

Indeed, many recommended that the Commission take a more restrictive "opt-in" approach, and prohibit telemarketing except to those consumers who expressly agree in advance to accept sales calls.<sup>576</sup> State regulators also supported a national registry, provided it did not preempt the "do-not-call" legislation already passed in many states or preclude the states from enforcing these laws.<sup>577</sup>

A number of industry commenters supported the general concept of a national "do-not-call" registry that would preempt state "do-not-call" laws, provided an exemption for "existing business relationships" were added to the Rule. The need for an established business relationship exemption was the most emphatic and consistent theme of industry comments, but other points were raised as well. Some questioned whether the Commission had the statutory authority to establish such a registry.<sup>578</sup> Others argued that a national "do-not-call" registry would impose an unconstitutional restriction on commercial speech.<sup>579</sup> Still others felt that an FTC registry was not necessary because the current system was sufficient to protect consumer privacy.<sup>580</sup> These commenters supported increased enforcement of existing federal and state "do-not-call" laws. Charitable organizations and the telemarketers who serve them uniformly opposed the national "do-not-call" registry proposal if applicable to charitable solicitations by for-profit telemarketers. They argued that such a registry would violate the First Amendment and that it would have a devastating impact on the level of contributions that non-profit

organizations depend upon to fulfill their missions.<sup>581</sup>

Based on the entire record in this proceeding, the Commission has determined to retain the provision in the original Rule that prohibits a seller or telemarketer from calling a consumer who has previously asked not to be called by or on behalf of that seller. The Commission has also determined to supplement that provision by amending the Rule to establish a national "do-not-call" registry. For the reasons set forth herein, the Commission has decided to limit coverage of the national registry to telemarketing calls made by or on behalf of sellers of goods or services, thus exempting telemarketing calls on behalf of charitable organizations. Calls on behalf of charitable organizations will be subject to the company-specific "do-not-call" provision. In addition, the Commission has decided to retain the provision that allows consumers who sign up on the national "do-not-call" registry to provide express agreement to specific sellers to call them, but has modified that provision to require that evidence of such agreements be written, not oral. Furthermore, the Commission has decided to supplement that express agreement provision with a narrowly-defined exemption for "established business relationships." The Commission is persuaded that these provisions will work in a complementary fashion to effectuate the appropriate balance between protecting consumer privacy and enabling sellers to have access to their existing customers. Of course, even a seller who is exempt from the prohibition against calling a consumer based on the existence of an "established business relationship" with that consumer must honor that consumer's direct request not to be called under the company-specific "do-not-call" provision.

**Background.** The original Rule's company-specific approach, which prohibited a seller or telemarketer from calling a person who had previously asked not to be called, was intended to prohibit abusive patterns of calls from a seller or telemarketer to a person. During the Rule Review, industry representatives generally supported the Rule's current company-specific approach, stating that it provides consumer choice and satisfies the consumer protection mandate of the Telemarketing Act while not imposing an undue burden on industry.<sup>582</sup> The

vast majority of individual commenters, however, joined by consumer groups and state law enforcement representatives, claimed that the TSR's company-specific "do-not-call" provision is inadequate to prevent the abusive patterns of calls it was intended to prohibit.<sup>583</sup> They cited several problems with the current "do-not-call" scheme as set out in the FTC and FCC regulations:<sup>584</sup> the company-specific approach is extremely burdensome to consumers, who must repeat their "do-not-call" request with every telemarketer that calls;<sup>585</sup> consumers' repeated requests to be placed on a "do-not-call" list are ignored;<sup>586</sup> consumers have no way to verify that their names have been taken off of a company's calling list;<sup>587</sup> consumers find that using the TCPA's private right of action<sup>588</sup> is very complex and time-consuming, and places an evidentiary burden on the consumer who must keep detailed lists of who called and when;<sup>589</sup> and finally, even if the consumer wins a lawsuit against a company, it is difficult for the consumer to enforce the judgment.<sup>590</sup>

In addition to the fact that it has proven ineffective, there is another problem that is not even addressed by the company-specific provision. In particular, because a great many telemarketers are now placing huge patterns of unsolicited telemarketing calls,<sup>591</sup> many consumers find even an

NAA-RR at 2; NASAA-RR at 4; PLP-RR at 1. *See also* DNC Tr. at 132-80.

<sup>583</sup> *See* NAAG-RR at 17-19; NCL-RR at 13-14; DNC Tr. at 132-80. *See also, e.g.,* Anderson-RR at 1; Bennett-RR at 1; Card-RR at 1; Conway-RR at 1; Garbin-RR at 1; A. Gardner-RR at 1; Gilchrist-RR at 1; Gindin-RR at 1; Harper-RR at 1; Heagy-RR at 1; Johnson-RR at 1; McCurdy-RR at 1; Menefee-RR at 1; Mey-RR *passim*; Mitchelp-RR at 1; Nova53-RR at 1; Peters-RR at 1; Rothman-RR at 1; Vanderburg-RR at 1; Ver Steeg-RR at 1; Worsham-RR at 1.

<sup>584</sup> The FCC's "do-not-call" regulations under the TCPA are at 47 CFR 64.1201.

<sup>585</sup> Garbin-RR at 1; NAAG-RR at 17; Ver Steeg-RR at 1.

<sup>586</sup> Harper-RR at 1; Heagy-RR at 1; Holloway-RR at 1; Johnson-RR at 1; Menefee-RR at 1; Mey-RR *passim*; Nova53-RR at 1; Nurik-RR at 1; Peters-RR at 1; Rothman-RR at 1; Runnels-RR at 1; Schiber-RR at 1; Schmied-RR at 1; Vanderburg-RR at 1.

<sup>587</sup> McCurdy-RR at 1; Schiber-RR at 1.

<sup>588</sup> The TCPA permits a person who receives more than one telephone call in violation of the FCC's "do-not-call" regulations to bring an action in an appropriate state court to enjoin the practice, to receive money damages, or both. 47 U.S.C. 227(b)(3). The consumer may recover actual monetary loss from the violation or receive \$500 in damages for each violation, whichever is greater. *Id.* If the court finds that a company willfully or knowingly violated the FCC's "do-not-call" rules, it can award treble damages. *Id.*

<sup>589</sup> Kelly-RR at 1; NAAG-RR at 17-19; NACAA-RR at 2; NCL-RR at 13-14.

<sup>590</sup> Kelly-RR at 1.

<sup>591</sup> Based on figures provided by the telemarketing industry, a study prepared for CCC

NPRM at 8; NFPPA-NPRM at 1; Pelland-NPRM *passim*; Proctor-NPRM *passim*; PRC-NPRM at 2; Private Citizen-NPRM at 1; TDI-NPRM at 4-5; Worsham-NPRM at 1. Of the approximately 49,000 comments, about 33,000 supported the creation of a national registry, while about 13,700 opposed it. Of the 14,700 comments from Gottschalks' customers, almost 11,500 supported the creation of a "do-not-call" registry, while only about 1800 opposed the idea of a registry.

<sup>576</sup> *See, e.g.,* EPIC-NPRM at 4; NCL-NPRM at 8.

<sup>577</sup> *See, e.g.,* Connecticut-NPRM at 1-2, 3; DC-NPRM at 4; Kansas-NPRM at 2; NAAG-NPRM at 4-29; NYSCPB-NPRM at 1; Tennessee-NPRM at 2, 9-10; Texas PUC-NPRM at 1, 2; Virginia-NPRM at 1-2. *See also* AARP-NPRM at 1; NCL-NPRM at 9-10; NCLC-NPRM at 13; PRC-NPRM at 4; Private Citizen-NPRM at 2; TDI-NPRM at 4-5.

<sup>578</sup> *See, e.g.,* Discover-NPRM at 2; ERA-NPRM at 26; NRF-NPRM at 2-3; NAA-NPRM at 2; Paramount-NPRM at 1; PMA-NPRM at 6, 24-26.

<sup>579</sup> *See, e.g.,* NAA-NPRM at 2; Paramount-NPRM at 2; PBP-NPRM *passim*; Redish-NPRM *passim*.

<sup>580</sup> *See, e.g.,* Craftmatic-NPRM at 3; ERA-NPRM at 5, 28; PMA-NPRM at 6; TeleStar-NPRM at 2; Weber-NPRM at 2.

<sup>581</sup> *See, e.g.,* DMA-NonProfit-NPRM *passim*; Not-for-Profit Coalition-NPRM *passim*; Hudson Bay-NPRM *passim*. *See also* June 2002 Tr. III at 110, 205-10.

<sup>582</sup> ARDA-RR at 2; ATA-RR at 8-10; Bell Atlantic-RR at 4; DMA-RR at 2; ERA-RR at 6; MPA-RR at 16;

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