Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Rules and Regulations Implementing the	)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991	)	CC Docket No. 92-90
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NOTICE OF PROPOSED RULEMAKING AND MEMORANDUM OPINION AND ORDER

Adopted: September 12, 2002 **Released: September 18, 2002**

Comment Date: 45 days after publication in the Federal Register
Reply Comment Date: 60 days after publication in the Federal Register

By the Commission: Chairman Powell, Commissioners Abernathy and Martin issuing separate statements.

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I. INTRODUCTION

1. In 1992, the Commission adopted rules pursuant to the Telephone Consumer Protection Act of 1991 (TCPA)[1] that restricted unsolicited advertising using the telephone and facsimile machine.[2] Since that time, telemarketing practices have changed significantly. New technologies have emerged that allow telemarketers[3] to better target potential customers and make it more cost effective to market using telephones and facsimile machines. At the same time, these new telemarketing techniques have increased public concern about the effect on consumer privacy. In addition, since the Commission adopted its TCPA rules, the number of telecommunications consumers that pay for receiving calls and messages has dramatically increased with the growth of commercial wireless services.[4] Congress provided in the TCPA

[1] Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991), *codified at* 47 U.S.C. § 227. The TCPA amended Title II of the Communications Act of 1934, 47 U.S.C. § 201 *et seq*.

[2] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 7 FCC Rcd 8752 (1992) *(TCPA Order)*.

[3] In this NPRM, the term "telemarketer" refers to any person or entity making a telephone solicitation or using the telephone network to deliver an unsolicited advertisement (regardless of the precise means used to place such a call).

[4] *See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, Seventh Report, FCC 02-179, rel. July 3, 2002, at C-2 (*2002 CMRS Competition Report*).

that "individuals' privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices."[5] In this Notice of Proposed Rulemaking (NPRM), we seek comment on whether the Commission's rules need to be revised in order to more effectively carry out Congress's directives in the TCPA. Specifically, we seek comment on whether to revise or clarify our rules governing unwanted telephone solicitations and the use of automatic telephone dialing systems, prerecorded or artificial voice messages, and telephone facsimile machines. We also seek comment on the effectiveness of company-specific do-not-call lists. In addition, we seek comment on whether to revisit the option of establishing a national do-not-call list and, if so, how such action might be taken in conjunction with the Federal Trade Commission's (FTC) proposal to adopt a national do-not-call list and with various state do-not-call lists.[6] In considering ways in which we might improve our TCPA rules, we seek to enhance consumer privacy protections while avoiding imposing unnecessary burdens on the telemarketing industry, consumers, and regulators. Finally, in the Memorandum Opinion and Order, we close and terminate CC Docket No. 92-90 and open a new docket in which we will consider the issues raised in this proceeding.

II. NOTICE OF PROPOSED RULEMAKING IN CG DOCKET 02-278

A. BACKGROUND

1. Telephone Consumer Protection Act

2. On December 20, 1991, Congress enacted the TCPA in an effort to address a growing number of telephone marketing calls and certain telemarketing practices thought to be an invasion of consumer privacy and even a risk to public safety.[7] The statute restricts the use of automatic telephone dialing systems, artificial and prerecorded messages, and telephone facsimile machines to send unsolicited advertisements. Specifically, the TCPA provides that:

> It shall be unlawful for any person within the United States—
>
> (A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice—
>
> (i) to any emergency telephone line (including any "911" line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency);
>
> (ii) to the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or
>
> (iii) to any telephone number assigned to a paging service, cellular telephone service,

[5] *See TCPA*, Section 2(9), *reprinted in* 7 FCC Rcd 2736 at 2744.

[6] *See Telemarketing Sales Rule, Notice of Proposed Rulemaking*, Federal Trade Commission, 67 Fed. Reg. 4492 (January 30, 2002) (*FTC Notice*).

[7] *See TCPA*, Section 2(5), *reprinted in* 7 FCC Rcd 2736 at 2744.

> specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call;
>
> (B) to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the Commission under paragraph (2)(B);
>
> (C) to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine; or
>
> (D) to use an automatic telephone dialing system in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.[8]

Under the TCPA, those sending fax messages or transmitting artificial or prerecorded voice messages are subject to certain identification requirements.[9] The statute also provides consumers with several options to enforce the restrictions on unsolicited telemarketing, including a private right of action.[10]

3. The TCPA requires the Commission to prescribe regulations to implement the statute's restrictions on the use of autodialers, artificial or prerecorded messages and unsolicited facsimile advertisements.[11] The TCPA also requires the Commission to "initiate a rulemaking proceeding concerning the need to protect residential telephone subscribers' privacy rights" and to consider several methods to accommodate telephone subscribers who do not wish to receive unsolicited advertisements, including live voice solicitations.[12] Specifically, section 227(c)(1) requires the Commission to "compare and evaluate alternative methods and procedures (including the use of electronic databases, telephone network technologies, special directory markings, industry-based or company-specific "do not call" systems, and any other alternatives,

[8] 47 U.S.C. § 227(b)(1).

[9] 47 U.S.C. §§ 227(d)(1)(B) and (d)(3)(A). *See also Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Order on Further Reconsideration, 12 FCC Rcd 4609, 4613, para. 6 (1997) (*1997 TCPA Reconsideration Order*), in which the Commission found that "[s]ection 227(d)(1) of the statute mandates that a facsimile include the identification of the business, other entity, or individual creating or originating a facsimile message and not the entity that transmits the message."

[10] The TCPA permits consumers to file suit in state court if an entity violates the TCPA prohibitions on the use of facsimile machines, automatic telephone dialing systems, and artificial or prerecorded voice messages and telephone solicitation. 47 U.S.C. §§ 227(b)(3) and (c)(5). Consumers may recover actual damages or receive up to $500 in damages for each violation, whichever is greater. If the court finds that the entity willfully or knowingly violated the TCPA, consumers may recover an amount equal to not more than three times this amount. 47 U.S.C. § 227(b)(3)(C). Consumers may also bring their complaints regarding TCPA violations to the attention of the state attorney general or an official designated by the state. This state entity may bring a civil action on behalf of its residents to enjoin a person or entity engaged in a pattern of telephone calls or other transmissions in violation of the TCPA. 47 U.S.C. § 227(f)(1). Additionally, a consumer may request that the Commission take enforcement actions regarding violations of the TCPA and the regulations adopted to enforce it. *See* 47 C.F.R. § 1.41 on informal requests for Commission action and 47 C.F.R. § 1.716 on the Commission's process for complaints filed against common carriers.

[11] *See* 47 U.S.C. § 227(b)(2).

[12] 47 U.S.C. § 227(c)(1)-(4).

individually or in combination) for their effectiveness in protecting such privacy rights, and in terms of their cost and other advantages and disadvantages."[13] The TCPA specifically authorizes the Commission to "require the establishment and operation of a single national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations."[14]

2. TCPA Orders

4. In 1992, the Commission adopted rules implementing the TCPA, including the requirement that entities making telephone solicitations institute procedures for maintaining do-not-call lists.[15] Pursuant to the Commission's rules, a person or entity engaged in telemarketing is required to maintain a record of a called party's request not to receive future solicitations for a period of ten years.[16] Telemarketers must develop and maintain written policies for maintaining their lists,[17] and they are required to inform their employees of the list's existence and train them to use the list.[18] Commission rules prohibit telemarketers from calling residential telephone subscribers before 8 a.m. or after 9 p.m.[19] and require telemarketers to identify themselves to called parties.[20] As mandated by the TCPA, the Commission's rules also establish general prohibitions against autodialed calls being made without prior express consent to certain locations, including emergency lines or health care facilities,[21] the use of prerecorded or artificial voice message calls to residences,[22] line seizure by prerecorded messages,[23] and the transmission of unsolicited advertisements by facsimile machines.[24] The TCPA rules provide that facsimile and prerecorded voice transmissions, as well as telephone facsimile machines, must meet specific identification requirements.[25]

5. In adopting rules to implement the TCPA, the Commission declined to create a national database of telephone subscribers who do not wish to receive calls from telemarketers.[26]

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[13] 47 U.S.C. § 227(c)(1)(A).

[14] 47 U.S.C. § 227(c)(3).

[15] 47 C.F.R. § 64.1200(e)(2).

[16] Initially telemarketers were required to honor a do-not-call request indefinitely. The Commission later modified its rules to require that the request be honored for a ten-year period. *See Rules and Regulations Implementing the Telephone and Consumer Protection Act of 1991,* CC Docket No. 92-90, Memorandum Opinion and Order, 10 FCC Rcd 12391, 12397-98, para. 15 (1995) (*1995 TCPA Reconsideration Order*); 47 C.F.R. § 64.1200(e)(2)(vi).

[17] 47 C.F.R. § 64.1200(e)(2)(i).

[18] 47 C.F.R. § 64.1200(e)(2)(ii).

[19] 47 C.F.R. § 64.1200(e)(1).

[20] 47 C.F.R. § 64.1200(e)(2)(iv).

[21] 47 C.F.R. § 64.1200(a)(1)(i)-(iii).

[22] 47 C.F.R. § 64.1200(a)(2).

[23] 47 C.F.R. §§ 64.1200(a)(4) and 68.318(c).

[24] 47 C.F.R. § 64.1200(a)(3).

[25] 47 C.F.R. §§ 64.1200(d)(1) and (2); 47 C.F.R. § 68.318(d).

[26] *TCPA Order*, 7 FCC Rcd at 8760-61, paras. 14-15.

In particular, the Commission noted that such a database would be costly, difficult to maintain in an accurate form, and might jeopardize the security of telemarketer proprietary information and the privacy of telephone subscribers who paid to have unpublished or unlisted numbers.[27] As explained above, the Commission opted instead to implement an alternative scheme—one involving company-specific do-not-call lists. The Commission determined that rules requiring commercial telemarketers to maintain their own lists of consumers who do not wish to be called sufficiently balanced consumers' privacy interests with Congress's instruction that telemarketing practices not be unreasonably hindered.[28]

6. In 1995 and 1997, the Commission released orders addressing petitions for reconsideration of the *TCPA Order.* In a Memorandum Opinion and Order released on August 7, 1995, the Commission exempted from its TCPA rules calls made on behalf of tax-exempt nonprofit organizations and by collection agencies, and required telemarketers to honor a do-not-call request for a period of ten years.[29] The Commission also extended its TCPA rules to accommodate technical advances in computer-based facsimile modems that enable solicitors to become "fax broadcasters."[30] On April 10, 1997, the Commission issued an Order on Further Reconsideration requiring that all facsimile transmissions contain the identifying information of the business, other entity, or individual creating or originating the facsimile message, rather than the entity that transmits the message.[31]

3. Marketplace Changes Since 1992

7. The marketplace for telemarketing has changed significantly in the last decade. When the TCPA was enacted in 1991, Congress determined that 300,000 solicitors were used to telemarket goods and services to more than 18 million Americans every day.[32] Congress also found that in 1990 sales generated through telemarketing amounted to $435 billion dollars.[33] Some estimate that today telemarketers may attempt as many as 104 million calls to consumers and businesses every day,[34] and that telemarketing calls generate over $600 billion in sales each

[27] *TCPA Order*, 7 FCC Rcd at 8758-61, paras. 11-15.

[28] *TCPA Order*, 7 FCC Rcd at 8763-67, paras. 20-24.

[29] *1995 TCPA Reconsideration Order*, 10 FCC Rcd at 12397-98, paras. 12-15.

[30] *Id.* at 12404-06, paras. 27-31.

[31] *1997 TCPA Reconsideration Order,* 12 FCC Rcd 4609. The Commission also "[did] not find anything in the TCPA to prohibit a facsimile broadcast provider from supplying identification of itself and the entity originating a message if it arranges with the message sender to do so." *Id.* at 4613, para. 6.

[32] *See TCPA,* Section 2(3), *reprinted in* 7 FCC Rcd 2736 at 2744.

[33] *See TCPA*, Section 2(4), *reprinted in* 7 FCC Rcd 2736 at 2744.

[34] In attempting to estimate the number of outbound marketing calls made each day in the United States, representatives of the Direct Marketing Association (DMA) have stated that, with as many as 1 million telemarketing representatives making 13 calls an hour, working 8 hours a day, it is possible that 104 million outbound calls are made to businesses and consumers every day. They noted that, of these calls, as many as 41% of them may be abandoned (because they get busy signals, no answer, hang-ups, or answering machines). *See* transcript from FTC Do-Not-Call Forum, June 6, 2002 at 68-69.

year.[35] The telemarketing industry is considered the single largest direct marketing system in the country, representing 34.6% of the total U.S. sales attributed to direct marketing.[36] The number of telemarketing calls, along with the increased use of various technologies to contact consumers, has heightened public concern about unwanted telemarketing calls and control over the telephone network. Autodialers permit telemarketers to deliver prerecorded messages to thousands of potential customers every day. Predictive dialers,[37] which initiate phone calls while telemarketers are talking to other consumers, frequently abandon calls before a telemarketer is free to take the next call.[38] Using predictive dialers allows telemarketers to devote more time to selling products and services rather than dialing phone numbers, but the practice inconveniences and aggravates consumers who are hung up on. Despite a general ban on faxing unsolicited advertisements,[39] and aggressive enforcement by the Commission,[40] faxed advertisements also have proliferated, as facsimile service providers (or "fax broadcasters") enable sellers to send advertisements to multiple destinations at relatively little cost. These unsolicited faxes result in substantial inconvenience and disruption and also may have serious implications for public safety.[41]

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[35] This figure represents telemarketing sales to consumers and businesses. *See* Seth Stern, *Will feds tackle telemarketers?* (visited May 8, 2002) (citing Direct Marketing Association statistics), <http://www.csmonitor.com/2002/0415/p16s01-wmcn.html>.

[36] *See* The Economic Impact of Direct Marketing by Telephone, a study presented by Direct Marketing Association Telephone Marketing Council, <http://www.third-wave.net/economics.htm> (visited July 3, 2002).

[37] A predictive dialer is an automated dialing system that uses a complex set of algorithms to automatically dial consumers' telephone numbers in a manner that "predicts" the time when a consumer will answer the phone and a telemarketer will be available to take the call. Such software programs are set up in order to minimize the amount of downtime for a telemarketer. In some instances, a consumer answers the phone only to hear "dead air" because the dialer simply hangs up when no telemarketer is free to take the call. *See FTC Notice*, 67 Fed. Reg. at 4522.

[38] Each telemarketing company can set its predictive dialer software for a predetermined abandonment rate (*i.e.*, the percentage of hang-up calls the system will allow). The higher the abandonment rate, the higher the number of hang-up calls. High abandonment rates increase the probability that a customer will be on the line when the telemarketer finishes each call. It also, however, increases the likelihood that the telemarketer will still be on a previously placed call and not be available when the consumer answers the phone.

[39] 47 U.S.C. § 227(b)(1)(C) and 47 C.F.R. § 64.1200(a)(3).

[40] The Commission or the Commission's Enforcement Bureau have issued forfeiture orders totaling $1.56 million for violations of the TCPA's prohibitions on unsolicited faxes, and we have most recently proposed a $5,379,000 forfeiture against a fax broadcaster. *See Fax.com, Inc. Apparent Liability for Forfeiture*, Notice of Apparent Liability for Forfeiture, FCC 02-226 (rel. Aug. 7, 2002) (*Fax.com NAL*) (finding Fax.com apparently liable in the amount of $5,379,000 for sending 489 unsolicited advertisements to telephone facsimile machines), *stayed Missouri v. American Blast Fax*, No. 4:00CV933SNL (E.D. Mo. Aug. 29, 2002). The Enforcement Bureau has also issued 173 junk fax citations and 18 citations for unlawful prerecorded messages sent to residential telephone lines. Prior to the formation of the Commission's Enforcement Bureau, the Common Carrier Bureau issued 9 additional citations against companies for violations of the TCPA's unsolicited fax rules. For a description of the Commission's enforcement actions involving the TCPA, *see* http://www.fcc.gov/eb/tcd/working.html. Under Section 503 of the Act, the Commission is required in an enforcement action to issue a warning citation to any non-licensee as an initial matter. Only if the non-licensee subsequently engages in conduct described in the citation may the Commission propose a forfeiture. The forfeiture may only be issued as to the subsequent violations. *See* 47 U.S.C. §§ 503(b)(5), (b)(2)(C).

[41] *See, e.g., Fax.com NAL*, para. 9, which describes a medical doctor's complaint about unsolicited fax advertisements he received on a line that is reserved for the receipt of patient medical data.

4. TCPA Inquiries and Complaints

8. This NPRM is prompted, in part, by the increasing number and variety of inquiries and complaints involving our rules on telemarketing and unsolicited fax advertisements. Many of these questions involve how the Commission's rules apply to more-widely used technologies such as caller ID,[42] predictive dialers, and different types of automatic dialing equipment. Consumers and industry representatives alike have also inquired about the exemptions for nonprofit organizations and businesses with which consumers have an established relationship. In the last two years alone, the Commission's Consumer & Governmental Affairs Bureau (CGB) has received over 26,900 TCPA-related inquiries[43] and over 11,000 complaints[44] about telemarketing practices. According to CGB's most recent Quarterly Report, in the wireline category, the top area of complaint after only billing and rates was compliance with the TCPA.[45] Additionally, in 2001, the Commission received over 2,100 complaints about unsolicited advertisements sent to fax machines.[46] In February 2002, the Commission's revised fact sheet titled "Unwanted Telephone Marketing Calls" received over 162,000 hits on the Commission's website (the second "most popular" fact sheet that month was "Charges on Your Phone Bill" with 5,422 hits).[47]

5. State Do-Not-Call Lists and FTC's Proposed Rules

9. A growing number of states have passed or are considering legislation to establish statewide do-not-call lists.[48] Such state lists vary widely in the methods used for collecting data, the fees charged, and the types of entities required to comply with their restrictions. Some state statutes provide for state-managed do-not-call lists, while others require telemarketers to use the Direct Marketing Association's Telephone Preference Service.[49] In some states, residents can

[42] *See* 47 C.F.R. § 64.1600 *et seq*. For an explanation of the Commission's caller ID rules, *see infra* n. 104.

[43] These inquiries were received during the period June 2000 through December 2001.

[44] This figure includes complaints received during the period January 2000 through December 2001.

[45] The Commission received 1,385 such complaints in the third quarter of FY 2002 (April – June, 2002). In addition, the Commission received 6,994 TCPA-related inquiries in the third quarter of FY 2002. *See* Consumer & Governmental Affairs Bureau Quarterly Report, 3rd Quarter, FY 2002 (rel. July 29, 2002).

[46] Five years earlier, in 1996, the Commission received 519 complaints on unsolicited faxes.

[47] Source: The Commission's Consumer & Governmental Affairs Bureau (CGB).

[48] Alabama, Arkansas, Connecticut, Florida, Georgia, Idaho, Indiana, Kentucky, Maine, Missouri, New Jersey, New York, Oregon, Tennessee, Texas, and Wyoming have Do-Not-Call databases in effect; California, Colorado, Louisiana, Pennsylvania, and Wisconsin are presently implementing database systems. Legislation proposing Do-Not-Call databases has been offered during the current legislative sessions in Alaska, Arizona, Iowa, Illinois, Kansas, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, Ohio, Oklahoma, Rhode Island, South Dakota, and Washington. *See* Comments and Recommendations of the Attorneys General of Alabama *et al.* filed with the FTC at 4, n. 1 and 2.

[49] *See, e.g.,* Wyoming (Wyo. Stat. Ann. § 40-12-301) and Maine (Me. Rev. Stat. § 4690-A). The Direct Marketing Association (DMA) is a trade association of businesses that advertise their products and services directly to consumers by mail, telephone, magazine, internet, radio or television. Established in 1985, the DMA's Telephone Preference Service (TPS) is a list of residential telephone numbers for consumers who do not wish to receive telemarketing calls. The DMA requires its members to adhere to the list. Telemarketers who are not members of DMA are not required to use the list, but may purchase the TPS for a fee. *See* <http://preference.the-dma.org/subscribe.php> (accessed July 3, 2002).

register for the do-not-call lists at no charge.[50] In others, telephone subscribers must pay a fee. For example, Georgia requires its residents to pay $5 to place their phone numbers on the do-not-call list for a period of two years.[51] To register with the Texas do-not-call list, residents must pay $2.25 for three years.[52] In most states, telemarketers must obtain a copy of the state do-not-call list if they wish to call residents in that state; however, such access fees vary from state to state. In Oregon, telemarketers must pay $120 per year to obtain the state do-not-call list;[53] in Missouri, the fee is $600 per year, although telemarketers can pay less if they want only numbers from certain area codes.[54] The state "do-not-call" statutes provide numerous and varying exceptions to their requirements. Nevertheless, state do-not-call lists appear to have been a popular government initiative. In Missouri, more than one million residential telephone numbers have been placed on the state's do-not-call list since it went into effect last July.[55] In Indiana, more than one million residential telephone numbers have been submitted to the state's do-not-call list. And, in New York, two million residential telephone numbers are enrolled on the do-not-call list.[56]

10. On January 22, 2002, the FTC released a Notice of Proposed Rulemaking in which it proposed amending its Telemarketing Sales Rule.[57] Noting changes in the way telemarketing is conducted and an increase in consumer demand for greater privacy, the FTC proposed additional restrictions on telemarketers, including additional disclosure requirements, prohibitions on certain billing practices, and prohibitions on the blocking of caller ID. The FTC also proposed creating a national do-not-call database that it would maintain. The FTC acknowledged that certain entities, including banks, credit unions, savings and loans, common carriers, nonprofit organizations and insurance companies, would not be covered by the proposed rules because they are specifically exempt from coverage under the FTC Act.[58]

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[50] *See, e.g.,* Connecticut (Conn. Gen. Stat. Ann. § 42-288a); Indiana (H.B. 1222, to be codified at Ind. Code Ann. § 24.4.7); Missouri (Mo. Rev. Stat. § 407.1098); and Tennessee (Tenn. Code Ann. § 65-4-401; *see also* rules at Tenn. Comp. R & Regs. Chap. 1220-4-11).

[51] *See* Ga. Code Ann. § 46-5-17; *see also* rules at Ga. Comp. R & Regs. R. 515-14-1.

[52] *See* H.B. 472, to be codified at Tex. Bus. & Com. Code Ann. § 43.001.

[53] *See* Or. Rev. Stat. § 464.567.

[54] *See* Mo. Rev. Stat. § 407.1098.

[55] *See Missouri No Call Tops 1 Million Three Days Before One-Year Anniversary of Law*, Office of Missouri Attorney General, June 28, 2002, <http://www.ago.state.mo.us/062802.htm>.

[56] *See* David Wessel, *On Hold: Gagging the Telemarketers*, Wall Street Journal, April 11, 2002 at A2. *See also,* Comments and Recommendations of the Attorneys General of Alabama *et al*. filed with the FTC at 4, n. 3.

[57] *See FTC Notice*, 67 Fed. Reg. 4492 (January 30, 2002). The FTC adopted its Telemarketing Sales Rule, 16 C.F.R. Part 310, on August 16, 1995, pursuant to the Telemarketing Consumer Fraud and Abuse Prevention Act ("Telemarketing Act"), 15 U.S.C. §§ 6101-6108. The Telemarketing Act, which was signed into law on August 16, 1994, directed the FTC to issue a rule prohibiting deceptive and abusive telemarketing acts or practices. *Id.* at 4492-93.

[58] *See* 15 U.S.C. § 45(a)(2); *see also FTC Notice*, 67 Fed. Reg. at 4493. In its Notice, the FTC explains that, while nonprofit organizations are not covered by its Telemarketing Sales Rule because they are specifically exempt from coverage under the FTC Act, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act ("USA Patriot Act") of 2001, Pub. L. 107-56 (Oct. 25, 2001) "amends the Telemarketing Act to extend the coverage of the TSR to reach not just telemarketing to induce the purchase of goods

(continued....)

B. DISCUSSION

11. It has been nearly ten years since the Commission adopted a broad set of rules to curb unwanted telephone solicitations in the *TCPA Order*. In this NPRM, we seek to review the practices used to market goods and services over the telephone and facsimile machine that are the focus of the TCPA and the Commission's implementing regulations. In doing so, we ask whether the Commission should: 1) refine its existing rules on the use of autodialers, prerecorded messages, and unsolicited facsimile advertisements, to account for technological developments in recent years and emerging telemarketing practices; 2) adopt any additional rules as permitted by the statute to ensure that our telemarketing requirements protect the privacy of individuals and permit legitimate telemarketing practices[59]; and 3) reconsider the option of establishing a national do-not-call list as authorized by Congress in the TCPA. On the subject of a national do-not-call list, we are particularly interested in comments addressing those entities not covered by the FTC's proposed national do-not-call database as well as the interplay between a national registry and state do-not-call lists. We request that commenters address issues relating to our current rules separately from those issues relating to a national do-not-call list.

12. In evaluating the issues in this NPRM, we will be mindful of the constitutional standards applicable to governmental regulations of commercial speech articulated in *Central Hudson Gas & Elec. Corp. v. Public Service Commission*.[60] In order to determine whether restrictions on commercial speech survive "intermediate scrutiny," *Central Hudson* sets out a four-part test.[61] *Central Hudson* asks first whether the speech in question concerns illegal activity or is misleading, in which case the government may freely regulate the speech. If the speech is not misleading and does not involve illegal activity, the court applies the rest of the four-part test to the government's regulation. The second prong of *Central Hudson* examines whether the government has a substantial interest in regulating the speech. Third, the government must show that the restriction on commercial speech directly and materially advances that interest. Finally, the regulation must be narrowly tailored. Narrowly tailored means that the government's restriction on speech reflects a "carefu[l] calculat[ion of] the costs and benefits associated with the burden on speech imposed by its prohibition."[62] To the extent that any proposed changes to our current rules implicate these constitutional standards, we seek comment on such implications.

1. TCPA Rules

a. Company-Specific Do-Not-Call Lists

13. The TCPA directs the Commission to "compare and evaluate alternative methods

(...continued from previous page)
or services, but also charitable fund raising conducted by for-profit telemarketers for or on behalf of charitable organizations."

[59] *See TCPA*, Section 2(9), *reprinted in* 7 FCC Rcd 2736 at 2744.

[60] *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980) (*Central Hudson*).

[61] *Central Hudson*, 447 U.S. at 564-65.

[62] *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 (1993) (internal quotation marks omitted).

and procedures . . . for their effectiveness in protecting [residential telephone subscribers'] privacy rights" to avoid receiving unwanted telephone solicitations.[63] In the *TCPA Order*, the Commission determined that rules requiring telemarketers to maintain their own lists of consumers who did not wish to be called sufficiently balanced consumer interests in limiting unsolicited advertising with telemarketers' interests in providing beneficial services to consumers.[64] The company-specific do-not-call approach protects residential telephone subscriber privacy by requiring telemarketers to place a consumer on a do-not-call list if the consumer asks not to receive further solicitations.[65]

14. We now seek comment on the overall effectiveness of the company-specific do-not-call approach in providing consumers with a reasonable means to curb unwanted telephone solicitations. We recognize that some consumers may feel that receiving product and service information by telephone helps them reap the benefits of a competitive marketplace; such consumers may value the savings and convenience that telemarketing often provides. Other consumers may wish to limit, or even stop altogether, the number of telemarketing calls they receive. Given the volume of telemarketing calls, we seek comment on whether the company-specific do-not-call approach adequately balances the interests of those consumers who wish to continue receiving telemarketing calls, and of the telemarketers who wish to reach them, against the interests of those who object to such sales calls. We note that, under the company-specific do-not-call approach, consumers must repeat their request not to be called on a case-by-case basis as calls are received. We seek comment on whether this approach is unreasonably burdensome for consumers. We also seek comment on how effective such requests have been in practice in preventing unwanted telephone solicitations.[66] For example, we seek comment on whether such requests are typically honored, whether consumers continue to receive calls for some period of time after requesting that they be placed on a do-not-call list, and whether some telemarketers hang up before consumers can assert their "do-not-call" rights. In addition, we seek comment on whether consumers with hearing and speech disabilities often may be unable to convey a request not to be called to telemarketers.[67]

15. As discussed above, changes in the marketplace and technological innovations since the Commission adopted its TCPA rules in 1992 may have reduced the effectiveness of the company-specific approach. For example, the widespread use of predictive dialers and answering machine detection technology results in many "hang-up" or "dead air" calls in which the consumer has no opportunity to request that the telemarketer not call in the future.[68] The

[63] 47 U.S.C. § 227(c)(1)(A).

[64] *TCPA Order*, 7 FCC Rcd at 8765-66, para. 23.

[65] 47 C.F.R. § 64.1200(e)(2)(iii).

[66] The U.S. Department of Justice has indicated that maintenance of a purely voluntary list by industry, or of separate do-not-call lists by various states, has not proven effective for consumers in ensuring that they will not receive unwanted telemarketing calls. *See* U.S. Department of Justice Comments filed in the FTC proceeding dated March 29, 2002 at 4.

[67] *See* Telecommunications for the Deaf, Inc. Comments in the FTC proceeding dated April 15, 2002 at 2 (indicating that these consumers often receive calls from telemarketers that are not equipped to handle TTY calls).

[68] *See supra* n. 37 and 38.

FTC indicates that use of predictive dialers has increased dramatically in the past decade.[69] The FTC notes that many consumers feel frightened, threatened, or harassed when receiving a pattern of such hang-up calls.[70] In addition, there is no way for the consumer to determine whether such calls are placed by telemarketers or may be part of some illegitimate conduct. Such calls may also be particularly trying for the elderly and persons with disabilities who may have difficulty reaching the phone only to be disconnected. Such calls may also be disruptive to the increasing number of individuals who now work from home by tying up telephone lines or disconnecting telecommuters from the Internet.[71] We seek comment on what, if any, legitimate business or commercial speech interest is promoted by these calls. We seek comment on these issues and any other impact that changes in the telemarketing industry over the last decade have had on the overall effectiveness of the company-specific approach.

16. In the *TCPA Order*, the Commission enumerated a number of advantages both to consumers and businesses in adopting a company-specific do-not-call approach. In particular, the Commission concluded that company-specific do-not-call lists: (1) were already maintained by many telemarketers; (2) allow residential subscribers to selectively halt calls from telemarketers; (3) allow businesses to gain useful information about consumer preferences; (4) protect consumer confidentiality because the lists would not be universally accessible; and (5) impose the costs of protecting consumers on telemarketers rather than telephone companies or consumers.[72] We seek comment on whether these and any other potential advantages of the company-specific do-not-call approach remain valid today. In addition, we seek comment on whether the company-specific approach should be retained if the FTC, either acting alone or in conjunction with the Commission, adopts a national do-not-call list. Under such circumstances, we seek comment as to whether the benefits of retaining company-specific do-not-call lists to consumers would continue to outweigh the costs to telemarketers. Parties are strongly encouraged to provide empirical studies or other specific evidence whenever possible to support their arguments.

17. If the Commission concludes that it should retain the company-specific do-not-call lists, we seek comment on whether the Commission should consider any additional modifications that would allow consumers greater flexibility to register on such lists. For example, we seek specific comment on whether companies should be required to provide a toll-free number and/or a website that consumers can access to register their name on the do-not-call list. In addition, we seek comment on whether any additional measures should be taken to ensure that consumers with disabilities have the same opportunity as other consumers to request that they be placed on do-not-call lists. We also seek comment on whether companies should be required to respond affirmatively to such requests or otherwise provide some means of

[69] *FTC Notice*, 67 Fed. Reg. at 4523.

[70] *FTC Notice*, 67 Fed. Reg. at 4523.

[71] The number of Americans who work off-site has dramatically increased since 1990, when there were 3.4 million telecommuters in the United States. In 1999, almost 20 million people in the United States telecommuted. This figure represents an 80% increase from 1997, when there were 11.1 million telecommuters nationally. *See General Telecommuting Questions*, Midwest Institute for Telecommuting Education (MITE) (visited April 16, 2002) <http://www.mite.org/>.

[72] *TCPA Order*, 7 FCC Rcd at 8765-66, para. 23.

confirmation so that consumers may verify that their requests have been processed. As a related matter, we seek comment as to whether the Commission should set a specific time frame for companies to process do-not-call requests. We also ask whether the requirement that companies honor do-not-call requests for ten years is a reasonable length of time for consumers and telemarketers.[73] In addition, we seek comment on any possible Commission or industry initiatives that would better inform consumers of their right to request placement on a company's do-not-call list. We also seek comment on the effectiveness of any private sector initiatives, such as the Direct Marketing Association's Telephone Preference Service, in reducing unwanted sales calls.[74] Are there any industry "best practices" that might provide telemarketers with possible safe harbors from liability for violating our do-not-call rules? Finally, we seek comment on whether our rules should be modified to minimize unnecessary burdens on telemarketers. We seek comment on these and any other modifications that commenters may suggest that would better balance the goal of limiting unsolicited advertising against telemarketers' burdens in conducting beneficial or otherwise legitimate telemarketing practices.

18. *Interplay of sections 222 and 227*. The Commission has recently released an Order implementing section 222 of the Communications Act of 1934, as amended.[75] Section 222, entitled "Privacy of Customer Information," obligates telecommunications carriers to protect the confidentiality of certain information. In the *CPNI Order*, the Commission determined that a telecommunications carrier may use a customer's customer proprietary network information (CPNI)[76] to market various services to a customer if that customer has provided its carrier with appropriate consent.[77] The section 227 rules require telemarketers to maintain their lists of consumers who do not wish to be called and to place a consumer on a do-not-call list if the consumer asks not to receive further solicitations.[78]

19. We seek comment broadly on the interplay between sections 222 and 227. For example, if an individual places her name on her carrier's do-not-call list under section 227 (or a national do-not-call list, if one were implemented), should such an express request not to be contacted by means of the telephone be honored even though the customer may also have provided implied (opt-out) consent under section 222 for use and disclosure of her CPNI? We believe that a consumer's request to be placed on a telecommunications carrier's do-not-call list limits that carrier's ability to market to that consumer over the telephone. The carrier, however,

[73] In its 1995 Order, the Commission stated that it would monitor the effectiveness of the 10-year retention requirement and readdress the issue if necessary at a later date. *See 1995 TCPA Reconsideration Order*, 10 FCC Rcd at 12398, para. 15.

[74] *See supra* n. 49.

[75] *See Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Third Report and Order and Third Further Notice of Proposed Rulemaking, CC Docket Nos. 96-115, 96-149, 00-257, FCC 02-214, (rel. July 25, 2002) *(CPNI Order)*.

[76] CPNI includes personal information such as the phone numbers called by a consumer, the length of phone calls, and services purchased by the consumer, such as call waiting. *See CPNI Order*, para. 7.

[77] The form of consent required varies with the CPNI uses and disclosures for which the carrier requests consent. Under an "opt-out" consent, if the customer fails to expressly advise the carrier that it does not want its CPNI used in the manner requested, then after a minimum thirty-day waiting period from the time notice is provided to the customer, the customer is deemed to have approved the requested use or disclosure.

[78] 47 C.F.R. § 64.1200(e)(iii); *see also* 47 U.S.C. § 227(c).

may still market to that consumer, using her CPNI, in other ways (e.g., direct mail, email, etc.). Honoring a do not call request under section 227 does not render a consent under section 222 a nullity, but instead merely limits the manner of contact (i.e., marketing over the telephone) consistent with the express request of the customer under section 227. Further, we believe it likely that permitting a section 222 opt-out consent to eliminate or trump a section 227 do not call request would lead to customer confusion concerning privacy rights and the actions required to secure those rights. We request comment on our tentative conclusion, as well as on the rationale underlying that conclusion. We also request comment on whether we should reach that same tentative conclusion where the form of consent provided under section 222 is an express opt-in consent. Commenters should also analyze those constitutional considerations that may influence our determination, and explain with particularity how their recommendations are consistent with first amendment requirements.[79]

20. As discussed below, the Commission's rules permit an exemption for companies to deliver artificial or prerecorded message calls to consumers with whom they have an "established business relationship."[80] The Commission seeks comment on what effect the established business relationship exemption might have on the telecommunications industry, if a national do-not-call list is established. Should we consider modifying the definition of "established business relationship" so that a company that has a relationship with a customer based on one type of product or service may not call consumers on the do-not-call list to advertise a different service or product?

b. Network Technologies

21. We seek comment on whether network technologies have been developed over the last decade that may allow consumers to avoid receiving unwanted telephone solicitations. If so, we seek comment on whether and how these technologies should influence our analysis of the merits of revising our company-specific do-not-call rules or possibly adopting a national do-not-call list. In particular, we seek comment on what factors the Commission should consider in deciding whether to rely on these technologies. In the 1992 *TCPA Order*, the Commission rejected the network technology method of avoiding unwanted telephone solicitations.[81] In particular, the Commission considered whether to require telemarketers to use a special area code or telephone number prefix that would allow consumers to block such calls using automatic number identification (ANI)[82] or a caller ID service. Based on the costs and technical barriers to implement this alternative, however, the Commission concluded that this solution was not the best means for accomplishing the objectives of the TCPA at that time.[83] The Commission also noted that it was unclear whether fees on telemarketers would be sufficient to cover the costs of

[79] *See Central Hudson*, 447 U.S. 564-65.

[80] *See infra* para. 34. *See also* 47 C.F.R. § 64.1200(c)(3).

[81] *TCPA Order*, 7 FCC Rcd at 8761-62, paras. 16-17.

[82] The term "ANI" (automatic number identification) refers to the delivery of the calling party's billing number by a local exchange carrier to any interconnecting carrier for billing or routing purposes, and to the subsequent delivery of such number to end users. 47 C.F.R. § 64.1600(b).

[83] *TCPA Order*, 7 FCC Rcd at 8762, para. 17 (noting that the more than 30,000 businesses engaged in telemarketing would be required to incur costs associated with changing their telephone numbers).

making call blocking technology universally available, raising the possibility that such costs would be passed on to residential telephone subscribers, in violation of the TCPA.[84] We seek comment on whether these concerns remain persuasive today. We seek comment on whether we should consider any other technologies in this context, and, if so, we ask commenters to include a brief explanation of how these technologies operate and how much they would cost to implement.

22. Under the Commission's rules, with certain limited exceptions, common carriers using Signaling System 7 (SS7) and offering or subscribing to any service based on SS7 functionality are required to transmit the calling party number (CPN) associated with an interstate call to interconnecting carriers.[85] As discussed in greater detail below, we take this opportunity to seek comment on whether the Commission should consider any additional "caller ID" requirements in the context of its review of the TCPA rules. Specifically, should the Commission require telemarketers to transmit the name and telephone number of the calling party, when possible, or prohibit them from blocking or altering the transmission of such information?[86] We also seek comment on what impact any changes to our "caller ID" rules might have on existing state "caller ID" rules.

c. Autodialers

23. *Definition*. Section 227 and the Commission's implementing regulations define automatic telephone dialing systems as "equipment which has the capacity to store or produce telephone numbers to be called using a random or sequential number generator and to dial such numbers."[87] The Commission seeks comment on the definition of "automatic telephone dialing system" (or "autodialer") and whether it is necessary to identify the technologies section 227 is designed to address. The TCPA and Commission's rules prohibit calls using an autodialer to emergency telephone lines, to the telephone line of a guest room of a health care facility, to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call.[88] In addition, Commission rules provide that all artificial or prerecorded messages delivered by an autodialer shall, at the beginning of the message, state the identity of the entity initiating the call and, during the message, the telephone number or address of such entity.[89] The Commission has received inquiries about whether certain technologies fall within these restrictions, given that they may or may not be classified as "automatic telephone dialing systems."

24. The legislative history of the TCPA suggests that autodialer-generated calls are

[84] *TCPA Order*, 7 FCC Rcd at 8762, para. 17.

[85] *See* 47 C.F.R. §§ 64.1600, 64.1601.

[86] *See infra*, para. 26. *See also* 2001 United States House Bill No. 90, 107th Congress (proposing to amend the Communications Act of 1934 to prohibit telemarketers from interfering with the caller identification service of any person to whom a telephone solicitation is made).

[87] 47 U.S.C. § 227(a)(1); 47 C.F.R. § 64.1200(f)(1).

[88] 47 U.S.C. § 227(b)(1)(A)(i)-(iii); 47 C.F.R. § 64.1200(a)(1)(i)-(iii).

[89] 47 C.F.R. § 64.1200(d)(1) and (2).

more intrusive to the privacy concerns of the called party than live solicitations.[90] An autodialer can generate far more calls to residences than a telemarketer can manually.[91] In addition, an autodialer is frequently used to send artificial or prerecorded messages, which the legislative history suggests are often a greater nuisance and invasion of privacy than calls placed by "live" persons.[92] We seek comment on this reading of the legislative history and whether Congress intended the definition of "automatic telephone dialing system" to be broad enough to include any equipment that dials numbers automatically, either by producing 10-digit telephone numbers arbitrarily or generating them from a database of existing telephone numbers. The Commission recognizes that in the last decade new technologies have emerged to assist telemarketers in dialing the telephone numbers of potential customers. More sophisticated dialing systems, such as predictive dialers[93] and other electronic hardware and software containing databases of telephone numbers, are now widely used by telemarketers to increase productivity and lower costs. Therefore, we ask commenters to provide information on the various technologies used to dial telephone numbers. We invite comment on the use of random and sequential number generators and whether an autodialer can generate phone calls from a database of existing numbers. If a particular technology generates numbers at random, how does a telemarketer comply with the law to avoid calling emergency phone lines, health care facilities, pager numbers, and wireless telephone numbers? In light of new technologies and the legislative history, is there a need to refine the definition in our rules to better balance the goal of limiting unsolicited advertising against the burdens on telemarketers and their interest in providing beneficial telemarketing services?

25. *Autodialed Calls to Residences and Businesses.* Additionally, the Commission seeks input from commenters about the costs and benefits of adopting rules to further restrict the use of autodialers to dial residential and business telephone numbers. We specifically seek comment on the practice of using automatic telephone dialing equipment to dial large blocks of telephone numbers in order to identify lines that belong to telephone facsimile machines.[94] Should the Commission adopt rules to restrict this practice?

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[90] "Computerized calls are the scourge of modern civilization. They wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of bed; they hound us until we want to rip the telephone right out of the wall . . . [O]wning a telephone does not give the world the right and privilege to assault the consumer with machine-generated telephone calls." 137 CONG. REC. S9874 (July 8, 1991)(statement of Sen. Hollings).

[91] Representative Markey noted that "[t]oday in America, more than 300,000 solicitors make more than 18 million calls every day in the United States, while some 75,000 stock brokers make 1.5 billion telemarketing calls a year. Automatic dialing machines, on the other hand, have the capacity to call 20 million Americans during the course of a single day, with each individual machine delivering a prerecorded message to 1,000 homes." 137 CONG. REC. H10,341 (Nov. 18, 1991).

[92] *See* S. REP. NO. 102-178, at 2 (1991). Congress found that complaints about automated calls included the fact that such calls fill the entire tape of an answering machine, thereby preventing the called party from receiving other messages from other callers.

[93] *See supra* text accompanying note 37.

[94] This practice, sometimes referred to as "war dialing," uses automated equipment to dial telephone numbers, generally sequentially, and software to determine whether each number is associated with a fax or voice line. We emphasize that any such autodialed calls to emergency lines, health care facilities, paging services and any service for which the called party is charged for the call would be prohibited under the TCPA. *See* 47 U.S.C. § 227(b)(1)(A)(i)-(iii); 47 C.F.R. § 64.1200(a)(1)(i)-(iii).

26. *Predictive Dialers*. We seek specific comment on whether a predictive dialer, as a form of automatic telephone dialing system, is subject to the ban on calls to emergency lines, health care facilities, paging services, and any service for which the called party is charged for the call.[95] Specifically, we ask whether a predictive dialer that dials telephone numbers using a computer database of numbers falls under the TCPA's restrictions on the use of autodialers.[96] We seek comment on whether the Commission should adopt rules to further restrict the use of predictive dialers to dial consumers' telephone numbers.[97] In addition to automatically dialing numbers, predictive dialers are set up to "predict" the average time it takes for a consumer to answer the phone and when a telemarketer will be free to take the next call. When a consumer answers the telephone, a predictive dialer transfers the call to an available telemarketer. When a predictive dialer simultaneously dials more numbers than the telemarketers can handle, some of the calls are disconnected. The consumer may hear silence on the line as the call is being transferred or a "click" as the call is disconnected.[98] In 1991, the Commission received a total of 757 complaints regarding calls placed to subscribers by autodialers.[99] From June 2000 to December 2001, the Commission received over 1,500 inquiries about predictive dialing alone. In addition, the consumer alert titled "Predictive Dialing: Silence on the Other End of the Line" has received over 16,000 hits on the Commission's website since the alert was posted in February of 2001.[100] In light of the increased use of predictive dialers, the Commission seeks recommendations on what approaches we might take to minimize any harm that results from the use of predictive dialers. Cognizant of the benefits of predictive dialing to the telemarketing industry,[101] the Commission invites comment on whether requiring a maximum setting on the number of abandoned calls[102] or requiring telemarketers who use predictive dialers to also transmit caller ID information are feasible options for telemarketers. We also seek comment on whether prohibiting telemarketers from blocking caller ID information would alleviate the harm that results when predictive dialers abandon calls.[103] As noted earlier, under the Commission's

[95] *See* 47 U.S.C. § 227(b)(1)(A)(i)-(iii); 47 C.F.R. § 64.1200(a)(1)(i)-(iii).

[96] *See, e.g., Kaplan v. Ludwig and Kustom Karpet Kleaners, Inc.*, County of Wayne, New York (June 6, 2000) (finding that equipment that uses a computer database to dial numbers is not an "automatic telephone dialing system" under the TCPA); *see also* discussion of "automatic telephone dialing system," *supra* paras. 23-24.

[97] Oklahoma Governor Frank Keating signed a bill in June, 2002 (HB-2837) that bans the use of automatic or predictive dialing devices that cause the volume of abandoned calls to exceed 5% of answered calls per day in any telemarketing campaign.

[98] *See supra* n. 38.

[99] *See In the Matter of the Telephone Consumer Protection Act of 1991, Notice of Proposed Rulemaking*, CC Docket No. 92-90, 7 FCC Rcd 2736 at 2740, para. 24 (1992) (*1992 NPRM*).

[100] Source: The Commission's Consumer & Governmental Affairs Bureau (CGB). *See* http://www.fcc.gov/cgb/consumerfacts/PredictiveAlert.html.

[101] The Direct Marketing Association (DMA) explains that predictive dialers enable small and large companies to reach more customers; allow smaller telemarketers to compete with larger competitors; allow companies to provide a greater number of services at lower prices; and allow telemarketers to better target customers most likely interested in telemarketing offers. *See* DMA's comments filed with the FTC at 43-44.

[102] The Direct Marketing Association (DMA) recommends that its members voluntarily abide by a 5% abandonment rate on calls.

[103] Consumers would then be able to identify the number of the calling entity and arguably would be better able to hold telemarketers accountable for their practices.

caller ID rules, common carriers using SS7 and offering or subscribing to any service based on SS7 functionality are required to transmit the CPN associated with an interstate call to interconnecting carriers.[104] If the Commission were to adopt rules regarding the transmission of caller ID information by telemarketers, should we consider amending the caller ID rules in any way to ensure the two sets of rules are consistent? We also invite commenters to suggest alternative approaches to the problems associated with abandoned calls.

27. *Answering Machine Detection*. Another reason for "dead air" may be the use of Answering Machine Detection (AMD) technology that monitors calls once they are answered.[105] According to DialAmerica Marketing, Inc., AMD can be used along with automatic dialing systems to deliver telemarketing calls. AMD may either send a prerecorded message to an answering machine or transfer the call to a telemarketer once it detects that a customer has answered the call. According to comments filed with the FTC, if the AMD detects "noise" (*e.g.,* the word "Hello") followed by silence, it assumes that a person has answered the phone. If the AMD detects noise for several seconds, it assumes that it is an answering machine message.[106] In either case, the AMD may be programmed to disconnect the call or send a prerecorded message to an answering machine. In the event that a person has answered the telephone and the call is transferred to a sales representative, the use of AMD involves the monitoring of the line for several seconds and may create "dead air" while the call is being transferred. The Commission seeks comment on the use of AMD by the telemarketing industry and whether AMD technology is responsible for much of the "dead air" consumers encounter. We also seek comment on whether consumers are most frustrated with the delay in response as the call is transferred to a telemarketer, or with calls that are abandoned entirely, or with both. Would restrictions on the use of AMD serve to alleviate the problem of "dead air?" Should restrictions on AMD be implemented in conjunction with restrictions on autodialers and predictive dialers? Commenters are strongly encouraged to support their arguments with empirical studies or other specific evidence.

d. Identification Requirements

28. Commission regulations require that a person or entity making a telephone solicitation must provide the called party with the name of the individual caller, the name of the person or entity on whose behalf the call is being made, and a telephone number or address at

[104] *See* 47 C.F.R. § 64.1601(a). The Commission's caller ID rules also require common carriers to notify subscribers that their telephone numbers may be identified by the calling party. In addition to CPN transmission and subscriber notification requirements, the Commission implemented rules to protect the privacy of the called and calling parties. Specifically, the rules require carriers to recognize *67 as a request for privacy. 47 C.F.R. § 64.1601(b). Dialing *67 before placing a call allows subscribers to block their numbers from transmission to the public switched network. Carriers must also recognize *82 as a request that the CPN be transmitted on an otherwise blocked line. Per call unblocking allows subscribers that have permanently blocked lines to unblock their lines on a per call basis, thus allowing passage of the CPN. The rules also prohibit carriers from revealing the calling party's name or number, and prohibit carriers from allowing the called party to return automatically the call (via Automatic Call Return, or "ACR"), when the original calling party invokes privacy. 47 C.F.R. § 1601(b). Section 64.1601(a) shall not apply when a local exchange carrier with SS7 capability does not have the software to provide *67 or *82 functionalities. Such carriers are prohibited from passing CPN. 47 C.F.R. § 1601(d)(2).

[105] *See* DialAmerica Marketing, Inc.'s comments filed with the FTC at 19-20.

[106] *See, e.g.,* DialAmerica Marketing, Inc.'s comments filed with the FTC at 19-22.

which the person or entity may be contacted.[107] The term "telephone solicitation" is defined to mean the initiation of a telephone call or *message* for the purpose of encouraging the purchase or rental of . . . property, goods, or services . . ." (emphasis added).[108] The TCPA clearly imposes identification requirements upon artificial and prerecorded voice messages[109] and our identification rules apply without limitation to "any telephone solicitation to a residential telephone subscriber."[110] Nonetheless, we seek comment on whether we should modify our rules to state expressly that the identification requirements apply to otherwise lawful artificial or prerecorded messages, as well as to live solicitation calls.

29. Under Commission rules, telemarketers who use autodialers to send artificial or prerecorded messages similarly must identify themselves by name and phone number or address.[111] We seek comment on the Commission's identification requirement at 47 C.F.R. § 64.1200(d) and its applicability to predictive dialing and other circumstances involving abandoned telemarketing calls. We note that, in its discussion on predictive dialing, the FTC maintains that telemarketers who abandon calls are violating § 310.4(d) of the Telemarketing Sales Rule.[112] The FTC states that, under its rules, when a telemarketer calls a consumer, the telemarketer is required to disclose identifying information to the person receiving the call. According to the FTC, the consumer is "receiving the call" when the consumer answers the telephone.[113] Therefore, if a predictive dialer abandons the call before the telemarketer identifies himself or herself, the FTC proposes that the telemarketer is violating the Telemarketing Sales Rule. We seek comment on whether the Commission should reach a similar conclusion.

e. Artificial or Prerecorded Voice Messages

(i) Commercial and Non-Commercial Calls

30. The TCPA and Commission rules prohibit telephone calls to residences using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is for emergency purposes or is specifically exempted.[114] Commission rules exempt calls that are non-commercial as well as commercial calls that do not include the transmission of any unsolicited advertisement.[115] The rules define "unsolicited advertisement" to mean "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission."[116] While the Commission has declined to create specific

[107] 47 C.F.R. § 64.1200(e)(2)(iv).

[108] 47 U.S.C. § 227(a)(3); 47 C.F.R. § 64.1200(f)(3).

[109] 47 U.S.C. § 227(d)(3)(A).

[110] 47 C.F.R. § 64.1200(e)(2)(iv).

[111] 47 C.F.R. § 64.1200(d)(1) and (2).

[112] *See FTC Notice*, 67 Fed. Reg. at 4524; 16 C.F.R. Part 310.

[113] *See FTC Notice*, 67 Fed. Reg. at 4524.

[114] 47 U.S.C. § 227(b)(1)(B); 47 C.F.R. § 64.1200(a)(2).

[115] *See* 47 U.S.C. § 227(b)(2)(b); 47 C.F.R. § 64.1200(c)(1) and (2).

[116] 47 C.F.R. § 64.1200(f)(5).

categories of non-commercial exemptions (other than for tax-exempt nonprofit organizations, discussed below), it noted that messages that do not seek to sell a product or service do not tread heavily upon the consumer interests implicated by section 227.[117] Therefore, the Commission determined that calls conducting research, market surveys, political polling, or similar activities which do not involve solicitation as defined by the rules are exempt from the prohibition on prerecorded messages.[118] We note here that the exemption for non-commercial calls applies to a wide range of entities, some of which are engaged in political or religious discourse. This Commission does not intend in this NPRM to seek comment on the exemption as it applies to political and religious speech.[119]

31. We specifically seek comment on artificial or prerecorded messages containing offers for free goods or services (including free estimates or free analyses) and messages with "information-only" about products. We also invite comment about calls seeking people to help sell or market a business' products (a kind of "help wanted" message).[120] We note that, while these calls do not purport to sell something, they often contain messages advertising the quality of certain goods or services and are intended to generate future business. Such messages usually include phone numbers that consumers can call to obtain further information, at which time the seller offers additional goods or services for purchase. Such calls arguably have a dual purpose, as in the case when a business calls to inquire about a customer's satisfaction with a product or service already purchased, but is nevertheless motivated in part by the desire to ultimately sell additional goods or services. The Commission therefore seeks comment on whether our rules would better serve consumers and businesses if they more explicitly addressed those calls that include information about a product or service but do not immediately solicit a purchase. Would it balance the interests of consumers and telemarketers more effectively for us to clarify that calls containing offers for free goods or services are prohibited without the prior express consent of the called party? Would such action assist telemarketers in their efforts to comply with our rules, as well as reduce the number of unwanted telephone solicitations? Again, as stated above, we note that we are not seeking comment regarding political or religious speech.[121]

32. Based on public inquiries, we also seek comment on prerecorded messages sent by radio stations or television broadcasters that encourage telephone subscribers to tune in at a particular time for a chance to win a prize or some similar opportunity.[122] Does the Commission

[117] *See 1992 NPRM*, 7 FCC Rcd at 2737, para. 11. Among the examples of calls that do not include the transmission of any unsolicited advertisement, the Commission cited calls from a business that wishes to advise its employees of a late opening time due to weather; or calls from a nationwide organization that wishes to remind members of an upcoming meeting or change in schedule; or calls from a catalogue or delivery company to confirm the arrival, shipment, or delivery date of a product to a customer. We note that such calls also would be covered by the exemption for an established business relationship. *See* 47 C.F.R. § 64.1200(c)(3).

[118] *See TCPA Order*, 7 FCC Rcd at 8774, para. 41.

[119] *See TCPA*, Section 2(13), *reprinted in* 7 FCC Rcd 2736 at 2745.

[120] Another example of a "help wanted" call might include a message from an insurance company recruiting agents to help sell insurance policies. *See, e.g., Lutz Appellate Services, Inc. v. Curry*, 859 F.Supp. 180 (E.D. Pa. 1994) (finding that "help-wanted" fax messages are not unsolicited advertisements under the TCPA).

[121] *See supra* para. 30.

[122] *See, e.g.,* Request for Clarification from Robert Biggerstaff, April 12, 2000, CC Docket No. 92-90.

need to specifically address these kinds of telemarketing calls, and, if so, what rules might we adopt to appropriately balance consumers' interest in restricting unsolicited advertising with commercial freedoms of speech?

(i) Tax-Exempt Nonprofit Organizations

33. The TCPA excludes calls or messages by tax-exempt nonprofit organizations from the definition of "telephone solicitation."[123] In the *TCPA Order*, the Commission concluded that calls by tax-exempt nonprofit organizations also should be exempt from the prohibition on prerecorded messages to residences as non-commercial calls.[124] Noting that the TCPA seeks primarily to protect subscribers from unrestricted commercial telemarketing activities, the Commission found no evidence to show that non-commercial calls represented as serious a concern for telephone subscribers as unsolicited commercial calls.[125] In addition, the Commission determined that calls made by independent telemarketers on behalf of tax-exempt nonprofit organizations are not subject to our rules governing telephone solicitations.[126] We point out, however, that the Commission has received inquiries over the years about certain practices by nonprofit organizations. We take this opportunity to seek comment on calls made jointly by nonprofit and for-profit organizations and whether they should be exempt from the restrictions on telephone solicitations and prerecorded messages. For example, if a nonprofit organization calls consumers to sell another company's magazines and receives a portion of the proceeds, should such calls fall within the exemption? We emphasize in this NPRM that the exemption for tax-exempt nonprofit organizations applies to religious and political organizations that have likewise received tax exempt status from the U.S. government. We note here that the exemption for non-commercial calls applies to a wide range of entities, some of which are engaged in political or religious discourse. In this NPRM, we do not seek comment on the exemption as it applies to political and religious speech.[127] We emphasize that we do not seek comment in this notice on the exemption as it applies to political and religious speech whether conducted by nonprofit organizations or for-profit organizations on behalf of nonprofit organizations. We note that the statute and our rules clearly apply already to messages that are predominantly commercial in nature, and that we will not hesitate to consider enforcement action should the provider of an otherwise commercial message seek to immunize itself by simply inserting purportedly "non-commercial" content into that message.

(ii) Established Business Relationship

34. In the *TCPA Order*, the Commission determined that, based on the record and legislative history, the TCPA permits an "established business relationship" exemption from the

[123] 47 U.S.C. § 227(a)(3)(C). The Commission later clarified that telemarketers who solicit on behalf of tax-exempt nonprofit organizations also are not subject to the rules governing telephone solicitations. *See 1995 TCPA Reconsideration Order*, 10 FCC Rcd at 12397, para. 13.

[124] *See TCPA Order,* 7 FCC Rcd at 8773-74, para. 40; see also 47 U.S.C. § 227(a)(3)(C) and 47 C.F.R. § 64.1200(c)(4).

[125] *See TCPA Order*, 7 FCC Rcd at 8773-8774, para. 40.

[126] *See 1995 TCPA Reconsideration Order*, 10 FCC Rcd at 12397, para. 13.

[127] *See TCPA*, Section 2(13), *reprinted in* 7 FCC Rcd 2736 at 2745.

restrictions on artificial or prerecorded message calls to residences.[128] The Commission concluded that a solicitation to someone with whom a prior business relationship exists does not adversely affect subscriber privacy interests.[129] The Commission defined the term "established business relationship" to mean "a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party."[130] We seek comment on whether any circumstances have developed that would justify revisiting these conclusions. If so, would revisiting the exemption interfere with ongoing business relationships or impede communications between businesses and their customers, particularly for small businesses? Should the Commission specify by rule the particular circumstances that would establish the requisite business relationship? We seek comment specifically on whether we should clarify the type of consumer *inquiry* that would create an established business relationship for purposes of the exemption.[131] For example, need we clarify that a consumer's request for information related to business hours or directions to a business location is not an inquiry that would establish the requisite business relationship?[132] The Commission also invites comment on whether merely asking at a previous time about a company's products, services, or prices could establish a prior business relationship.[133] If so, is there any time limitation to such relationships?

35. We also seek comment on the interplay between the established business relationship exemption and a customer's request not to receive calls from a person or entity with which the customer has a prior business relationship.[134] In the *TCPA Order*, the Commission

[128] *See TCPA Order*, 7 FCC Rcd at 8770, para. 34; 47 C.F.R. § 64.1200(c)(3).

[129] *See TCPA Order*, 7 FCC Rcd at 8770, para. 34.

[130] 47 C.F.R. § 64.1200(f)(4).

[131] The Commission noted in the *TCPA Order* that persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary. However, a party making an inquiry cannot be considered to have given prior express consent to future autodialed or prerecorded message calls simply because that party's number has been "captured" by an ANI device or similar system. Nor can a customer inquiry be considered to create a business relationship where the consumer's number has been captured absent that consumer's express invitation or permission to be contacted at the captured number. *See TCPA Order*, 7 FCC Rcd at 8769-71, paras. 31 and 35, n. 67.

[132] The Commission emphasized that, if a caller's number is "captured" by a caller ID or ANI device without notice to the residential telephone subscriber, the caller cannot be considered to have given an invitation or permission to receive autodialer or prerecorded voice message calls. *See TCPA Order,* 7 FCC Rcd at 8769, para. 31.

[133] We note the following legislative history on this issue: "In the Committee's view, an 'established business relationship' also could be based upon any prior transaction, negotiation, or inquiry between the called party and the business entity that has occurred during a reasonable period of time. However, the Committee strongly believes that a subsequent telemarketing solicitation by an entity with an 'established business relationship' to an objecting consumer must be substantially related to the product or service which formed the basis of the prior relationship. By requiring this type of relationship, the Committee expects that otherwise objecting consumers would be less annoyed and surprised by this type of unsolicited call since the consumer would have a recently established interest in the specific products or services." H.R. Rep. NO. 102-317, at 14, 102nd Cong. 1st Sess. (1991).

[134] *See, e.g.,* Request for Clarification from Robert Biggerstaff, May 1, 2000, CC Docket No. 92-90; *see also* discussion about the effect of the established business relationship exemption on the telecommunications industry, *supra* para. 20.

noted that a business may not make telephone solicitations to an existing or former customer who has asked to be placed on that company's do-not-call list.[135] The Commission explained that a customer's request to be placed on the company's do-not-call list terminates the business relationship between the company and that customer for the purpose of any future solicitation.[136] We seek comment on the effect of a do-not-call request on a prior business relationship. Specifically, should a company be obligated to honor a do-not-call request even when the customer continues to do business with the entity making the solicitations?[137] Or is the consumer obligated to first terminate all business with the company before the company must suspend solicitation calls to that customer? For example, must a consumer who subscribes to a daily newspaper or holds a credit card cancel the newspaper subscription or credit card in order to stop future solicitation calls from those businesses?[138]

f. Time of Day Restrictions

36. In the *TCPA Order*, the Commission concluded that it was in the public interest to impose time of day restrictions on telephone solicitations as reasonable limitations on telemarketing to residences.[139] Accordingly, the Commission implemented regulations that prohibited unsolicited sales calls before 8:00 am and after 9:00 pm local time at the called party's location.[140] As part of our review of the current TCPA rules, we seek comment on how effective these time restrictions have been at limiting objectionable solicitation calls. The FTC's Telemarketing Sales Rule also includes calling time restrictions that are consistent with the FCC's rules on calling hours.[141] The FTC indicates that the current calling time restrictions provide reasonable protections for consumers' privacy while not burdening the telemarketing industry.[142] The FTC also notes that altering the calling hours under the TSR would create a

[135] *See TCPA Order*, 7 FCC Rcd at 8770, n. 63.

[136] *See TCPA Order*, 7 FCC Rcd at 8770, n. 63; *see also* H.R. Rep. No. 102-317, at 15-16, 102nd Cong. 1st Sess. (1991) ("If a subscriber asks a company with whom it has an established relationship not to call again, the company has an obligation to honor the request and avoid further contacts. Despite the fact that objecting subscribers can be called based on an 'established business relationship,' it is the strongly held view of the Committee that once a subscriber objects to a business that calls based on an established relationship, such business must honor this second objection and implement procedures not to call that twice-objecting subscriber again").

[137] Two examples of an "ongoing relationship" might include: (1) a consumer who subscribes to a newspaper and requests that the newspaper not call again about other services; or (2) a consumer who holds a credit card with a company and has asked not to receive future telephone solicitations. Should a call by a newspaper or magazine to renew a subscription be permitted because of an existing business relationship, even after the customer has requested that the company not call again?

[138] *See, e.g., Charvat v. Dispatch Consumer Services, Inc., et al.*, 769 N.E.2d 829 (Ohio 2002) (finding that an existing customer can effectively terminate an "established business relationship" for purposes of the TCPA, by requesting to be placed on a do-not-call list).

[139] *See TCPA Order*, 7 FCC Rcd at 8767-68, paras. 25-26.

[140] 47 C.F.R. § 64.1200(e)(1). The Commission later clarified that calls made before 8 am or after 9 pm do not violate the TCPA rules if they are made with the prior express invitation or permission of the resident. If a resident withdraws express consent, however, any further solicitations to that resident by or on behalf of the same person or entity will be subject to the Commission's rules on telephone solicitations barring calls before 8 am or after 9 pm. *1995 TCPA Reconsideration Order*, 10 FCC Rcd at 12396, paras. 10-11.

[141] 16 C.F.R. § 310.4(c).

[142] *FTC Notice*, 67 Fed. Reg. at 4521.

conflict in the federal [FCC] regulations governing telemarketers.[143] We seek comment on this reasoning. In addition, should more restrictive calling times be adopted only in the event a national do-not-call list is not established, or could they work in conjunction with a national registry to better protect consumers from receiving telephone solicitations to which they object?

g. Unsolicited Facsimile Advertisements

37. The TCPA prohibits the transmission of unsolicited advertisements by telephone facsimile machines[144] and requires those sending any messages via telephone facsimile machines to identify themselves to message recipients.[145] We seek comment on the continued effectiveness of these regulations and on any developing technologies, such as computerized fax servers, that might warrant revisiting the rules on unsolicited faxes. In considering any possible rule changes, we will take into account both the record developed during this proceeding, as well as the Commission's extensive enforcement experience regarding the rules on unsolicited fax advertisements.

(i) Prior Express Invitation or Permission

38. The TCPA prohibits the sending of unsolicited advertisements to telephone facsimile machines.[146] The Commission's rules define an unsolicited advertisement as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission."[147] We seek comment on the need to clarify what constitutes prior express invitation or permission for purposes of sending an unsolicited fax. In the *1995 TCPA Reconsideration Order*, the Commission determined that the intent of the TCPA was not to equate mere distribution or publication of a telephone facsimile number with prior express permission or invitation to receive such advertisements.[148] The Commission determined that given the variety of ways in which fax numbers may be distributed, it was appropriate to treat the issue of consent in any complaint on a case-by-case basis.[149] We seek comment on the circumstances in which

[143] *FTC Notice*, 67 Fed. Reg. at 4521.

[144] 47 U.S.C. § 227(b)(1)(C). The TCPA's provision on unsolicited faxes has been held unconstitutional by one United States district court on grounds that it violates the First Amendment's guarantee of freedom of speech. *See State of Missouri, ex rel. Nixon v. American Blast Fax, Inc., et al.,* 196 F. Supp.2d 920 (E.D. Mo. Mar. 13, 2002); appeal pending Nos. 02-2705 & 02-2707 (8th Circuit). *But see, Texas v. American Blast Fax*, 121 F.Supp.2d 1085, 1091-92 (W.D. Tex. 2000), *Kenro, Inc. v. Fax Daily, Inc.*, 962 F. Supp. 1162, 1167-69 (S.D. Ind. 1997), *Destination Ventures, Ltd. v. FCC*, 46 F.3d 54 (9th Cir. 1995) (holding that the TCPA's ban on unsolicited faxes did not violate the First Amendment), *aff'g* 844 F. Supp. 632, 634-40 (D. Or. 1994), *Minnesota v. Sunbelt Communications and Marketing*, Civil No. 02-CV-770 (JEL/JGL) (D. Minn. Sept. 4, 2002).

[145] 47 U.S.C. § 227(d)(1). The Commission determined that the sender of a facsimile message is the creator of the content of the message. *See 1997 Reconsideration Order*, 12 FCC Rcd at 4613, para. 6.

[146] 47 U.S.C. § 227(b)(1)(C).

[147] 47 C.F.R. § 64.1200(f)(5).

[148] *See 1995 TCPA Reconsideration Order*, 10 FCC Rcd at 12408, para. 37.

[149] *See 1995 TCPA Reconsideration Order*, 10 FCC Rcd at 12408-9, para. 37. The Commission noted that facsimile numbers may be distributed using business cards, advertisements, directory listings, trade journals, or by membership in an association.

facsimile numbers are distributed or published by individuals and businesses. We invite comment specifically on the issue of membership in a trade association or similar group. For example, should the publication of one's fax number in an organization's directory constitute an invitation or permission to receive an unsolicited fax?[150] The Commission also seeks comment on what effect its case-by-case analysis has had on the number of unsolicited faxes sent to consumers and on costs incurred by the recipients of such faxes.

(ii) Established Business Relationship

39. We seek comment on the Commission's determination that a prior business relationship between a fax sender and recipient establishes the requisite consent to receive telephone facsimile advertisement transmissions.[151] This determination has amounted to an effective exemption from the prohibition on sending unsolicited facsimile advertisements, although our rules do not expressly provide for such an exemption. We ask whether, in practice, the Commission's previous determination has served to protect ongoing business relationships and whether it has had any adverse impact on consumer privacy. If we were to preserve the "exemption," should we amend our rules to expressly provide for it? We also seek comment on the need to clarify the scope of the "exemption." For instance, should a company that has an established relationship with a customer based on one type of product or service also be allowed to send unsolicited faxes about a different service or product? We invite comment on a consumer's authority to stop faxes to his facsimile number from a business with which he has an established relationship. Is it necessary for the Commission to adopt rules to protect consumers from unsolicited faxes in such circumstances?

(iii) Fax Broadcasters

40. We seek comment on whether the Commission should address specifically in the rules the activities of "fax broadcasters" who transmit other entities' advertisements to a large number of telephone facsimile machines for a fee. In the *TCPA Order*, the Commission stated that "[i]n the absence of a 'high degree of involvement or actual notice of an illegal use and failure to take steps to prevent such transmissions,' *common carriers* will not be held liable for the transmission of a prohibited facsimile message."[152] When asked whether common carriers' exemption from liability extended to entities that engage in fax broadcasting but are not common carriers, the Commission found that "[t]he entity or entities on whose behalf facsimiles are transmitted are ultimately liable for compliance with the rule banning unsolicited facsimile advertisements, and that fax broadcasters are not liable for compliance with the rule."[153] In a later order further addressing fax broadcasters' obligations under the TCPA rules, the Commission stated that "[f]acsimile broadcast service providers are businesses or individuals

[150] *See, e.g.,* A Petition for a Declaratory Ruling, filed by John Holcomb, October 3, 2001, CC Docket No. 92-90; *see also* Holcomb v. SullivanHayes Brokerage Corporation, Case No. 01CV2193, District Court – El Paso County, Colorado (Feb. 25, 2002) (finding that disclosure of a fax number as part of membership in a business or professional organization does not constitute consent to receive faxed ads from other members of the organization).

[151] *See 1995 TCPA Reconsideration Order*, 10 FCC Rcd 12408, para. 37.

[152] *TCPA Order*, 7 FCC Rcd at 8780, para. 54 (emphasis added) (quoting *Use of Common Carriers*, 2 FCC Rcd 2819, 2820 (1987)).

[153] *See 1995 TCPA Reconsideration Order*, 10 FCC Rcd at 12407, para. 35.

that transmit messages on behalf of other entities to selected destinations and that do not determine either the message content or to whom they are sent."[154] Some fax broadcasters maintain lists of telephone facsimile numbers that they use to direct their clients' advertisements.[155] This practice, among others, indicates a fax broadcaster's close involvement in sending unlawful fax advertisements and may subject such entities to enforcement action under the TCPA and our existing rules.[156] Based on the number of complaints and inquiries the Commission has received in the last few years on unwanted faxes,[157] and the apparent prevalence of fax broadcasters that determine the destination of their clients' advertisements, we seek comment on whether the Commission should address specifically in the rules the activities of such fax broadcasters. Should the Commission amend the rules to state explicitly that certain fax broadcasting practices expose the fax broadcaster to liability under the TCPA and the Commission's rules? Should the Commission specify by rule the particular activities that would demonstrate a fax broadcaster's "high degree of involvement" in the unlawful activity of sending unsolicited advertisements to telephone facsimile machines? Would such a rule afford consumers a greater measure of protection from unlawful faxing than they already enjoy under existing rules? Would such a rule better inform the business community about the general prohibition on unsolicited fax advertising? Have the Commission's rules that require fax advertisements to identify the entity on whose behalf the messages are sent been effective at protecting consumers' rights to enforce the TCPA?

h. Wireless Telephone Numbers

41. The TCPA and the Commission's rules specifically prohibit telephone calls using an autodialer or an artificial or prerecorded voice message to any telephone number assigned to a paging service, cellular telephone service, or any service for which the called party is charged for the call, except in emergencies or with the prior express consent of the called party.[158] The Commission's rules also state that live telephone solicitations to residential telephone subscribers must comply with time of day restrictions and must institute procedures for maintaining do-not-call lists. The Commission has not opined on whether wireless subscribers or a subset thereof are "residential telephone subscribers" for purposes of these restrictions.[159]

42. Since 1991, the commercial wireless industry has grown dramatically, both in the

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[154] *1997 TCPA Reconsideration Order*, 12 FCC Rcd at 4610 n. 7.

[155] *See, e.g.,* website maintained by Fax.com, Inc.:

> Fax.com is the only enhanced fax company offering the world's largest database of fax numbers cataloged by location. Broadcast your advertising fax based on Radius, Zip Codes, Metro Area, Area Code, County, State or the entire United States. When you choose to use Fax.com's proprietary database, you can receive a precise breakdown of how many people you'll be faxing and in what region. There's no other fax database like it! http://www.fax.com/Services/faxblast.asp (website visited June 28, 2002).

[156] *See, e.g., Fax.com NAL*, FCC 02-226 (rel. Aug. 7, 2002).

[157] *See supra* n. 40 and para. 8.

[158] 47 U.S.C. § 227(b)(1)(A)(iii); 47 C.F.R. § 64.1200(a)(1)(iii).

[159] 47 C.F.R. § 64.1200(e).

number of subscribers and the amount of usage for each subscriber.[160] A USA Today/CNN/Gallop poll found that almost one in five mobile telephony users regard their wireless phone as their primary phone.[161] Also, many wireless consumers purchase large "buckets" of minutes at a fixed rate, which may have an impact on the way consumers perceive the costs of making and receiving calls on their wireless phones.[162]

43. We seek comment on the extent to which telemarketing to wireless consumers exists today. Specifically, we seek comment on whether consumers receive solicitations on their wireless phones, and the nature and frequency of such solicitations. We also seek comment on whether telemarketers are including or targeting wireless phone numbers in their telemarketing calls. Do telemarketers distinguish between wireless and wireline phone numbers and, if so, how?

44. In addition, we seek comment on whether the Commission's TCPA rules are sufficient to address any issues identified above, or whether any revisions are necessary. For example, should wireless telephone numbers or a subset thereof be considered "residential telephone numbers" for the purposes of the Commission's rules on telephone solicitations?[163] If so, should there be any different rules that apply to solicitations to wireless telephone numbers than already would apply under section 64.1200(e)?

45. We note that the TCPA permits the Commission to exempt from the restrictions on autodialer or prerecorded message calls to wireless phone numbers "calls to a telephone number assigned to a cellular telephone service that are not charged to the called party, subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights this section is intended to protect."[164] In the *TCPA Order*, the Commission concluded that calls made by cellular carriers to their subscribers for which the subscribers were not charged do not fall within the prohibitions on autodialers or prerecorded messages.[165] We seek comment on whether there are other types of calls to wireless telephone numbers that are not charged to the called party, and whether such calls also should not fall within the prohibitions on autodialers or prerecorded messages.

46. Lastly, we seek comment on any developments anticipated in the near future that may affect telemarketing to wireless phone numbers. For example, when consumers are able to port numbers from their wireline phones to wireless phones, or are assigned numbers from a pool

[160] From December 1991 to December 2001, the estimated number of wireless subscribers increased from approximately 7.5 million to approximately 128 million. From 1993 to 2001, the average minutes of use per subscriber per month increased from 140 minutes to 385 minutes. *See 2002 CMRS Competition Report* at C-2, C-12.

[161] *2002 CMRS Competition Report*, Section II.A.1.e, citing Michelle Kessler, *18% See Cellphones as Their Main Phone*, USA Today, Feb. 1, 2002.

[162] *2002 CMRS Competition Report*, Section II.A.1.d.i.

[163] *See* 47 C.F.R. § 64.1200(e), which places restrictions on any telephone solicitation to a residential telephone subscriber.

[164] 47 U.S.C. § 227(b)(2)(C).

[165] *TCPA Order*, 7 FCC Rcd at 8775, para. 45.

of numbers rather than from a full central office code, how will telemarketers identify wireless numbers in order to comply with the TCPA?[166] We therefore seek comment on the availability of any technological tools that would allow telemarketers to recognize numbers that have been ported from wireline to wireless phones or to recognize wireless numbers that have been assigned from a pool of numbers that formerly were all wireline. For example, we note that the public safety community is finalizing plans that would enable Public Safety Answering Points to identify the type of phone from which the caller is making an emergency call. The Number Portability Administration Center administrator, Neustar, has, however, limited access to this Interactive Voice Response (IVR) system to service providers, authorized law enforcement, and public safety agencies.[167] Telemarketers currently do not have access to the IVR system. Should telemarketers be given access to the IVR system, or should access to the IVR system continue to be restricted to service providers, law enforcement, and public safety agencies? If telemarketers are granted access, will the IVR system be sufficient to enable them to determine whether a number serves a wireline or wireless subscriber? If telemarketers should not be given access to the IVR system, or if this system will be insufficient to identify whether a number serves a wireless or wireline subscriber, should a different system be developed, perhaps based on the IVR system,[168] for use by telemarketers?

i. Enforcement

(i) Private Right of Action and Individual Complaints

47. Based on the statutory language, the Commission determined that "[a]bsent state law to the contrary, consumers may immediately file suit in state court if a caller violates the TCPA's prohibitions on the use of automatic dialing system and artificial or prerecorded voice messages."[169] The Commission also determined that the TCPA permits a consumer to file suit in state court if he or she has received more than one telephone call within any 12-month period by or on behalf of the same company in violation of the guidelines for making telephone solicitations.[170] The Commission has continued to receive inquiries about a consumer's right to file suit against a person or entity that has made *one* phone call in violation of the TCPA rules. Should we clarify whether a consumer may file suit after receiving one call from a telemarketer who, for example, fails to properly identify himself or makes a call outside the time of day

[166] The Commission had determined that, by November 24, 2002, wireless carriers in the largest 100 Metropolitan Statistical Areas (MSAs) were required to support service provider local number portability (LNP), in the areas in which another carrier has made a specific request for the provision of LNP. LNP will enable wireless customers to "port" their telephone numbers in the event they switch from one wireless carrier to another, or from a wireline to a wireless carrier. On July 16, 2002, the Commission adopted an order extending the LNP deadline for a period of one year until November 24, 2003. *See In the Matter of Verizon Wireless's Petition for Partial Forbearance from the Commercial Mobile Radio Services Number Portability Obligation and Telephone Number Portability,* WT Docket No. 01-184 and CC Docket No. 95-116, Memorandum Opinion and Order, FCC 02-215 (rel. July 26, 2002).

[167] The Interactive Voice Response (IVR) system allows its users to determine whether a particular telephone number is serving a wireline or wireless subscriber by identifying the carrier serving the subscriber.

[168] Perhaps telemarketers could have limited access to a modified IVR system that would provide a wireless service code, rather than carrier-specific information, for a particular number.

[169] *TCPA Order*, 7 FCC Rcd at 8780, para. 55; *see also* 47 U.S.C. § 227(b)(3).

[170] 47 U.S.C. § 227(c)(5); *see also TCPA Order*, 7 FCC Rcd at 8780, para. 55.

restrictions? In addition, telemarketers that are not common carriers are not currently subject to the informal complaint rules that require common carriers to reply to individual complaints upon notice of a complaint by the Commission. The Commission released an NPRM in February seeking comment on whether to extend the informal complaint rules to entities other than common carriers.[171] We seek comment in this proceeding on whether the Commission should amend these informal complaint rules to apply to telemarketers.

(ii) State Law Preemption

48. In the TCPA, Congress provided a standard for preemption of state law on autodialers, artificial or prerecorded voice messages, and telephone solicitations.[172] The TCPA does not preempt "any state law that imposes more restrictive intrastate requirements or regulations on, or which prohibits--(A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements; (B) the use of automatic telephone dialing systems; (C) the use of artificial or prerecorded voice messages; or (D) the making of telephone solicitations."[173] The Commission seeks comment on whether and, if so, to what degree, state requirements should be preempted. Some courts have held that the TCPA does not necessarily preempt less restrictive state laws on telemarketing.[174] We seek comment on this interpretation. In addition, we ask whether preemption should depend on whether the state law in question applies solely to intrastate telemarketing or to interstate telemarketing as well. What conflicts between state telemarketing laws and federal law might warrant preemption?

2. National Do-Not-Call List

49. Pursuant to section 227(c)(3) of the TCPA, the Commission "may require the establishment and operation of a single national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations, and to make that compiled list and parts thereof available for purchase."[175] In this section, we seek comment on whether the Commission should revisit its determination not to adopt a national do-not-call list.[176] Persistent consumer complaints regarding unwanted telephone solicitations indicate that

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[171] 47 C.F.R. § 1.716 *et seq. See also Establishment of Rules Governing Procedures to Be Followed When Informal Complaints Are Filed by Consumers Against Entities Regulated by the Commission; Amendment of Subpart E of Chapter 1 of the Commission's Rules Governing Procedures to Be Followed When Informal Complaints Are Filed Against Common Carriers; 2000 Biennial Review*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, CI Docket No. 02-32, CC Docket Nos. 94-93, 00-175, 17 FCC Rcd 3919 (2002).

[172] *See* 47 U.S.C. § 227(e).

[173] 47 U.S.C. § 227(e)(1). The TCPA specifically preempts state law where it conflicts with the technical and procedural requirements for identification of senders of telephone facsimile messages or autodialed artificial or prerecorded voice messages. *See* 47 U.S.C. § 227(e) and *TCPA Order*, 7 FCC Rcd at 8780-81, para. 56.

[174] *See, e.g., Van Bergen v. Minnesota*, 59 F.3d 1541 (8th Cir. 1995) (concluding that the "savings clause" of section 227(e)(1) does not state that all less restrictive requirements are preempted; it merely states that more restrictive intrastate requirements are not preempted); *see also Kaufman v. ACS Systems, Inc.*, No. BC222588 (Los Angeles Superior Ct. Dec. 12, 2001).

[175] 47 U.S.C § 227(c)(3).

[176] As noted in paragraph 11 above, we ask commenters to address issues relating to a national do-not-call list separately from issues relating to our existing TCPA rules.

the time may now be ripe to revisit this issue.[177] We note that a national list might provide consumers with a one-step method for preventing telemarketing calls. This option might be less burdensome than repeating requests on a case-by-case basis, particularly in light of the number of entities that conduct telemarketing today. A national list might also be less burdensome for telemarketers, who, under the company-specific approach, must retain do-not-call records for a period of ten years.[178] We also seek comment on the options for possible Commission action in conjunction with the FTC's proposal to adopt a nationwide do-not-call list for those entities over which it has jurisdiction and the proliferation of state-adopted do-not-call lists. We acknowledge that the FTC has not yet adopted final rules based on its proposal, and we note that we have the option to seek further comment to fully address the interplay between final FTC rules and possible Commission action.

50. As discussed above, we invite comment in the context of our consideration of a national do-not-call list on the constitutional standards applicable to governmental regulation of commercial speech.[179] Specifically, we seek comment on whether a national do-not-call list satisfies each of the standards articulated in *Central Hudson*, including the requirement that the regulation be narrowly tailored to ensure that it is no more extensive than necessary to serve the governmental interest.[180]

51. In declining to adopt a national do-not-call list in 1992, the Commission concluded that a national database would be costly and difficult to establish and maintain in a reasonably accurate form.[181] The Commission found that frequent updates would be required, regional telemarketers would be forced to purchase a national database, costs might be passed on to consumers, and the information compiled would present problems in protecting consumer privacy. The Commission noted that, because nearly one-fifth of all telephone numbers change each year, any such database would require frequent updates to remain accurate.[182] The Commission also noted concerns in protecting the privacy of telephone subscriber information including whether the confidentiality of subscribers having unpublished or unlisted numbers could be maintained.

52. We seek comment on any disadvantages to consumers or any other parties to establishing a national do-not-call list including whether the concerns noted by the Commission

[177] The FTC received over 40,000 comments in response to its Notice. According to this Commission's most recent Quarterly Workload Report, in the wireline category, the top area of complaint after billing and rates was compliance with the TCPA. The Commission received 1,385 such complaints in the third quarter of FY 2002 (April – June, 2002). In addition, the Commission received 6,994 TCPA-related inquiries in the third quarter of FY 2002. *See* Consumer & Governmental Affairs Bureau Quarterly Report, 3rd Quarter, FY 2002 (rel. July 30, 2002). The Commission has taken numerous enforcement actions in response to such complaints. *See, e.g.*, *21st Century Fax(es) Ltd. a.k.a. 20th Century Fax(es), Apparent Liability for Forfeiture*, Forfeiture Order, File No. EB-00-TC-174, FCC 02-2 (rel. Jan. 11, 2002).

[178] *See* 47 C.F.R § 64.1200(e)(2)(vi).

[179] *See supra* para. 12.

[180] *Central Hudson*, 447 U.S. at 565-66.

[181] *TCPA Order*, 7 FCC Rcd at 8760, para. 14. Commenters then estimated that the start-up and operational costs for a national database in the first year ranged from $20 million to $80 million. *Id.* at 8758, para. 11.

[182] *TCPA Order*, 7 FCC Rcd at 8759, para. 12.

in declining to adopt a national do-not-call list in 1992 remain persuasive today.[183] Specifically, we seek information regarding the potential costs of establishing and maintaining a national do-not-call database, the burdens on telemarketers of compliance with a national do-not-call database, and whether there should be any distinction on a national, regional, state, or local level or for small businesses.[184] In particular, we seek comment on whether technological innovations in computers and software programs over the last ten years have mitigated, in any respect, concerns about the costs, accuracy, and privacy issues involved in establishing a national database.[185] We also seek comment on how state commissions and parties involved in compiling and maintaining the state established do-not-call lists have dealt with each of these issues. The information and experience acquired by these parties in the actual operation of such databases may prove particularly useful in this analysis. We also seek comment on what effect, if any, some combination of efforts by the FTC, states, and this Commission would have on the cost and privacy issues involved in developing and maintaining a national do-not-call list. We seek comment on whether a national do-not-call list provides any advantages to telemarketers in identifying those consumers who do not wish to be contacted.

53. Section 227(c)(3) enumerates a number of specific requirements that the Commission must satisfy in adopting a national database.[186] In relevant part, these include: (1) specifying a method by which to select an entity to administer the database; (2) requiring each common carrier providing telephone exchange service to inform subscribers of the opportunity to object to receiving telephone solicitations; (3) specifying the methods by which subscribers may be informed, by the common carrier that provides service to the subscriber, of the subscriber's right to give or revoke a notification of an objection to receiving telephone solicitations; (4) specifying the methods by which such objections shall be collected and added to the database; (5) prohibiting any residential subscriber from being charged for giving or revoking such notification or being included in the database; (6) prohibiting any person from making or transmitting a telephone solicitation to the telephone number of any subscriber included in the database; (7) specifying the method by which any person desiring to make or transmit telephone solicitations will obtain access to the database and the costs to be recovered from such persons; (8) specifying the methods for recovering, from persons accessing the database, the cost involved in operating the database; (9) specifying the frequency with which the database will be updated and the method by which such updates will take effect; (10) designing the database to enable states to use it to administer or enforce state law; (11) prohibiting the use of the database for any purpose other than compliance with the requirements of section 227 and any such state law, and specifying methods for protection of the privacy rights of persons whose numbers are included in the database; and (12) requiring each common carrier providing services to any person for the purpose of making telephone solicitations to notify such persons of the requirements of this

[183] For example, the FTC estimates that the cost to develop and implement a national registry will be approximately $5 million in the first year. *See FTC User Fee Notice*, 67 Fed. Reg. 37362 at 37363 (2002).

[184] *See* 47 U.S.C. § 227(c)(4).

[185] The FTC has issued a Privacy Act Notice noting its intent to compile and maintain the data collected in response to the national do-not-call list "in a secure electronic database designed, developed, operated, and serviced by agency and/or contractor personnel bound by the restrictions of the Privacy Act." *See* FTC Privacy Notice, 67 Fed. Reg. 8985 (2002).

[186] 47 U.S.C. § 227(c)(3)(A-L).

section and the regulations thereunder. We seek comment on what possible options the Commission might pursue that would satisfy the requirements listed above, as well as complement the FTC's proposal and the individual state do-not-call statutes and regulations. We note that while the FTC's proposal could incorporate some, if not all, of the twelve criteria above, the FTC is not required by statute to satisfy these requirements. Therefore, we ask whether these twelve requirements would preclude the Commission from adopting rules requiring common carriers and other entities under our TCPA jurisdiction to comply with a national do-not-call regime administered by the FTC, should the FTC adopt rules that are inconsistent with the TCPA.

54. We recognize that the effectiveness and value of any national do-not-call list would be contingent upon an informed public. As noted above, Congress provided that, should the Commission establish a national do-not-call list, each common carrier providing telephone exchange service shall be required to inform its subscribers of the opportunity to object to telephone solicitations and the option to register with a national do-not-call list.[187] As part of our ongoing efforts to ensure that consumers are aware of their rights under the TCPA, we will continue to disseminate our own public notices, fact sheets, and other information to publicize the rules applicable to telemarketing calls. In addition, should we establish a national do-not-call list, we propose adopting rules that codify the statutory provisions requiring common carriers to notify their subscribers of the opportunity to place their telephone numbers on a national do-not-call list. We seek input on this proposal and any other suggestions to ensure that consumers are well informed.

55. *FTC Proposal to Adopt a Nationwide Do-Not-Call List*. As noted above, the FTC has recently issued a Notice of Proposed Rulemaking seeking comment on a number of potential amendments to its Telemarketing Sales Rule.[188] In relevant part, the FTC proposes to adopt a national do-not-call list that would allow consumers to prohibit calls from any telemarketer within the FTC's jurisdiction by placing their telephone number on a central registry to be maintained by, or on behalf of, the FTC.[189] Because the FTC lacks jurisdiction over banks, common carriers, insurance companies, and certain other entities, these entities could continue to make telemarketing calls to individuals on the FTC's do-not-call list.[190] We seek comment on whether the Commission should use its authority under the TCPA to extend any national do-not-call requirements adopted by the FTC to those entities that fall outside the FTC's jurisdiction. If so, we seek comment on what role the Commission should play in the administration and enforcement of a national database.

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[187] *See* 47 U.S.C. §§ 227(c)(3)(B) and (C).

[188] 16 C.F.R. Part 310. These proposals include additional disclosure requirements, prohibitions on certain billing practices, and prohibitions on the blocking of caller ID.

[189] The FTC proposes that consumers who have placed themselves on the national do-not-call registry could allow telemarketing calls from or on behalf of specific sellers, or charitable organizations, by providing "express verifiable authorization" to the seller, or telemarketer making calls for or on behalf of the organization, that the consumer agrees to accept calls from that telemarketer. *FTC Notice*, 67 Fed. Reg. at 4517.

[190] *See* 15 U.S.C. § 45(a)(2). The FTC has stated that, although it does not have jurisdiction over these entities, it does have jurisdiction over any third-party telemarketers those entities might use to conduct telemarketing activities on their behalf. *FTC Notice*, 67 Fed. Reg. at 4497.

56. If the Commission should determine that a national do-not-call list is warranted, we seek comment on what actions the Commission could take to most efficiently, effectively, and consistently complement the FTC's proposal. The FTC indicates that its do-not-call proposal is consistent with the Commission's regulations and should "not be construed to permit any conduct that is precluded or limited by FCC regulations."[191] If inconsistencies exist at the end of the rulemakings, would this create confusion regarding the applicability and enforcement of the do-not-call requirements to certain entities? For example, the FTC proposes to extend the do-not-call requirement to telemarketing calls from "for-profit entities" that solicit charitable contributions.[192] In so doing, the FTC indicates that its authority extends not only to the sale of goods or services but also to charitable solicitations by for-profit entities on behalf of nonprofit organizations. The Commission has concluded, however, that its regulations under the TCPA apply only to commercial calls.[193] In addition, the TCPA specifically excludes "tax exempt nonprofit organizations" from its provisions.[194] The Commission has concluded that this exemption for nonprofit organizations extends to telephone solicitations made by telemarketers on behalf of tax-exempt nonprofit organizations.[195] We seek comment on whether this interpretation raises possible inconsistencies with the FTC's proposal. If so, we seek comment on how these inconsistencies could be reconciled in the administration of any national do-not-call database.

57. The FTC's proposal also may allow some business and wireless telephone subscribers to register on the national database.[196] The TCPA, however, only grants authority to the Commission to establish a national database for residential subscribers.[197] We seek comment on the extent to which wireless subscribers may be considered "residential" for purposes of the TCPA.[198] In addition, we seek comment on what, if any, conflict exists under the FTC's rules and proposals and the TCPA regarding inclusion of business consumers on the national do-not-call list. The FTC proposal also does not indicate whether consumers will be charged a fee for including their names on the national do-not-call database.[199] We note that the TCPA prohibits

[191] *FTC Notice*, 67 Fed. Reg. at 4519.

[192] *FTC Notice*, 67 Fed. Reg. at 4497.

[193] *See TCPA Order*, 7 FCC Rcd at 8773-74, para. 40.

[194] 47 U.S.C. § 227(a); *see also* discussion in para. 33 on calls by religious and political organizations that have received tax-exempt status from the U.S. government. This Commission does not intend in this NPRM to seek comment on the exemption as it applies to political and religious speech.

[195] *1995 TCPA Reconsideration Order*, 10 FCC Rcd at 12397, para. 13.

[196] Section 310.6(g) of the FTC's Telemarketing Sales Rule exempts most business-to-business telemarketing from the Rule's requirements; only the sale of nondurable office and cleaning supplies are covered under the Rule. The FTC, however, proposes to also eliminate this exemption for telemarketers of Internet and Web services. *FTC Notice*, 67 Fed. Reg. at 4531-32.

[197] *See* 47 U.S.C. § 227(c)(3).

[198] Section 227(b)(1) prohibits calls using any automatic telephone dialing system or an artificial or prerecorded voice to any service for which the called party is charged for the call. *See* 47 U.S.C. § 227(b)(1)(A)(iii).

[199] The FTC has indicated on its website that consumers will be able to call a toll free number and enter their request to be included on the national do-not-call database. The FTC has indicated that it proposes to collect $3 million in user fees from approximately 3,000 telemarketers or sellers that may be required to use the national

(continued....)

the Commission from charging residential consumers to be included in the database.[200] We seek comment on whether these and any other issues that commenters may identify raise potential areas of concern in coordinating the FTC's proposals with any Commission action. To the extent that any such inconsistencies exist, we seek suggestions as to how they could be reconciled to minimize the potential for confusion to consumers, telemarketers, and regulators in the administration and enforcement of any national do-not-call database established under the combined authority of the FTC and the Commission.

58. We also seek comment on whether the Commission should adopt any new rules or revise any of its existing rules to remain consistent with the proposals of the FTC. For example, the FTC proposes that consumers who have placed themselves on the national do-not-call registry "could allow telemarketing calls from or on behalf of specific sellers, or on behalf of charitable organizations, by providing express verifiable authorization to the seller, or telemarketer making calls on behalf of a seller or charitable organization, that the consumer agrees to accept calls from that seller or telemarketer."[201] The FTC also proposes adopting certain recordkeeping requirements that must be met before companies may avail themselves of the "safe harbor" protections for violating the do-not-call rules.[202] In so doing, the FTC notes that the Commission's rules are silent as to any such requirements to reconcile names or numbers on a national registry because our rules relate only to company-specific lists. We seek comment on whether, if the Commission implements a national database with the FTC, the Commission should adopt recordkeeping or other rules that mirror those proposed by the FTC.

59. Finally, we note that the FTC has sought comment on establishing a national do-not-call registry for a two-year trial period, after which it may review the costs and benefits of the central registry in order to determine whether to modify or terminate its operation.[203] We seek comment on how this could affect any Commission decision to establish a joint database with the FTC, including whether the Commission should commit to a similar review at the same time. We also seek comment on what, if any, disruptions this may cause consumers if the FTC determines at that time to terminate the operation of its national do-not-call database. Finally, we note that the FTC has released a Privacy Act Notice specifying the measures it intends to take to ensure the privacy of consumers in compiling and maintaining the national registry.[204] In its

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registry. *FTC User Fee Notice*, 67 Fed. Reg. at 37363. Under the FTC's proposal, telemarketers would be charged $12 per year for each area code of data they use with a maximum annual cap of $3,000.

[200] *See* 47 U.S.C. § 227(c)(3)(E).

[201] *FTC Notice*, 67 Fed. Reg. at 4517. The FTC proposes two means of obtaining the express verifiable authorization of a consumer to receive telemarketing calls despite that consumer's inclusion on the national do-not-call list: (1) written authorization including the consumer's signature; and (2) oral authorization that is recorded and authenticated by the telemarketer as being made from the telephone number to which the consumer is authorizing access.

[202] *FTC Notice*, 67 Fed. Reg. at 4520. These include the requirement that: (1) sellers and telemarketers must obtain and reconcile on not less than a monthly basis the names and/or telephone numbers of those on the national registry; (2) sellers and telemarketers must maintain the consumers' express verifiable authorization to call; and (3) sellers and telemarketers must monitor compliance and take disciplinary action for non-compliance.

[203] *FTC Notice*, 67 Fed. Reg. at 4517.

[204] FTC Privacy Act Notice, 67 Fed. Reg. at 8985.

Notice, the FTC proposes to collect certain information including, at a minimum, telephone numbers of individuals who do not wish to receive telemarketing calls.[205] To the extent necessary, the FTC may collect other information such as date(s) and time(s) that the individual's telephone number was placed on the registry; the individual's specific telemarketing preferences; and other identifying information that individuals may provide voluntarily (e.g., residential zip codes for record sorting purposes). The FTC expects to use automated methods to collect the information and to process requests from individuals seeking access to their records in the system. The FTC states that it intends to maintain these records in a secure electronic database operated by that agency and/or contractor personnel bound by the restrictions of the Privacy Act.[206] We seek comment on whether the Commission should impose any requirements beyond those proposed by the FTC to ensure that consumer proprietary information would be protected in a national database.

60. *State Do-Not-Call Lists*. As noted above, a number of states have adopted or are considering legislation to establish statewide do-not-call lists.[207] Such state lists vary widely in the methods used for collecting data, the fees charged, and the types of entities required to comply with their restrictions. Some state statutes provide for state-managed do-not-call lists, while others require telemarketers to use the Direct Marketing Association's Telephone Preference Service.[208] In some states, residents can register for the do-not-call lists at no charge.[209] In others, telephone subscribers must pay a fee. The state "do-not-call" statutes provide for varying exceptions to the do-not-call requirements. In the context of our review of the national do-not-call database, we seek comment on how effective these state administered do-not-call lists have been in curbing unwanted telephone solicitations and whether a national database would correct any of the shortcomings of the state lists.

61. If the Commission should establish a nationwide do-not-call list in conjunction with the FTC, we seek comment on the potential relationship of that database to state do-not-call laws. We seek comment on the potential role that states could play in administering and enforcing federal do-not-call requirements. We believe that many states have obtained valuable experience and insight into the administration of the do-not-call lists in their respective states. We therefore seek comment from the states, and any other interested parties, on the following options to incorporate state expertise in this process. We also invite additional suggestions on these or any alternative proposals.

62. First, we seek comment on whether those states that have adopted do-not-call laws should administer those laws to the extent that they apply to intrastate telemarketing calls, while the federal law would govern interstate telemarketing.[210] Under such circumstances, we

[205] *See* FTC Privacy Act Notice, 67 Fed. Reg. at 8986

[206] *See* FTC Privacy Act Notice, 67 Fed. Reg. at 8986.

[207] *See supra* n. 48.

[208] *See e.g.,* Wyoming (Wyo. Stat. Ann. § 40-12-301) and Maine (Me. Rev. Stat. § 4690-A).

[209] *See* Connecticut (Conn. Gen. Stat. Ann. § 42-288a); Indiana (H.B. 1222, to be codified at Ind. Code Ann. § 24.4.7); Missouri (Mo. Rev. Stat. § 407.1098); Tennessee (Tenn. Code Ann. § 65-4-401; see also rules at Tenn. Comp. R & Regs. Chap. 1220-4-11).

[210] *But see* Comments and Recommendations of the Attorneys General of Alabama *et al.* filed with the FTC at 10.

seek comment on whether the Commission should establish a regulatory scheme similar to that developed with the Commission's "slamming" rules that would allow states to "opt-in" and thereby co-administer and enforce the federal interstate do-not-call rules in their respective states.[211] Consistent with the Commission's slamming regulations, states that "opt-in" would be required to write and interpret their statutes and regulations for telemarketing calls in a manner that is consistent with the federal rules.[212] States would be allowed to adopt more restrictive rules for intrastate telemarketing calls if such action is necessary based on its local experiences.[213] Consumers residing in states that decided not to "opt-in" would be allowed to register with the administrator of the federal do-not-call database. These consumers would register and file do-not-call complaints regarding both unwanted intrastate and interstate telephone solicitations with the appropriate federal regulatory entity.[214]

63. We seek comment on whether this proposal is administratively feasible, including whether it is possible and/or necessary for regulators and consumers to distinguish intrastate from interstate telemarketing calls. We note that in comments filed in the FTC proceeding, the Attorneys General of all fifty states, Puerto Rico, and the Northern Mariana Islands, indicated that states have enforced their own do-not-call laws against telemarketers irrespective of whether such calls are intrastate or interstate in nature. The Attorneys General contend that states have historically enforced their consumer protection laws within, as well as across, state lines to prosecute out-of-state companies that have contacted their residents over the telephone. We seek comment on this interpretation of state authority to regulate telemarketing calls originating outside of the state.

64. Second, we seek comment on how we could work together with states that have adopted do-not-call lists. The state Attorneys General argue that the states have the authority to enforce their own no-call laws against telemarketers across the country.[215] Although many states have adopted laws that differ in some respects from the FTC's proposal, these differences may be reflective of the particularized circumstances of consumers and telemarketers in that state. In this context, the federal do-not-call database could act either as a default mechanism for those states that have not adopted do-not-call laws or coexist with the state do-not-call laws to provide consumers with additional safeguards.

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[211] Slamming is the practice of changing a consumers presubscribed telecommunications carrier without the consumer's authorization. *See Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers*, Second Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 94-129, 14 FCC Rcd 1508 at 1561-64, paras. 86-90 (1998) (*Second Report and Order*). *See also* 47 U.S.C. § 258; 47 C.F.R. § 64.1100 *et seq*.

[212] *See Second Report and Order*, 14 FCC Rcd at 1562, para. 89.

[213] *See* 47 U.S.C. § 227(e)(1).

[214] Section 2(b) provides the Commission with authority to apply section 227 to intrastate communications. *See* 47 U.S.C. § 152(b). *See also Texas v. American Blast Fax*, 121 F. Supp. 2d at 1087-89, *Minnesota v. Sunbelt Communications and Marketing*, Civil No. 02-CV-770 (D. Minn. Sept. 4, 2002).

[215] Comments and Recommendations of the Attorneys General of Alabama *et al.* filed with the FTC at 10. *See also* New York State Consumer Protection Board Comments filed with the FTC dated March 26, 2002 at 4 (indicating that New York has jurisdiction over interstate calls provided they terminate in New York).

65. Under this approach, there would be no disruption to consumers in the administration and enforcement of the state regulations as applied to interstate calls.[216] In this context, we seek comment on whether consumers in states that have adopted do-not-call laws should be restricted solely to registering on the state database or should also be allowed the option to register on any federal national do-not-call database. If consumers are allowed the option to register on both databases, we seek comment on whether the federal database should permit states to submit do-not-call requests from their own database and to obtain from the federal database any requests from their own state.[217] As noted above, states have adopted a variety of do-not-call laws, some of which may be less restrictive of telemarketing activity than the regulations proposed by the FTC. We therefore seek comment on whether the administration of both a state and federal do-not-call database would be feasible, including whether this approach may lead to consumer confusion or duplicative administrative costs. In this regard, we seek suggestions on how the federal and state regulatory entities should coordinate their efforts, including providing adequate information to consumers.

66. Finally, we invite comment on additional proposals to reconcile the administration of any national do-not-call list with the various state lists. For example, the Commission has received inquiries regarding whether the Commission may also consider preempting the state do-not-call statutes, in whole or in part,[218] under the theory that Congress has legislated comprehensively in this area, thus occupying the entire field of regulation and leaving no room for the states to supplement federal law.[219] This issue has never been addressed

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[216] Comments and Recommendations of the Attorneys General of Alabama *et al.* filed with the FTC at 11 (indicating that more than 7 million consumers have already enrolled in state do-not-call databases).

[217] *See* 47 U.S.C. § 227(e)(2) (providing that, if the Commission requires the establishment of a national database of telephone numbers of subscribers who object to receiving telephone solicitations, a state may not, in its regulations of telephone solicitations, require the use on any database that does not include the part of such national database that relates to such state).

[218] Section 227(e)(1) provides:

> Except for the standards prescribed under [section 227(d)] and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits—
>
> (A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;
> (B) the use of automatic telephone dialing systems;
> (C) the use of artificial or prerecorded voice messages; or
> (D) the making of telephone solicitations.

47 U.S.C. § 227(e)(1). *See also Van Bergen v. Minnesota*, 59 F.3d 1541 (8th Cir. 1995) (concluding that the "savings clause" of section 227(e)(1) does not state that all less restrictive requirements are preempted; it merely states that more restrictive intrastate requirements are not preempted).

[219] *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947). For example, the TCPA's prohibitions on the use of artificial or prerecorded messages and facsimile machines apply to "any person within the United States." *See* 47 U.S.C. § 227(b)(1). In addition, section 2(a) grants the Commission jurisdiction over interstate and foreign communications. 47 U.S.C. § 152(a). While section 2(b) generally reserves to the states jurisdiction over intrastate communications, section 2(b) provides the Commission with concurrent jurisdiction over intrastate communications under section 227. *See* 47 U.S.C. § 152(b). *But see Van Bergen v. Minnesota*, 59 F.3d 1541 (8th Cir. 1995)

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on the Commission level, leading to uncertainty among states and telemarketers.[220] In addition, the legislative history indicates that Congress believed the TCPA was necessary because states may lack jurisdiction to regulate interstate telemarketing calls.[221] We seek comment on whether there are any advantages to a single national database over a collection of state do-not-call laws.[222] Alternatively, we seek comment on whether the development of state do-not-call lists obviates the need for a national list.[223] We also seek comment on whether preemption of state do-not-call lists would result in substantial confusion for those consumers that may have already registered in states that have adopted do-not-call lists. Similar to our discussion above, we seek comment in this context on whether the states could be allowed to "opt-in" and thereby co-administer and enforce the federal do-not-call rules in their respective states.

III. MEMORANDUM OPINION AND ORDER IN CC DOCKET 92-90

67. Since the Commission released the *1997 TCPA Reconsideration Order* in CC Docket 92-90, the telemarketing marketplace has undergone significant changes, many of them spurred by new technologies developed to advertise over the telephone network. In addition, the Commission has received thousands of complaints from consumers who allege violations of the TCPA and our rules and orders. Based on these complaints, the changes in the way telemarketing is conducted, and our decision to revisit the option of establishing a national do-not-call list, it is clear that the focus of this proceeding has changed significantly from when the *1997 TCPA Reconsideration Order* was released. Therefore, we now close and terminate CC Docket 92-90 and open a new docket to address the issues raised in this proceeding. Only pending Petitions and Requests for Clarification[224] from CC Docket 92-90 will be incorporated into the instant proceeding.

IV. PROCEDURAL ISSUES

A. Ex Parte Presentations

68. This is a non-restricted notice and comment rulemaking proceeding. Ex parte

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(concluding that "the TCPA was intended not to supplant state law, but to provide interstitial law preventing evasion of state law by calling across state lines.").

[220] A staff level letter did opine that "[t]he Communications Act, however, precludes Maryland from regulating or restricting interstate commerce telemarketing calls." *See* Letter from Geraldine A. Matise, FCC, to Ronald A. Guns, Maryland House of Delegates, dated January 26, 1998. We note, however, that staff level letters do not necessarily speak for or bind the Commission in reviewing this issue. *See, e.g.*, *Amor Family Broadcasting Group v. FCC*, 918 F.2d 960, 962 (D.C. Cir. 1991); *Malkan FM Associates v. FCC*, 935 F.2d 1313, 1319 (D.C. Cir. 1991).

[221] S. REP. NO. 102-178 at 3 (1991) (". . . over 40 States have enacted legislation limiting the use of ADRMPs (automatic dialer recorded message players) or otherwise restricting unsolicited telemarketing. These measures have had limited effect, however, because States do not have jurisdiction over interstate calls."). *See also* H.R. REP. NO. 102-317 at 21 (1991).

[222] *But see* Comments and Recommendations of the Attorneys General of Alabama *et al.* filed with the FTC at 8-10.

[223] In so doing, we note that approximately one-half of the states have not adopted a do-not-call statute.

[224] *See* Requests for Clarification submitted by Robert Biggerstaff, March 14, April 11, April 12, May 1 and May 2, 2000, CC Docket No. 92-90; A Petition for a Declaratory Ruling filed by John Holcomb, October 3, 2001, CC Docket No. 92-90.

presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's rules.[225]

B. Paperwork Reduction Act

69. This NPRM contains either a proposed or modified information collection. As part of a continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the information collections contained in this NPRM, as required by the Paperwork Reduction Act of 1995, Public Law 104-13. Public and agency comments are due at the same time as other comments on this NPRM; OMB comments are due 60 days from the date of publication of this NPRM in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

C. Initial Regulatory Flexibility Analysis

70. As required by the Regulatory Flexibility Act of 1980, as amended, (RFA),[226] the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic effect on small entities by the policies and rules proposed in this NPRM. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadline for comments on the NPRM provided below in the Comment Filing Procedures section. The Commission will send a copy of the NPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.[227] In addition, the NPRM and IRFA (or summaries thereof) will be published in the Federal Register.[228]

1. Need for, and Objectives of, the Proposed Rules

71. Since 1992, when the Commission adopted rules pursuant to the TCPA, telemarketing practices have changed significantly. New technologies have emerged that allow telemarketers to better target potential customers and make marketing using telephones and facsimile machines more cost-effective. At the same time, these new telemarketing techniques have heightened public concern about the effect on consumer privacy. The Commission has received numerous inquiries and complaints involving its rules on telemarketing and unsolicited fax advertisements. A growing number of states have passed or are considering legislation to establish statewide do-not-call lists, and the FTC has proposed establishing a national do-not-call

[225] *See generally* 47 C.F.R. §§ 1.1202, 1.1203, 1.1206(a).

[226] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[227] *See* 5 U.S.C. § 603(a).

[228] *See id.*

registry. Congress provided in the TCPA that "individuals' privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices."[229] In this NPRM, we seek comment on whether the Commission's rules need to be revised in order to more effectively carry out Congress's directives in the TCPA. Specifically, we seek comment on whether to revise or clarify our rules governing unwanted telephone solicitations and the use of automatic telephone dialing systems, prerecorded or artificial voice messages and telephone facsimile machines. In addition, we seek comment on the effectiveness of company-specific do-not-call lists. We also seek comment on whether the Commission should revisit its determination not to adopt a national do-not-call list. In so doing, we seek comment on the options for possible Commission action in conjunction with the FTC's proposal to adopt a national do-not-call registry for those entities over which it has jurisdiction and the proliferation of state-adopted do-not-call lists. We seek comment on these issues, as well as any alternative means of protecting consumers' privacy while avoiding imposing unnecessary burdens on the telemarketing industry, consumers, and regulators.

2. Legal Basis

72. The legal basis for any action that may be taken pursuant to this NPRM is contained in sections 1-4, 227 and 303(r) of the Communications Act of 1934, as amended; 47 U.S.C. §§ 151-154 and 227; and 47 C.F.R. §§ 64.1200 and 1201 of the Commission's rules.

3. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

73. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that will be affected by the proposed rules, if adopted.[230] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[231] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[232] Under the Small Business Act, a "small business concern" is one that: 1) is independently owned and operated; 2) is not dominant in its field of operation; and 3) meets any additional criteria established by the Small Business Administration (SBA).[233]

74. The Commission's rules on telephone solicitation and the use of autodialers, artificial or prerecorded messages and telephone facsimile machines apply to a wide range of entities, including all telecommunications carriers and other entities that use the telephone or

[229] *See TCPA*, Section 2(9), *reprinted in* 7 FCC Rcd 2736 at 2744.

[230] 5 U.S.C. § 603(b)(3).

[231] 5 U.S.C. § 601(6).

[232] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in the Small Business Act, 5 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[233] 15 U.S.C. § 632.

facsimile machine to advertise.[234] Thus, we expect that the proposals in this proceeding could have a significant economic impact on a substantial number of small entities. In 1992, there were approximately 4.44 million small business firms in the United States, according to SBA data.[235] The SBA has determined that "telemarketing bureaus" with $6 million or less in annual receipts qualify as small businesses.[236] For 1997, there were 1,727 firms in this category, total, which operated for the entire year. Of this total, 1,536 reported annual receipts of less than $5 million.[237]

75. Determining a precise number of small entities that would be subject to the requirements proposed in this NPRM is not readily feasible. Therefore, we invite comment about the number of small business entities that would be subject to the proposed rules in this proceeding. After evaluating the comments, the Commission will examine further the effect any rule changes might have on small entities, and will set forth our findings in the final Regulatory Flexibility Analysis.

4. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

76. We are seeking comment on whether to amend the Commission's TCPA rules and/or to revisit the option of establishing a national do-not-call list. The proposed rules will apply, with certain exceptions, to all entities making telephone solicitations or using automatic telephone dialing systems, prerecorded or artificial voice messages or telephone facsimile machines to send unsolicited advertisements. If we retain the company-specific do-not-call approach, we seek comment on whether to require companies to provide a toll-free number and/or website for consumers to register their names on the do-not-call lists. We also seek comment on whether additional measures should be taken to ensure that consumers with disabilities can register their do-not-call requests. Any such measures, if adopted, may involve additional costs to businesses. If we find that establishing a national do-not-call list is warranted, we must determine the entity that will maintain the list and the procedures for administering the list. For small businesses whose call lists are not automated, scrubbing lists could be more labor-intensive and thus, more time-consuming and costly. However, we do not anticipate that such recordkeeping will require the use of professional skills, including legal and accounting expertise. In this NPRM, we seek information regarding the burdens on telemarketers to comply with a national do-not-call database,[238] including the requirements to obtain a national list of telephone numbers and to incorporate those numbers into telemarketers' individual do-not-call lists. Entities, especially small businesses, are encouraged to quantify the costs and benefits of a national do-not-call list, as well as the costs and benefits of any possible new rules regarding certain telemarketing technologies and practices. Finally, the TCPA under section 227(c)(3)

[234] 47 C.F.R. § 64.1200.

[235] U.S. Department of Commerce, Bureau of the Census, 1992 Census of Transportation, Communications, and Utilities, UC 92-S-1, Subject Series, Establishment and Firm Size, Table 2D, Employment Size of Firms.

[236] *See* 13 C.F.R. § 121.201.

[237] U.S. Census Bureau 1997 Economic Census, Subject Series: Information, "Employment Size of Establishments of Firms Subject to Federal Income Tax: 1997," Table 4, NAICS code 561422 (issued October 2000).

[238] *See supra* para. 52.

provides that should the Commission adopt a national do-not-call list, common carriers shall be required to inform subscribers of the option to register on a national do-not-call list. We seek input on this proposal and any other suggestions to ensure the public is well-informed.[239]

5. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

77. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[240]

78. This NPRM invites comment on a number of alternatives to modify the existing TCPA rules on telephone solicitation and the use of autodialers, artificial or prerecorded messages, and telephone facsimile machines. The Commission also will consider additional significant alternatives developed in the record. We seek comment on the effectiveness of company-specific do-not-call lists and whether the benefits of individual company lists continue to outweigh the costs to telemarketers.[241] We also seek comment on whether any network technologies have been developed over the last decade that could serve as alternatives to do-not-call lists.[242] We ask whether any such technologies are effective, universally available, and affordable to consumers in allowing consumers to curb unwanted telephone solicitations. In addition, we seek comment on a number of proposals such as requiring a maximum setting on the number of abandoned calls, requiring telemarketers to transmit caller ID information or prohibiting them from blocking such information.[243] We also ask whether revisiting the established business relationship exemption would interfere with ongoing business relationships, particularly for small businesses.[244]

79. We also seek comment on options for possible Commission action in conjunction with the FTC's proposal to establish a national do-not-call registry. A national do-not-call list might provide consumers with a one step method to avoid unwanted sales calls and assist telemarketers in identifying those consumers who do not wish to be contacted. We seek information, however, about the potential costs of establishing and maintaining a national list and about the burdens on telemarketers of complying with a national do-not-call list. Specifically, we ask whether there should be any distinctions for small businesses that must comply with a national do-not-call registry.[245] We also ask whether consumers listed on a

[239] *See supra* para. 54.

[240] 5 U.S.C. § 603(c).

[241] *See supra* para. 16.

[242] *See supra* para. 21.

[243] *See supra* para. 26.

[244] *See supra* para. 34.

[245] *See supra* para. 52.

national registry should be permitted to also provide express verifiable authorization to those businesses from whom they want to receive calls.[246]

6. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules

80. The Telemarketing Consumer Fraud and Abuse Prevention Act ("Telemarketing Act"), 15 U.S.C. §§ 6101-6108, and the Telemarketing Sales Rule (TSR)[247] adopted by the FTC also address certain telemarketing acts or practices. The TCPA and Commission rules currently do not duplicate, overlap or conflict with the Telemarketing Act or TSR; however, there are provisions in the FTC's rules that mirror the Commission's rules, such as the calling time restrictions. It is difficult to determine at this time whether any of the proposals contained in this NPRM might conflict with any other federal rules, given that the FTC has undertaken a rulemaking proceeding of its own. Therefore, we ask in the NPRM whether any inconsistencies at the end of the rulemakings would create confusion regarding the applicability and enforcement of the do-not-call requirements to certain entities.[248] For instance, the FTC proposes to extend its do-not-call requirements to telemarketing calls from "for-profit entities" that solicit charitable contributions; the Commission has concluded that its regulations apply only to commercial calls. The FTC's proposal also appears to allow some business and wireless telephone subscribers to register on the national database, while the TCPA grants authority to the Commission to establish a national database only for residential subscribers. Therefore, the Commission invites comment in this NPRM on whether we could adopt any new rules or revise any of our existing rules to remain consistent with the FTC's proposals.[249]

D. Filing of Comments and Reply Comments

81. We invite comment on the issues and questions set forth above. Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on or before 45 days after publication in the Federal Register, and reply comments on or before 60 days after publication in the Federal Register. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24121 (1998).

82. Comments filed through the ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/e-file/ecfs.html>. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by

[246] *See supra* para. 58.

[247] 16 C.F.R. part 310.

[248] *See supra* para. 56.

[249] *See supra* para. 58.

Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form." A sample form and directions will be sent in reply. Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appear in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). The Commission's contractor, Vistronix, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW, Washington, D.C. 20554. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission. Parties also should send four (4) paper copies of their filings to Kelli Farmer, Federal Communications Commission, Room 4-C740, 445 12th Street, S.W., Washington, DC 20554.

83. Written comments by the public on the proposed and/or modified information collections are due on or before 45 days after the date of publication in the Federal Register. Written comments must be submitted by the Office of Management and Budget (OMB) on the proposed and/or modified information collections on or before 60 days after date of publication in the Federal Register. In addition to filing comments with the Secretary, a copy of any comments on the information collection(s) contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 1-C804, 445 12th Street, S.W., Washington, DC 20554, or via the Internet to jboley@fcc.gov and to Edward Springer, OMB Desk Officer, Room 10236 NEOB, 725 17th Street, N.W., Washington, D.C. 20503 or via the Internet to edward.springer@omb.eop.gov.

84. Accessible formats (computer diskettes, large print, audio recording and Braille) are available to persons with disabilities by contacting Brian Millin of the Consumer & Governmental Affairs Bureau, at (202) 418-7426, TTY (202) 418-7365, or at bmillin@fcc.gov.

V. ORDERING CLAUSES

85. Accordingly, IT IS ORDERED that, pursuant to the authority contained in Sections 1-4, 227 and 303(r) of the Communications Act of 1934, as amended; 47 U.S.C. §§ 151-154 and 227; and 47 C.F.R. §§ 64.1200 and 1201 of the Commission's rules, the NOTICE OF PROPOSED RULEMAKING IS ADOPTED.

86. IT IS FURTHER ORDERED that the proceedings in CC Docket 92-90 ARE TERMINATED, and the docket is closed.

87. IT IS FUTHER ORDERED that the Commission's Consumer & Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

SEPARATE STATEMENT OF CHAIRMAN MICHAEL K. POWELL

Re: Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, CC Docket No. 92-90

As I have stated on many occasions, maximizing consumer welfare and protecting consumer interests are key Commission priorities. The Commission achieves these ends, in part, by creating market policy that allows innovation to bring new and improved telecommunications products and services to all Americans, while balancing the rights of consumers. We also seek to empower consumers directly by providing them information they can use to make educated decisions in a marketplace where the options can sometimes be daunting.

Today, the Commission takes an important step in adding to its substantial record of consumer-oriented policy and outreach initiatives. Given the number of consumer inquiries and complaints about telemarketing the Commission has received, and in light of technological and market changes, we have determined that it is time to review the rules under the Telephone Consumer Protection Act (TCPA) of 1991 on unsolicited advertising using telephones and facsimile machines. This item also seeks comment on the establishment of a national do-not-call list that would cover most telemarketing calls, an issue that the Commission last considered a decade ago. In particular, the item asks about possible FCC actions that could complement the Federal Trade Commission's proposal to establish and administer a national do-not-call list.

Since the TCPA was adopted, telemarketing practices have changed significantly, the number of telemarketing calls received by consumers has increased exponentially, and the technologies used by telemarketers have become more sophisticated. Therefore, the rulemaking proposed today is timely in considering whether consumers are adequately protected against unlimited unsolicited advertising, as contemplated by the TCPA. In reviewing our rules, we must balance this consumer interest against the burdens on telemarketers and their interest in conducting legitimate telemarketing.

Consumer policy efforts like this one are complemented by the Commission's outreach and education initiatives, which include producing fact sheets, consumer alerts, and consumer forums and making concise, reader-friendly information available on the Commission Web site and through our Consumer Centers. Other recent consumer-related FCC activities include:

(1) Proposing to extend the Commission's informal complaint rules to encompass all entities we regulate, not just telephone service providers. If this item is adopted, a consumer will be able to file a complaint with the Commission and receive a response from the company in question.
(2) Permitting reimbursement from the interstate Telecommunication Relay Service (TRS) fund in a way that persons with disabilities who use Internet-based TRS access can initiate calls from their computers rather than having to purchase TTY (teletypewriter/text telephone) devices.
(3) Educating consumers through our "Get Connected: Afford-A-Phone" national outreach campaign about Link-Up America and Lifeline Assistance, programs that provide

discounts on initial telephone installation and basic monthly telephone service for qualifying low-income consumers.

(4) Producing a brochure in 13 languages that explains consumer options for saving money on international long distance telephone calls.

Today's telemarketing item and the initiatives enumerated above are only several of our recent actions designed to serve consumers of telecommunications goods and services. The American public can be confident that the Commission will continue to advance consumer value through its policies and programs.

SEPARATE STATEMENT OF COMMISSIONER KATHLEEN Q. ABERNATHY

In re: Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278 and CC Docket No. 92-90, Notice of Proposed Rulemaking and Memorandum Opinion and Order

I fully support today's Notice to re-examine our implementation of the Telephone Consumer Protection Act. Since I became a Commissioner, I have repeatedly emphasized the obligations of this Commission to protect consumers from irresponsible business practices. While I continue to believe that markets more effectively deliver consumer benefits than regulation ever can, a regulatory agency takes on additional specific responsibilities in a competitive market that never existed under a monopoly regime. The Commission must rise to the challenge of a regulatory agency in a competitive age and today's decision is a positive step in that direction.[1]

As previously stated,[2] the protections created by the TCPA are among the most important activities this Commission undertakes to improve the daily lives of the public. I will continue to work with my fellow Commissioners and our Consumer and Governmental Affairs Bureau to ensure that the American people are fully aware of their rights under the Act and the Commission's efforts to enforce our rules. In this regard, I have been particularly heartened by recent tough enforcement action taken against unsolicited fax advertisers.[3] We are fully committed to increasing public awareness about these rules and strictly enforcing them.

Today's Notice takes our efforts to another level. It has been 10 years since the Commission promulgated rules under the TCPA. In the intervening decade, there have been tremendous changes in both the communications capabilities of everyday Americans and the tools available to marketers. We have an obligation to examine those changes and adapt our rules to that new reality. I have followed the efforts of the FTC in re-examining their rules and I support our similar action today. In examining these issues, I am particularly concerned about

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[1] Kathleen Q. Abernathy, *A Regulatory Agency for a Competitive Age: Harnessing the Chaos*, Commissioner's remarks at May 22, 2002 Press Breakfast, available at http://www.fcc.gov/Speeches/Abernathy/2002/spkqa213.html ("We must continually refine our mission at the Commission to best respond to changed conditions."). *My View from the Doorstep of FCC Change*, 54 Fed. Comm. L.J. 2, 202 (2002) ("Unsolicited faxes certainly do not grab headlines in the way free political advertising does, but that is not the standard by which we should assess the FCC's job performance. Therefore, I believe that the Commission should devote additional resources to enforce our rule prohibiting unsolicited faxes. I have been heartened by the Commission's increased enforcement efforts in this area over the past few years. In addition, the FCC should step up its efforts to inform consumers of their rights under the TCPA. Only with these efforts will the Commission fulfill the statutory mandate and the prioritization inherent in the TCPA.").

[2] Kathleen Q. Abernathy, *Do-Not-Call Lists*, 2 Focus on Consumer Concerns 1, (January – February 2002) available at http://www.fcc.gov/commissioners/abernathy/news/donotcall.html.

[3] *See* Fax.com Apparent Liability for Forfeiture, File No. EB-02-TC-120 (released August 7, 2002)(Issuing a Notice of Apparent Liability in the amount of $5,379,000). 21st Century Faxes Ltd., Forfeiture Order, File No. EB-00-TC-174, 17 FCC Rec. 1384 (released January 11, 2002)(Issuing a Forfeiture in the amount of $1,107,500).

the burdens imposed on consumers to express -- on a company-by-company basis -- their desire to be placed on a do-not-call list. In light of the technological tools now available, I believe the time has come to examine the effectiveness of a national do-not-call list. Current state policy efforts, implementation issues, and the efforts of private parties will each inform my consideration of these issues. However, I am committed to using the full resources of this Commission to ensure that consumers have a reliable and simple way to stop undesired telemarketing calls.

I am also increasingly concerned about the possibility of telemarketing calls to wireless phones by autodialers or using prerecorded messages. There have been sporadic reports of violations of our current ban on such calls. The Commission will continue to vigorously enforce this ban. However, as technology evolves, we must remain vigilant that such calls not take place. I am particularly concerned that when local number portability is implemented for wireless devices late in 2003, telemarketers will not be able to readily distinguish landline phone numbers from wireless numbers. The marketing industry, carriers, consumers, and the Commission will need to work together to develop solutions that implement our bar against wireless calls from autodialers and the use of prerecorded messages even after local number portability is a reality.

SEPARATE STATEMENT OF
COMMISSIONER KEVIN J. MARTIN

Re: Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; CG Docket No. 02-278 ; CC Docket No. 92-90

I commend the Chairman and Bureau staff for their effort to craft this Notice that seeks comment on how we can more effectively protect consumers from unwanted telephone solicitations and facsimile transmissions. I also support the inquiry on whether to revisit the option of establishing a national do-not-call list and, to what extent, we should supplement the Federal Trade Commission's pending proposal to adopt a national do-not-call list.

With the development of more effective telemarketing practices during the past decade, American consumers are now faced with a greater amount of unwanted solicitations on their telephones and fax machines. The frequency of these solicitations has become an unwanted interruption in the busy lives of the American family. Today, we begin the process to give the American consumer additional tools to stem the tide of these unwanted solicitations. I am pleased to support another Commission decision that engages our authority to protect consumers by modifying our rules to address evolving business practices, changing marketplace conditions, and technological innovation.

I am also pleased to note that the proceeding we launch today does not seek to alter in any way the existing exemption from the telemarketing restrictions for entities involved in political or religious speech. Protecting free and unfettered political and religious speech is critical to our democracy. In my view, the risk of any actual or perceived infringement on political and religious discourse outweighs whatever speculative benefits may be obtained from imposing additional regulatory restrictions on such activity.