

coercive or abusive of such consumer's right to privacy, Congress knowingly put the FTC on the same path that the FCC had trod three years earlier, but did not mandate that the two agencies arrive at the identical conclusion. Instead, the Telemarketing Act is written broadly and does not limit how the Commission is to effectuate the Congressional mandate; it leaves the method of achieving the goal of protecting privacy to the Commission's discretion.<sup>692</sup> There is nothing in the TCPA that would lead to the conclusion that the FCC was the only federal agency authorized to create a national registry. In fact, although Congress had passed the TCPA only three years earlier, it mandated in the Telemarketing Act that the FTC promulgate provisions similar to those that the FCC had promulgated pursuant to TCPA. For example, although FCC regulations already restricted the times that telemarketers can call consumers,<sup>693</sup> Section 6102(a)(3)(B) of the Telemarketing Act directed the FTC to also include in its regulations a provision that would prohibit telemarketers from making unsolicited phone calls to consumers during certain hours of the day or night. Thus, Congress clearly intended to provide the FTC with sufficient authority to remedy the problem of unwanted telemarketing calls by means of a national registry, notwithstanding that the FCC had earlier decided not to exercise its own authority to do so.

*Interplay between the national "do-not-call" registry and state "do-not-call" laws.* The NPRM specifically requested comment on how the proposed establishment of a national "do-not-call" registry should interplay with similar requirements on the state level.<sup>694</sup> In response, NAAG and representatives of individual states with "do-not-call" laws expressed concern about the possible preemptive effect of a national "do-not-call" registry.<sup>695</sup> On the other hand, industry representatives urged that if, despite their opposition, the Commission adopted TSR

provisions establishing a national "do-not-call" registry, the national registry must preempt similar state requirements.<sup>696</sup>

At this time, the Commission does not intend the Rule provisions establishing a national "do-not-call" registry to preempt state "do-not-call" laws. Rather, the Commission's intent is to work with those states that have enacted "do-not-call" registry laws, as well as with the FCC, to articulate requirements and procedures during what it anticipates will be a relatively short transition period leading to one harmonized "do-not-call" registry system and a single set of compliance obligations.<sup>697</sup> The Commission is actively consulting with the individual states to coordinate implementation of the national registry to minimize duplication and maximize efficiency for consumers and business. The Commission's goal is a consistent, efficient system whereby consumers, in a single transaction, can register their requests not to receive calls to solicit sales of goods or services, and sellers and telemarketers can obtain a single list to ensure that in placing calls they do not contravene those consumers' requests. In adopting the "do-not-call" provisions in the amended Rule, the Commission intends to advance that goal. At this time, the Commission specifically reserves further action on the issue of preemption until sufficient time has passed to enable it to assess the success of the approach outlined above.<sup>698</sup>

#### *Implementation of a National Do-Not-Call Registry*

In developing an implementation plan for a national "do-not-call" registry, the Commission has been guided by a number of concerns. Most importantly, the Commission has sought to ensure

the accuracy and validity of the consumer telephone numbers added to the registry, and to build a system that can handle the potential volume of consumer requests to be placed on the registry.<sup>699</sup> Equally important, the system must ensure the security of the information maintained in the registry. The registry also must be easily accessible to both telemarketers and appropriate law enforcement agencies. In addition, the Commission seeks to develop the system with the lowest possible costs.

The Commission conducted extensive research to determine the feasibility of a national "do-not-call" registry and to develop a plan for implementing such a registry. The NPRM asked for comment on a number of specific implementation questions.<sup>700</sup> The staff contacted the states with their own registries, and also contacted many of the contractors used by those states to develop their registries. On February 28, 2002, as part of its research, the Commission issued a Request for Information ("RFI") to contractors capable of assisting the FTC in the development, deployment, and operation of the national registry.<sup>701</sup> Thirty-six different companies responded to the RFI. In August 2002, the Commission issued a Request for Quotes ("RFQ") to selected vendors.<sup>702</sup> A number of those vendors have submitted proposals and quotes to the Commission; the agency is currently evaluating those proposals.<sup>703</sup>

Based on all of the information gathered during this process, the Commission plans to develop a national registry with three components: consumer registration; access to the consumer registration database by telemarketers and sellers; and law enforcement access to both the consumer registration database and the list of telemarketers and sellers who have accessed the consumer registration database. The entire system will be fully automated to simplify the process and keep costs to a minimum.

*Consumer registration.* Consumers will be able to add their telephone numbers to the national "do-not-call" registry through two methods: either through a toll-free telephone call or over

<sup>692</sup> See KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 3.2 (3rd ed. 1994) (noting that agencies have the power to "fill any gaps" that Congress either expressly or implicitly left to the agency to decide pursuant to the decision in *Chevron v. Natural Res. Def. Council*, 467 U.S. 837 (1984)). It is, therefore, permissible for agencies to engage in statutory construction to resolve ambiguities in laws directing them to act, and courts must defer to this administrative policy decision.

<sup>693</sup> 47 CFR 64.1200(e)(1). See also discussion at 7 FCC Rcd at 8767-68.

<sup>694</sup> 67 FR at 4539.

<sup>695</sup> See, e.g., NAAG-NPRM at 6-14; Connecticut-NPRM at 3; DC-NPRM at 4-5 (District of Columbia); NYSCPB-NPRM at 13-17 (New York); Texas PUC-NPRM at 3-4.

<sup>696</sup> See, e.g., ATA-NPRM at 28-29; DMA-NPRM at 3, 14; ERA-NPRM at 34.

<sup>697</sup> In this regard, the Commission notes that in September 2002, the FCC published an NPRM to review its TCPA regulations, including, among other things, whether its company-specific "do-not-call" requirement has been effective and whether a national registry would better serve the public interest. See FCC TCPA 2002.

<sup>698</sup> See generally *English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79 (1990) (preemption can occur "where it is impossible for a private party to comply with both state and federal requirements, see, e.g., *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963), or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)."); *Crosby v. Nat'l. Foreign Trade Council*, 530 U.S. 363, 372-73 (2000); *Ass'n of Banks in Ins. v. Duryee*, 270 F.3d 397, 404 (6th Cir. 2001) (where state and federal laws are inconsistent, state law can be preempted even if it was enacted to protect its citizens or consumers).

<sup>699</sup> Consumer interest in state "do-not-call" registries has varied from a few percent to over 40 percent of all telephone lines within the state.

<sup>700</sup> 67 FR at 4538-39.

<sup>701</sup> See <http://www.ftc.gov/procurement>.

<sup>702</sup> The Commission issued the RFQ to those vendors that expressed an interest in developing the national registry and that were on General Service Administration ("GSA") schedules to provide goods or services to the federal government.

<sup>703</sup> All vendor responses to both the RFI and RFQ contain confidential proprietary business information and therefore cannot be made public.