

the Commission believes that such an approach may be impractical because of cost considerations and because of the difficulty for consumers to understand and deal with the complications of such a system. Thus, these factors may render a bifurcated registry an insufficient or excessively cumbersome response to the imperative of narrow tailoring.

After careful consideration of the record as a whole and the relevant case law, the Commission has determined that the best approach to achieve narrow tailoring of the "do-not-call" provisions at this time is to exempt from the "do-not-call" registry requirements solicitations to induce charitable contributions via outbound telephone calls,<sup>683</sup> and instead to bring charitable solicitation telemarketing only within the ambit of the company-specific "do-not-call" regime contained in the original Rule.<sup>684</sup>

The Commission believes that the encroachment upon consumers' privacy rights by unwanted solicitation calls is not exclusive to commercial telemarketers; consumers are disturbed by unwanted calls regardless of whether the caller is seeking to make a sale or

telemarketing calls to induce the purchase of goods and services are handled separately from requests not to receive calls soliciting charitable contributions?" Question 5 i, 67 FR at 4539. Few commenters addressed this question, and those who did so expressed only the most general views, without advocating or opposing the concept of bifurcation. See, e.g., NYSCPB-NPRM at 23 ("[T]he technical problems and costs of implementing such a system might be prohibitive."); NCLC-NPRM at 19; NCL-NPRM at 9; NAAG-NPRM at 20. Only about 100 individual consumer email comments received by the Commission responded to a direct question on the issue included on the Commission's website. A minority of these commenters (about 40 percent) expressed the view that the "do-not-call" registry should not treat calls from charitable fundraisers differently, while about 60 percent expressed the view that it should do so.

<sup>683</sup> "Solicitations to induce charitable contributions via outbound telephone calls are not covered by § 310.4(b)(1)(iii)(B) of this Rule." Section 310.6(a) of the amended Rule.

<sup>684</sup> The comments of many non-profit or charitable organizations indicate that these organizations have a policy of maintaining a "do-not-call" list even though not legally required to do so. Lautman-NPRM at 1 ("[P]rofessional fundraisers) use the Direct Marketing Association's 'do not call' database, in addition to client maintained 'do not call' lists."); HRC-NPRM at 1 ("[W]e have (like most nonprofit organizations) eliminated unwanted calls to our donors by requiring our telemarketing partners to keep a 'do-not-call' list. We also require them to use the Direct Marketing Association's 'do not call' list."); Telefund-NPRM at 1 ("Most non-profit organizations maintain lists of their own donors who prefer to be contacted via the mail. Telefund Inc. also maintains such a database for its clients."); See also ADA-NPRM at 1; American Rivers-NPRM at 1; Angel Food-NPRM at 1; APTS-NPRM at 3; Childhood Leukemia-NPRM at 1; FOP-NPRM at 1; Italian American Police-NPRM at 1; Illinois Police-NPRM at 1; Leukemia Society-NPRM at 2; SO-CN-NPRM at 1; SO-CO-NPRM at 1; National Children's Cancer-NPRM at 1; Southern Poverty-NPRM at 2; Stage Door-NPRM at 1.

to ask for a charitable contribution.<sup>685</sup> Thus, the Commission rejects the suggestion from numerous non-profit organizations and their representatives that no privacy protection measures are necessary with respect to charitable solicitation telemarketing, and that telefundraisers should be exempt from even the company-specific "do-not-call" provisions.<sup>686</sup>

The Commission believes that even though the company-specific approach has not been fully adequate to the task of protecting consumers' privacy rights against an onslaught of commercial solicitations, this more limited approach does provide some privacy protection in the context of charitable fundraising, and works better to accommodate both the right of privacy and the right of free speech. The Commission is persuaded by the arguments of Hudson Bay that fundamental differences between commercial solicitations and charitable solicitations may confer upon the company-specific "do-not-call" requirements a greater measure of success with respect to preventing a pattern of abusive calls from a fundraiser to a consumer than it was able to produce in the context of commercial fundraising:

When a pure commercial transaction is at stake, callers have an incentive to engage in all the things that telemarketers are hated for. But non-commercial speech is a different matter. The success of an advocacy call does not hinge entirely on whether the recipient decides to part with a sum of money. A calling center employee working for a citizens' group is less interested in the volume of calls than in effective communication of the group's concerns. That is the reason the money is needed in the first place, not for profit.

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In a non-commercial call the recipient is more than a potential source of income. Rather he or she is also a voter, a constituent, a consumer, a source of information to others, and a potential source of a future contribution, even if not in the current call. There is more than a sale, there is a cause at stake. It is, therefore, self-defeating for the advocacy caller to engage in the abusive telemarketing practices that motivated the draft TSR. Such a caller risks alienating the

<sup>685</sup> One indication of this is that, even though the FTC web page advising consumers on how to comment specifically included a direct question calling attention to the possibility of a separate database for charitable fundraisers, only about 100 consumer email comments responded to it. A great many consumer email comments expressed the view that unsolicited calls disturb their privacy, and did not distinguish between sales calls and other types of solicitation calls, such as those for charities.

<sup>686</sup> See generally Not-For-Profit Coalition-NPRM; DMA-NonProfit-NPRM.

recipient of the call against the cause not just against the caller or their organization.<sup>687</sup>

Nevertheless, if experience indicates that the company-specific approach does not in fact provide adequate protections for consumers' privacy in the context of charitable solicitation telemarketing, the Commission may revisit this decision in the future, and reconsider whether to require telemarketing calls soliciting charitable donations to comply with the national "do-not-call" registry requirements.

*FTC authority to establish a "do-not-call" registry.* Several industry members questioned whether the FTC had the statutory authority to establish a national "do-not-call" registry.<sup>688</sup> They argued that the Telemarketing Act does not mention the creation of a "do-not-call" registry and that, in fact, another statute (TCPA) had directed another agency (the FCC) to explore the possibility of establishing such a registry.<sup>689</sup> They noted that the FCC had considered such a registry and rejected it in 1992 in favor of a company-specific approach that required consumers to tell those companies from which they did not wish to receive calls to place them on the company's "do-not-call" list.<sup>690</sup>

Congress passed the Telemarketing Act three years after the FCC rejected a national registry. As noted in the NPRM, the Telemarketing Act authorizes the Commission to prescribe rules "prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or practices," and specifically mandates that these rules prohibit telemarketers from undertaking "a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy."<sup>691</sup> Thus, establishment of the national "do-not-call" registry is squarely within the authority granted by the statute.

The goal in both the TCPA and § 6102(a)(3) of the Telemarketing Act is to protect consumer privacy. When Congress directed the FTC to include in the TSR a prohibition against a pattern of unsolicited telephone calls which the reasonable consumer would consider

<sup>687</sup> See also HRC-NPRM at 1 ("Most importantly, nonprofits are dependent upon the revenue generated by their supporters and will do nearly anything to honor their requests and treat them with the utmost respect.")

<sup>688</sup> See, e.g., Advanta-NPRM at 2; ATA-NPRM at 6-10, 20-21; DMA-NPRM at 16-22; ERA-NPRM at 26-27; MPA-NPRM at 34-38; PMA-NPRM at 25-26. See also ARDA-Supp. at 1; ATA-Supp. at 7.

<sup>689</sup> See, e.g., DMA-NPRM at 16-22; ERA-NPRM at 26; MPA-NPRM at 34-38; PMA-NPRM at 25-26.

<sup>690</sup> FCC Report and Order, CC Docket No. 92-90, 7 FCC Rcd 8752 at 8762-67 (Oct. 16, 1992).

<sup>691</sup> 15 U.S.C. 6102 (a)(1) and (a)(3)(A) (emphasis added).