA-NPRM at 5; Associations-NPRM at 2; ARDA-NPRM at 17; Bank One-NPRM at 4; BofA-NPRM at 4; Best Buy-NPRM at 1; Cendant-NPRM at 5-6; Citigroup-NPRM at 4; Comcast-NPRM at 3; CMC-NPRM at 6; Cox-NPRM at 2, 4; DMA-NPRM at 33, 34; Eagle Bank-NPRM at 2; Roundtable-NPRM at 5; Gottschalks-NPRM at 1; NCTA-NPRM at 4; NRF-NPRM at 13; SIIA-NPRM at 2-3; Time-NPRM at 6; VISA-NPRM at 3.

¹³⁵ Six months (Louisiana, Missouri); 12 months (Pennsylvania, Tennessee); 18 months (Colorado, Illinois); 24 months (Alaska, Massachusetts, Oklahoma); 36 months (Arkansas, Kansas). In addition, New York apparently has adopted an 18-month time period: the New York statute does not contain a time limit; however, at the June 2002 Forum, NYSCPB stated that New York applies an 18-month time limit. June 2002 Tr. I at 115 ("We have two separate exemptions. . . . The second thing is a prior business relationship, which we define as an exchange of goods and services for consideration within the preceding 18 months. . . ."). Indiana's statute does not have an exemption for "established business relationships."

¹³⁶ Industry commenters generally supported a 24-month time period, but did not submit data that

believes, based on the record evidence and statements from Congress regarding the TCPA's "established business relationship," that a company should be able to claim the exemption only if there has been a relatively recent transaction between the customer and the seller sufficient to support the existence of an "established business relationship."

Based on the comments, the Commission finds little support for a 36-month time period. Most of the commenters who suggested that time period did so as part of a joint comment filed by five associations.¹³⁷ In the comments the individual associations filed separately, however, they suggested a time period of 24 months.¹³⁸ NAA initially suggested 24 months, but expanded that to 36 months in its supplemental comment. Industry commenters who advocate 24 months provide little support for their assertion that it is the appropriate length of time by which to measure "reasonableness;" nor did they submit data that would show that a shorter time period would not serve their purposes. Other industry members (such as Bank of America, Consumer Mortgage Coalition, and Federated Department Stores) suggested shorter time periods. The Commission does not believe that a relationship which terminated or lapsed two years ago would constitute a relationship that had recently terminated or lapsed. The Commission believes that if consumers received a call from a company with whom the most recent purchase, rental, lease or financial transaction occurred or lapsed two years ago or longer, consumers would likely be surprised by that call and find it to be unexpected.

The Commission believes that 18 months is an appropriate time frame because it strikes a balance between industry's needs and consumers' privacy rights and reasonable expectations about who may call them and when. By extending beyond a single annual sales cycle, the 18-month period allows sufficient time for businesses to renew contact with prospects who may only purchase once a year. Moreover,

would tend to show that a shorter time period would not serve their purposes. The breakdown of suggested time periods is as follows: "recently terminated or lapsed" (New Orleans-NPRM at 14-15); 12 months (BofA-NPRM at 4; CMC-NPRM at 6-7); 24 months (ATA-Supp. at 8; ERA-NPRM at 38; ERA-Supp. at 19; MPA-Supp. at 11; NAA-NPRM at 11; June 2002 Tr. I at 109 (PMA)); 36 months (ARDA-NPRM at 20; Associations-Supp. at 3-4). In a supplement to their comment, FDS supported limiting telemarketing sales calls to customers who have made a purchase in the past 12 months, while allowing strictly informational calls to persons who have had a transaction within the past 36 months. Federated-Supp. at 1-2.

¹³⁷ See Associations-NPRM at 3-4.

¹³⁸ See note 136 above.

¹³¹ Fourteen state "do-not-call" statutes are open-ended and do not contain a time limit for tolling the established business relationship: Alabama, California, Connecticut, Florida, Georgia, Idaho, Kentucky, Maine, Minnesota, Oregon, Texas, Vermont, Wisconsin, and Wyoming. Three of these "open-ended" state statutes incorporate the FCC definition either in whole or in part: California, Texas, and Wyoming. In addition, four other states incorporate the FCC definition in whole or in part, but limit the time period during which a business may claim an "established business relationship" once the relationship has lapsed: Colorado, Kansas, Oklahoma, and Pennsylvania. See note 592 below for citations to all state "do-not-call" statutes.

¹³² See discussion and note 135 below.