

urged that the Commission keep the exemption very narrow and limit it to existing relationships only, as opposed to prior relationships.⁶⁵¹

Based on the record as a whole, the Commission is persuaded that the benefits of including an exemption for established business relationships outweigh the costs of such an exemption. Therefore, the Commission has decided to provide an exemption for "established business relationships" from the national "do-not-call" registry, as long as the consumer has not asked to be placed on the seller's company-specific "do-not-call" list. Once the consumer asks to be placed on the seller's "do-not-call" list, the seller may not call the consumer again regardless of whether the consumer continues to do business with the seller. If the consumer continues to do business with the seller after asking not to be called, the consumer *cannot* be deemed to have waived his or her company-specific "do-not-call" request.⁶⁵²

The amended Rule limits the "established business relationship" exemption to relationships formed by the consumer's purchase, rental or lease of goods or services from, or financial transaction with, the seller within 18 months of the telephone call or, in the case of inquiries or applications, to three months from the inquiry or application. As indicated in the discussion of the definition of "established business relationship" in § 310.2(n), this time frame is consistent with most state laws that include a time limit.⁶⁵³ The exemption is terminated by the consumer's request to be placed on the company's "do-not-call" list, which is consistent with the FCC's regulations and those of many of the states.⁶⁵⁴ As explained above in the discussion of § 310.2(n), the definition

of "established business relationship" encompasses those affiliates of the seller that the consumer would reasonably expect to be included given the nature and type of goods or services offered and the identity of the affiliate.

In addition to an exemption for "established business relationships," the Commission has decided to retain the provision that allows sellers to obtain the express agreement of consumers who wish to receive telephone calls from that seller, but has modified the provision to require that such express agreement may be evidenced only by a signed, written agreement. The Commission believes that it is important to limit the established business relationship to those where there is ongoing contact or where the relationship has recently lapsed or terminated. However, the Commission recognizes that consumers may have ongoing relationships with sellers where the contacts may be infrequent. Therefore, the Commission has decided to retain the provision that would allow sellers to obtain the consumer's express agreement to call, regardless of whether there has been contact during the prior 18 months. In order to minimize the potential for abuse, the amended Rule does not permit sellers or telemarketers to obtain the consumer's oral authorization. Rather, the amended Rule requires that the express agreement meet the same standards as written authorization in § 310.3(a)(3)(i)—*i.e.*, that the express agreement be in writing, signed by the consumer—and must also include the telephone number to which the calls may be placed. Because the express agreement requires the consumer's signature, the Rule makes it more difficult for sellers and telemarketers to bury the consent in the fine print of a document where the consumer might not notice it. The Commission intends that the consent be clear and conspicuous. This express agreement is effective as long as the consumer has not asked to be placed on the seller's company-specific "do-not-call" list. Once the consumer asks to be placed on the seller's "do-not-call" list, the seller may not call the consumer again regardless of whether the consumer continues to do business with the seller.

First Amendment and related considerations applicable to "do-not-call" provisions. As noted above, the proposal to include charitable solicitation telemarketing by for-profit telemarketers within the scope of a national "do-not-call" registry requirement drew extensive negative comment from non-profit organizations and their representatives. These

commenters advanced a number of criticisms of the proposal based upon the practical effects it would foreseeably produce if adopted. They also argued that the proposal was fatally flawed from the standpoint of First Amendment analysis. Each of the major points made by these commenters is discussed below.

Because of the central role of the telephone and of professional fundraisers in the non-profit arena, non-profit organizations and their representatives uniformly predicted financial disaster for the non-profit sector if such a proposal were adopted.⁶⁵⁵ According to DMA-NonProfit, a quarter of all charitable contributions raised in 2001 came from telephone solicitation,⁶⁵⁶ and an estimated 60 to 70 percent of that solicitation was performed by professional fundraisers.⁶⁵⁷ These commenters feared the detrimental impact of a national "do-not-call" registry on this important element of the non-profit world's financial support system.⁶⁵⁸ One commenter opined that the proposed "do-not-call" registry requirement would reduce the potential donor pool by between 40 to 50 percent, and based on sign-up rates in some states, possibly by as much as 70 or 80 percent.⁶⁵⁹

The proposed registry's impact on non-profit organizations' ability to solicit previous donors was of particular concern. According to a number of commenters, it is axiomatic that persons who have already contributed to a non-profit or charitable organization are much more likely to contribute than are persons who have never done so.⁶⁶⁰ In

⁶⁵⁵ See, e.g., DMA-NonProfit-NPRM at 16; Not-for-Profit Coalition-NPRM at 7. See also Red Cross-NPRM at 3; APTS-NPRM at 2-3; Childhood Leukemia-NPRM at 1; FireCo-NPRM at 1; California FFA-NPRM at 2; Edwardsville FFA-NPRM at 1; HRC-NPRM at 1-2; Leukemia Society-NPRM at 1-2; March of Dimes-NPRM at 1; Michigan Nonprofit-NPRM at 1; Purple Heart-NPRM at 2; NC Zoo-NPRM at 1; NPR-NPRM at 2; AAST-NPRM at 5; FOP-NPRM at 2; Southern Poverty-NPRM at 2.

⁶⁵⁶ DMA-NonProfit-NPRM at 2 (citing the Turner Study, see note 142 above).

⁶⁵⁷ DMA-NonProfit-NPRM at 2. See also Not-for-Profit Coalition-NPRM at 6.

⁶⁵⁸ See, e.g., ACE-NPRM at 1; ADA-NPRM at 1; Red Cross-NPRM at 3; Blood Centers-NPRM at 2; Childhood Leukemia-NPRM at 1; LifeShare-NPRM at 1; March of Dimes-NPRM at 2; NPR-NPRM at 4-5; FOP-NPRM at 3, 4; Project Angel Food-NPRM at 1.

⁶⁵⁹ Not-for-Profit Coalition-NPRM at 9.

⁶⁶⁰ AFP-NPRM at 4 ("For nearly all nonprofit organizations, pre-existing donors and volunteers constitute the source of a majority of all gifts and volunteer time. These individuals are most committed to a cause and best understand the organization. Donors should not lose the opportunity to hear from organizations they supported in the past."); March of Dimes-NPRM at 3 ("The most generous donors and volunteers are

⁶⁵¹ AARP-Supp. at 3.

⁶⁵² See June 2002 Tr. I at 278-82 (Consumer recounted that a telemarketer from a retailer telephoned her, notwithstanding the fact that she was on the retailer's "do-not-call" list. When she questioned them about this apparent error, the telemarketer said that she had recently made a purchase at the retailer, which re-created an "established business relationship," which exempted them from complying with her "do-not-call" request.).

⁶⁵³ See discussion of § 310.2(n) and note 135, above.

⁶⁵⁴ See 47 CFR 64.1200(f)(4), and discussion in FCC TCPA 2002 (see note 633 above) at 8765, para. 23, and at 8770, para. 34, n.63. In addition, several state "do-not-call" statutes contain a similar provision in their exemption for "established business relationships" which terminates the exemption if the consumer has asked not to be called. See, e.g., Alaska, California, Colorado, Connecticut, Illinois, Kansas, New York, Oklahoma, Texas, and Wyoming. See note 592, above, for citations to each state's "no-call" laws and/or regulations.