

limiting the “established business relationship” to 18 months from the date of the last purchase or transaction would be at least as restrictive as the majority of states that have such an exemption, thus achieving greater consistency for both industry and consumers. The experience of states that have an “established business relationship” exemption in their “do-not-call” laws indicates that a relatively limited “established business relationship” exemption does not conflict with consumers’ expectations. At the June 2002 Forum, the representatives from New York and Missouri spoke about consumer expectations in connection with their states’ “do-not-call” lists.¹³⁹ Both noted that consumers appeared to be comfortable with such an exemption because they had received few complaints from consumers regarding companies with whom they had an established relationship.¹⁴⁰ The states’ experience is not contradicted by the comments of individual consumers in response to a specific question included on the Commission’s website inviting email comments from the public. Although 60 percent of consumers who responded to this question stated that they opposed an exemption for “established business relationship,” 40 percent favored such an exemption.¹⁴¹

Furthermore, a study conducted in 2002 by the Information Policy Institute found that consumers preferred a “nuanced approach” to the “do-not-call” issue, wanting to limit some calls to their household, but not all calls.¹⁴²

¹³⁹ See June 2002 Tr. I at 110-21.

¹⁴⁰ *Id.* at 118-19 (New York: “Well, [consumers are not unhappy], and a lot of times they complain, and you could say they’re [sic] prima facie evidence they’re unhappy. We call them back and say, gee, did you have a transaction with these folks? They claim you did on X, Y and Z, and they furnished us this paperwork. And then they say, oh, yeah. They don’t seem to be mad.”) (Missouri: “Most people when you call them back are delighted that 70 to 80 percent of their phone calls have been caused to not come in, so when we explain to them that you had a relationship or you explain to them that some of these calls are exempt, they understand when you explain that to them, and they’re delighted, because our anecdotal information shows that 70 to 80 percent of the calls people had been receiving, they’re not receiving now.”).

¹⁴¹ Analysis of consumer email comments in the Commission’s TSR comment database indicates that about 860 favored an exemption for calls from firms with whom they already have an established relationship, while about 1,080 opposed such an exemption. Furthermore, over 13,000 of the 14,971 comments submitted by Gottschalks’ customers supported allowing Gottschalks to call them even if they signed up on a “do-not-call” registry to block other calls.

¹⁴² Michael A. Turner, “Consumers, Citizens, Charity and Content: Attitudes Toward Teleservices” (Information Policy Institute, June 2002) at 4, 8 (hereinafter “Turner study”).

According to the study, 50 percent of consumers surveyed supported regulations that would allow local or community-based organizations to call during specific hours of the day.¹⁴³ Furthermore, slightly less than half of the respondents supported legislation that would allow calls, but only from local or community-based organizations with whom they have an existing relationship.¹⁴⁴ The survey showed that consumers were less likely to welcome calls from national companies, although 40 percent indicated that they would allow calls from national organizations with whom they had an existing relationship.¹⁴⁵

In sum, consumers are split over whether they favor an “established business relationship” exemption. Given the difference of opinion among consumers, and industry’s convincing arguments regarding the detrimental effects the lack of an exemption would cause, the Commission is persuaded to provide an exemption for “established business relationships.”

The definition of “established business relationship” in the amended Rule would limit the exemption in the case of inquiries and applications to three months after the date of the application or inquiry (except with the consumer’s express consent or permission to continue the relationship). The Commission believes that a consumer’s reasonable expectations are different in the case of inquiries and applications as compared to purchase, rental, and lease transactions. A simple inquiry or application would reasonably lead to an expectation of a prompt follow-up telephone contact close in time to the initial inquiry or application, not one after an extended period of time. Comments from NYSCPB at the June 2002 Forum also warned of possible abuse in the creation of an “established business relationship” based on inquiries from consumers.¹⁴⁶ The Commission believes three months should be a sufficient time frame in

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ [146]: June 2002 Tr. I at 116 (NYSCPB) (“[D]oes a mere inquiry constitute a business relationship? And our answer to that is no, because we have had some what I would say are really sleazy operators. They will call up and leave a message on your phone. They won’t even identify who they are. They will simply say ‘Call us back, it’s very important.’ You call back out of curiosity or whatever, okay, and then all of a sudden they feel free to bombard you for the next few years with calls.”). The Commission intends that such a practice would not entitle a seller or telemarketer to make calls to consumers by claiming to have an “established business relationship.”

which to respond to a consumer’s inquiry or application.

The amended Rule allows for an 18-month time limit where there has been a purchase, rental or lease, or other financial transaction between the customer and seller. The 18-month time limit for an “established business relationship” based on a purchase, lease, rental, or financial transaction runs from the date of the last payment or transaction, not from the first payment. In instances where consumers pay in advance for future services (e.g., purchase a two-year magazine subscription or health club membership), the seller may claim the exemption for 18 months from the last payment or shipment of the product. For such ongoing relationships, it makes little difference to likely consumer expectations whether the purchase was financed over time or paid for up front. Sellers who provide products or services where the consumer is required to pay in advance can also get the consumer’s express agreement to call, as provided in § 310.4(b)(1)(iii)(B)(i).

Several financial services industry commenters urged that any “established business relationship” exemption should encompass all affiliates of a seller.¹⁴⁷ These commenters noted that regulatory requirements often dictate the corporate structure of financial institutions, which must market products and services across holding company affiliates and subsidiaries.¹⁴⁸ For that reason, they suggested that any exemption for an “established business relationship” should extend to all members of a corporate family, including affiliates and subsidiaries, so long as the individual has an “established business relationship” with any member of that corporate family.¹⁴⁹ They also suggested that agents of the seller be included within the exemption if the consumer reasonably would expect the agent to be included under the exception.¹⁵⁰

The Commission believes that such a broad definition of “established business relationship” is inappropriate in the context of a “do-not-call” registry which is intended to protect consumers’ privacy. As stated earlier, the Commission believes that such an exemption must be narrowly crafted to avoid defeating the purpose of the “do-not-call” registry. In determining whether affiliates or subsidiaries should

¹⁴⁷ See, e.g., BofA-NPRM at 4; Bank One-NPRM at 4; Eagle Bank-NPRM at 2; Roundtable-NPRM at 5; Fleet-NPRM at 4; VISA-NPRM at 3-4.

¹⁴⁸ See Bank One-NPRM at 4; Fleet-NPRM at 4.

¹⁴⁹ See Eagle Bank-NPRM at 2; HSBC-NPRM at 2; Roundtable-NPRM at 5.

¹⁵⁰ See Roundtable-NPRM at 5.