

the unwanted telemarketing call to the consumer's cellular telephone.⁶³⁴

Established business relationship. Industry commenters overwhelmingly opposed as unworkable the Commission's proposal to allow consumers to give their express authorization to companies from which they wished to receive calls. Industry stated that it would be cost prohibitive for them to contact their customers to obtain authorization (although they provided no detailed support for this argument) and that consumer inertia would keep consumers from independently providing that type of affirmative authorization.⁶³⁵ They also argued that consumers may not know in advance which companies they want to hear from.⁶³⁶

Industry commenters noted that, without an exemption permitting calls to existing customers, companies would be unable to conduct normal servicing of customers' accounts, since such customer service calls frequently are multiple purpose calls that also include attempts to sell additional goods or services to the customer.⁶³⁷ Additionally, magazines and newspapers would be unable to contact consumers whose subscriptions had expired to offer them a new subscription.⁶³⁸ Commenters from financial institutions pointed out that, if not permitted to call current customers, they may run afoul of their fiduciary relationship with those customers.⁶³⁹ Sellers argued that it would be cost prohibitive for them to use direct mail or other means to contact their customers to obtain authorization to call.⁶⁴⁰

Industry commenters also pointed out that, in failing to include an exemption for existing business relationships, the

proposed Rule was at odds with the approach taken by the states with regard to "do-not-call" registries. All state "do-not-call" laws, except Indiana's, include such an exemption.⁶⁴¹ State regulators noted that there have been few complaints from consumers about calls from companies with whom they have an existing business relationship.⁶⁴² In addition, FCC regulations under the TCPA exempt "established business relationships" from the company-specific "do-not-call" regulations.⁶⁴³ Individual commenters who expressed an opinion on this issue were divided on whether there should be such an exemption. Analysis of individual consumer comments that touched on this issue indicates that about 860 favored an exemption for calls from firms with whom they already have an established relationship, while about 1080 opposed such an exemption.⁶⁴⁴ Furthermore, over 13,000 of the nearly 15,000 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.

⁶⁴¹ See, e.g., Ark. Code Ann. § 4-99-403(2)(A); Colo. Rev. Stat. § 6-1-903(10)(B)(II); Conn. Gen. Stat. Ann. § 42-288a(a)(9); Fla. Stat. Ann. § 501.059(1)(c); Ga. Code Ann. § 46-5-27(b)(3)(B); Mo. Rev. Stat. § 407.1095(3)(b); and Tenn. Code Ann. § 65-4-401(6)(B)(iii).

⁶⁴² See June 2002 Tr. I at 118 (New York: "Well, [consumers are not unhappy], and a lot of times they complain, and you could say that's 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."); June 2002 Tr. I at 118-19 (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."); and see generally, June 2002 Tr. I at 110-21.

⁶⁴³ 47 CFR 64.1200(c)(3). The TCPA requires such an exemption. 47 U.S.C. 227(a)(3).

⁶⁴⁴ See, e.g., GBELois (Msg. 44) ("If a person is a member, subscriber, current customer, etc., of a company and the company is calling regarding the status of that relationship then the company should not be obligated to conform to the do not call registry."); Jerry Warnke (Msg. 371) ("Have to be a way to exempt businesses or organizations when they are returning your phone calls or they have a need to call you with an ongoing relationship."); But see, e.g., Karl Engelberger (Msg. 331) ("All pre-existing agreements and relationships should be voided and can, at the line subscribers discretion be re-established."); Don Price (Msg. 483) ("Sometimes pre-existing relationships are those hardest to communicate with regarding the fact that the individual wants to end the relationship with the telemarketer business—once you give or buy something, many telemarketers expect you to continue what you started and make it a monthly habit—even if that was never your intent.").

Finally, industry commenters suggested that the Commission's rationale for not including an exemption for "established business relationships" was faulty.⁶⁴⁵ In adopting the original Rule, the Commission had expressed the view that such an exemption was inappropriate because it was not workable in the context of fraud.⁶⁴⁶ These commenters pointed out that the "do-not-call" registry was driven by privacy concerns, not concerns about fraud. Therefore, they argued, the Commission's stated rationale was inapplicable in the "do-not-call" context.⁶⁴⁷ However, these commenters misunderstood the Commission's rationale in not including an exemption for "established business relationship" in the proposed "do-not-call" provision. In fact, the Commission's rationale for not including such an exemption in its proposal was driven not by concerns about fraud, but by the same privacy concerns that those commenters noted. The Commission believed that the national registry should contain few exemptions in order to provide consumers with the most comprehensive privacy protection possible.

Because the proposed Rule did not contain any "established business relationship" exemption, it is not surprising that few commenters raised this issue unless they were advocating that such an exemption be added. In response to industry's strong advocacy in favor of an "established business relationship" exemption, however, the June 2002 Forum elicited comment on whether such an exemption would be appropriate. Privacy advocates opposed any exemptions to the registry, stating that exemptions erode the effectiveness of a "do-not-call" registry.⁶⁴⁸ These commenters feared that, because of the difficulty in crafting such an exemption narrowly, an "established business relationship" exemption would provide too great a loophole, and would severely hamper the effectiveness of a national "do-not-call" registry.⁶⁴⁹ One consumer spoke at the June 2002 Forum about the dangers inherent in such an exemption.⁶⁵⁰ AARP noted in its supplemental comments that an exemption appeared to be necessary, but

⁶⁴⁵ See, e.g., DMA-NPRM at 34-36; NCTA-NPRM at 8; Nextel-NPRM at 13-15; Wells Fargo-NPRM at 4.

⁶⁴⁶ See 60 FR at 43859.

⁶⁴⁷ See, e.g., DMA-NPRM at 34-36; NCTA-NPRM at 8; Nextel-NPRM at 13-15; Wells Fargo-NPRM at 4.

⁶⁴⁸ See, e.g., EPIC-NPRM at 20-21; NCL-NPRM at 10.

⁶⁴⁹ NCL-NPRM at 10.

⁶⁵⁰ June 2002 Tr. I at 278-82 (Diana Mey).

⁶³⁴ See, e.g., Andy Vuong, *Telemarketers tap cellphone: Complaints on rise as solicitors dial into no-call exemption*, DENVER POST, July 30, 2002; Jennifer Bayot, *Now, That Ringing Cellphone May Be a Telemarketer's Call*, N.Y. TIMES, July 5, 2002.

⁶³⁵ See, e.g., AFSA-NPRM at 8; BofA-NPRM at 9; Cox-NPRM at 6; MBA-NPRM at 5.

⁶³⁶ See, e.g., DialAmerica-NPRM at 14; Roundtable-NPRM at 4-5.

⁶³⁷ See, e.g., ACA-NPRM at 2; ARDA-NPRM at 17; Associations-NPRM at 2; Cendant-NPRM at 5; Comcast-NPRM at 2; DMA-NPRM at 34; HSBC-NPRM at 1; MBA-NPRM at 1-2.

⁶³⁸ See NAA-NPRM at 12, June 28-Supp. at 1, and July 31-Supp. at 1; NNA-NPRM at 3.

⁶³⁹ See, e.g., ABA-NPRM at 10; ABIA-NPRM at 4; AFSA-NPRM at 13-14; AmEx-NPRM at 3; BofA-NPRM at 3; Bank One-NPRM at 4-5; VISA-NPRM at 13; Wells Fargo-NPRM at 4. However, unless such a customer service call includes an inducement to purchase additional goods or services, it would fall outside the definition of "telemarketing" and, therefore, beyond the scope of the Rule's coverage.

⁶⁴⁰ See, e.g., Comcast-NPRM at 2; CAP-Supp. at 1-2.