

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 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

COMMENTS OF THE DIRECT MARKETING ASSOCIATION

Robert Wientzen
President & CEO
Gerald Cerasale
Senior Vice President, Government Affairs
The Direct Marketing Association, Inc.
1111 19th Street, N.W., Suite 1100
Washington, DC 20036
(202) 955-5030

Ian D. Volner
Heather L. McDowell
Ronald M. Jacobs
Venable, Baetjer, Howard & Civiletti
1201 New York Avenue, N.W., Suite 1000
Washington, DC 20005-3917
(202) 962-4800
Counsel for The DMA

TABLE OF CONTENTS

SUMMARY iii

INTRODUCTION 1

 A. TELEMARKETING IS A PERFECTLY LEGITIMATE AND EFFECTIVE
 MEDIUM 2

 B. THE DMA’S TELEPHONE PREFERENCE SERVICE IS VERY
 EFFECTIVE IN REDUCING UNWARRANTED SOLICITATIONS 4

PART I – COMMENTS REGARDING THE CURRENT RULES..... 7

 A. THE COMMISSION SHOULD RETAIN – BUT MODIFY – ITS
 RULES FOR COMPANY-SPECIFIC DO-NOT-CALL LISTS 7

 1. The Current Rules Work And A National Do-Not-Call List is
 Unnecessary..... 7

 (a) There Is No Credible Evidence That The Current Rules Do Not Work 7

 (b) There May Be Alternatives to Bolster The Existing Rules 12

 (i) Mandatory Caller ID 13

 (ii) Unique Identifiers 15

 2. The Commission Should Modify the Rules Governing Retention of
 DNC Lists..... 16

 B. THE COMMISSION SHOULD RETAIN THE CURRENT DEFINITION OF
 “ESTABLISHED BUSINESS RELATIONSHIP” 18

 C. THE COMMISSION MUST EXERCISE ITS EXCLUSIVE JURISDICTION
 OVER THE USE OF PREDICTIVE DIALERS 21

 1. The FCC Has Sole Authority to Regulate Predictive Dialers as Customer
 Premises Equipment (CPE)..... 21

 2. The TCPA Permits the FCC to Preempt State Regulation of Predictive
 Dialers 26

 3. The Commission Should Adopt a *Reasonable* Limit on Predictive
 Dialer Abandoned Calls 30

D. THE COMMISSION DOES NOT NEED TO AMEND THE RULES GOVERNING PRE-RECORDED CALLS	34
E. IT IS NOT NECESSARY TO REDEFINE “RESIDENTIAL” CALLS TO INCLUDE CALLS TO WIRELESS PHONES	34
PART II – COMMENTS REGARDING A NATIONAL DO-NOT-CALL LIST	35
A. A NATIONAL DNC LIST REQUIREMENT OFFENDS THE FIRST AMENDMENT	37
B. CORE REQUIREMENTS OF A NATIONAL DNC PROGRAM	40
1. Preemption of State Requirements	40
2. Superseding an FTC Do-Not-Call Program	41
3. State Jurisdictional Issues	43
4. Exemptions for Non-Profit and Established Business Relationship Calls	45
C. A PROPOSAL FOR A “SUM OF THE STATES” DNC PROGRAM	46
1. The Basic Framework	46
2. Additional Proceedings and Public Comment	49
CONCLUSION	53

SUMMARY

The Direct Marketing Association, Inc. (“The DMA”) is submitting comments in this proceeding regarding the Commission’s proposals and questions concerning possible revisions to its current telemarketing rules, as well as the possibility of establishing a national Do-Not-Call list.

The DMA believes that the Commission should make only modest changes to the current rules. The Commission should retain, but modify, its current rules mandating that telephone solicitors retain company-specific do-not-call (“DNC”) lists. There is no basis for reversing the Commission’s previous finding that company-specific lists are the best means to address consumers’ concerns while avoiding unduly burdensome industry regulation. As we discuss in these comments, a survey recently conducted by The DMA shows that its well-known and well-respected, Telephone Preference Service satisfies consumers’ expectations in reducing unwarranted telephone solicitations. There is no evidence to indicate that a nationwide DNC list is necessary or would be better than the current rules. And there are potential alternatives – such as mandatory caller ID – that could enhance the efficacy of company-specific lists and, thus, warrant further study. In light of the high turnover rate for telephone numbers, however, The DMA urges the Commission to permit marketers to use National Change of Address – not merely a telephone number – to verify the continued accuracy of a DNC request, and revise the rules to reduce the retention period for keeping a consumer on the list from 10 years to 5 years.

The Commission does not need to revise the current definition of an “established business relationship” (“EBR”) and, in particular, should not attempt to narrow it to apply

only to subsequent solicitations involving “related” goods or services, or apply a temporal limit on EBRs. It also is not necessary to modify the regulations governing pre-recorded messages.

With respect to predictive dialers, the Commission should clarify that its standards – including a decision *not* to impose new rules, if that is the case – preempt any other regulations that purport to govern the use of predictive dialers. If the Commission determines that the record in this proceeding demonstrates a need for regulatory limits on predictive dialers, The DMA believes that a cap of 5% of answered calls per day is a reasonable limit on “abandoned” calls.

The DMA has traditionally opposed a governmentally imposed national do-not-call list and we still do not believe that a nationwide list is necessary. The DMA has long maintained its own, privately administered Telephone Preference Service (“TPS”) and we continue to believe that self-regulation is the best way to address issues in a broad and complex medium such as telephone marketing. If, however, the Commission decides to establish a national DNC database, we propose a “Sum of the States” framework. This approach would incorporate existing statewide DNC lists into a single database, to be complemented by use of The DMA’s TPS in states that have not enacted DNC legislation. At a minimum, however, the Commission must ensure that this or any other nationwide DNC program achieve several core objectives: It must preempt state DNC list requirements; it must supersede any FTC requirement to subscribe to a national DNC list; and it must exempt calls to persons with whom the calling party has an established business relationship and calls by tax-exempt, non-profit entities.

Finally, if the Commission determines to develop a nationwide DNC database, it must issue a further NPRM to set forth, and seek comment on, specific proposals for detailed implementation of such a program. The Commission must also afford interested parties the opportunity to comment upon any FTC rules issued during the pendency of this proceeding that implicate TCPA requirements or restrictions.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 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

COMMENTS OF THE DIRECT MARKETING ASSOCIATION

The Direct Marketing Association, Inc. (“The DMA”) respectfully submits these comments in the above-captioned proceeding pursuant to the Notice of Proposed Rulemaking (“NPRM”) that the Federal Communications Commission (“Commission” or “FCC”) released on September 18, 2002. As requested by the Commission, we comment separately on the two basic themes raised in the NPRM: The first section of these comments address the issues raised by the Commission concerning possible revisions to the current TCPA rules; the second section deals with the legal and policy issues surrounding a possible national do-not-call list.

INTRODUCTION

Founded in 1917, The DMA is the largest trade association for businesses involved in database marketing. We have approximately 5,000 member companies from the United States and over 50 other nations worldwide. Our members include marketers from every business segment, as well as non-profit organizations. The DMA membership reflects the broad array of businesses and organizations that use, or provide services to entities that use, the telephone as a marketing medium. The membership includes direct sellers, list brokers, common carriers, teleservices bureaus, fulfillment companies, and advertising companies. The DMA has established and rigorously

enforces stringent ethical standards for all aspects of direct marketing, including teleservices.

A. TELEMARKETING IS A LEGITIMATE AND EFFECTIVE COMMUNICATIONS MEDIUM.

Although the terms “telemarketing” and “teleservices” are in common use, they are, in fact, misnomers. Telemarketing is not an industry; it is a medium of communication between businesses and the public that they serve or seek to serve. Outbound telemarketing is functionally no different than advertising through radio or television, print media, or direct mail. There is an enormous range of industries that use the telephone to promote the goods and services that they sell or, in the case of a not-for-profit organization, to raise funds to support their philanthropic, eleemosynary, and political activities.

While it is well known that telephone companies, financial service organizations (including, but not limited to, banks), and cable operators all promote their services through outbound telephone marketing, there are a host of other industries that use the telephone extensively as a medium of communication with both present and prospective customers. These include, for example, retail stores (so-called “brick and mortar” businesses), magazines, newspapers, realtors, insurance companies, and home service companies ranging from dry cleaners to lawn care. Total sales to consumers last year from outbound marketing via the telephone amounted to \$296 billion. The industry’s contribution to the overall well-being of the economy – in terms of jobs, manufacturing, and the provision of goods and services – far exceeds that number. It is vital that the Commission keep in mind the breadth and scope of the industries that use this medium in its consideration of the legal and policy issues at stake.

It is also a mistake to view outbound telephone marketing in isolation. It is true that there are other media through which, in theory, businesses that are now heavily or exclusively dependent upon outbound telephone marketing could attempt to reach their customers or their desired audience. Yet, outbound marketing by the telephone has been successful – as evidenced by the \$296 billion in consumer sales generated last year – because it is a uniquely effective medium of communication. It is convenient to the consumer, and it is interactive and interpersonal in a way that no other advertising medium can replicate. As a result, for start-ups or smaller specialized businesses that do not have nationwide brand recognition, as well as for larger well-recognized businesses seeking entry into new markets or seeking to offer new products or services to established markets, outbound calling is a keystone to the consumer-driven economy that exists in the United States. Outbound marketing serves to fuel other, less discriminating, and more impersonal channels of communication.

At the same time, there is simply no truth to the claim that, unless further and more stringent controls are put on this medium, the American public will be inundated with telephone solicitations. The marketplace and industry self-regulation will and, in fact, have imposed natural constraints on this valuable medium. For example, industry data shows that between 1998 and 2002, the number of billable minutes of outbound telemarketing calls by teleservices bureaus was virtually flat, rising from 3.7 million minutes in 1998 to 3.9 million for 2002. By contrast, the number of inbound billable minutes nearly tripled in the same 5-year period from 2.5 million minutes to 6.8 million minutes. Hence, there were nearly twice as many inbound calls – some of which undoubtedly were generated by outbound calls – than there were outbound calls in 2002.

In short, any notion that there is a need for more regulation to curb the growth of a medium that is otherwise out of control is without factual foundation.

The Commission conducted a thorough and careful examination of telemarketing practices 10 years ago, when it first adopted the TCPA rules. The rules have imposed significant limits and responsibilities on businesses and, for the most part, they have worked well. With a few exceptions, we believe that time and experience have shown that the current rules strike the right balance to accommodate business, regulatory, and consumer interests. Some things have changed in the years since the Commission adopted the TCPA rules, but we do not believe that any of the changes we have seen warrant more than a few modifications to the current regulations. Companies should be permitted to use National Change of Address – not merely a telephone number – to verify the continued accuracy of a DNC request since 16% of the phone numbers change annually. We also urge the Commission to reduce the retention period for company-specific lists from 10 years to 5 years. Beyond this, however, the current rules do not need to be revised. We do believe that more active enforcement of the existing rules would promote greater compliance and help curb abuses. But adding new layers of regulatory burdens will only impair legitimate business and increase consumer costs, it will not coerce greater compliance from those who are not complying now.

2. THE DMA’S TELEPHONE PREFERENCE SERVICE IS VERY EFFECTIVE IN REDUCING UNWARRANTED SOLICITATIONS.

We do not believe that it is necessary to adopt a nationwide do-not-call database. The DMA has a unique perspective on this issue, and extensive experience with the cost and benefits of operating such a database. As the Commission is aware, since 1985, we have maintained the Telephone Preference Service, or “TPS,” which identifies

individuals who have indicated that they do not want to receive promotional calls at home. The TPS is a file of individuals who have contacted The DMA to register with TPS by providing their names, home addresses, and home phone numbers. Consumers can register for TPS by mail, fax, or over the Internet. Consumers find out about the service through state and local consumer agencies and print and broadcast advertising. Once registered, they remain on the list for five years. The TPS currently includes approximately 7.5 million names.

All DMA members are required to subscribe to the TPS as a condition of membership. We also make the list available to non-members. Marketers are not, however, required to use TPS to suppress calls to customers. The list is updated monthly, and TPS subscribers can elect to receive it on a quarterly or monthly basis. Subscribers also must agree to use the TPS data only for the purpose of removing consumers' names from their calling lists and not for any other purpose.

The TPS is very effective in reducing unwanted solicitations, and it is an efficient and manageable tool for marketers to avoid calling consumers who do not want to receive telephone solicitations. In fact, a number of states rely on TPS to serve as their "state" DNC list. Connecticut's state-managed do-not-call list is incorporated into The DMA's TPS file. Beginning October 1, 2002 The DMA also began to distribute the TPS list for the state of Pennsylvania. Subscribing to the DMA's TPS file also satisfies do-not-call requirements in Maine, Vermont, and Wyoming.

In the NPRM, the Commission specifically inquired about the effectiveness of private-sector initiatives such as the TPS.¹ Therefore, we commissioned a survey of 400 TPS subscribers, and 400 non-subscribers, to get a sense of consumers' current perceptions about the service. We were particularly interested in learning whether consumers perceive it to be easy or difficult to get on the list, and whether or not they receive fewer unwanted calls after they get on the list. We are delighted to report that subscribers think that the TPS is working very well.

Nearly 80 percent – 78.58% – of TPS subscribers responding² said that it is either “extremely easy” or “very easy” to sign up for the TPS service. Notably, those who register by mail (47%), telephone (25%), and over the Internet (18%) rated all methods of registration as “very easy” to use. Thirty-two percent of all 400 TPS subscribers that we surveyed reported that they are “somewhat satisfied” with the level of service that TPS has provided. Another 46 percent reported that they are either “extremely satisfied” (14%) or “very satisfied” (32%) with the level of service. Perhaps most significantly, an overwhelming 80.5 percent (322) of subscribers surveyed said that that they noticed a decrease in the number of telephone solicitations that they have received since registering with the TPS. Among those reporting a decrease in calls, 42 percent said that they have noticed a “substantial” decrease and another 45 percent noticed a “moderate” decrease. The survey result make clear that that TPS is not only consumer-friendly and easy to use, but also highly effective in limiting unwanted solicitations.

¹ Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, *Notice of Proposed Rulemaking and Memorandum Opinion and Order*, FCC 02-250 (Released September 18, 2002) ¶17 (hereinafter “NPRM at ___”).

² A small number – 41 or 10.2% – of the 400 subscribers surveyed said that they did not know or refused to give an answer to this question.

We recognize that governmentally-imposed DNC lists have become popular in the states. And they might *seem* like an easy way to address consumer complaints about annoying, unwanted calls. Indeed, if the Commission finds compelling reasons to establish a federal database, we offer suggestions for how to structure it to balance the sometimes-competing interests of consumers, regulators, and businesses. Nonetheless, as our TPS survey results indicate, existing self-regulatory efforts to reduce unwanted telephone solicitations, in conjunction with company-specific DNC lists, are highly successful and provide ample protection for consumers.

Moreover, the Commission evidently believes that the existing company-specific DNC requirements have worked well, since it has not issued any fines for non-compliance since the rules were adopted in 1992. These and other factors that we discuss below lead us to conclude that a government-mandated nationwide DNC list remains as unnecessary today as it was 10 years ago.

PART I - COMMENTS REGARDING THE CURRENT RULES

A. THE COMMISSION SHOULD RETAIN – BUT MODIFY – ITS RULES FOR COMPANY-SPECIFIC DO-NOT-CALL LISTS

1. The Current Rules Work And A National Do-Not-Call List is Unnecessary

(a) There Is No Credible Evidence That The Current Rules Do Not Work

In 1992, the Commission carefully and exhaustively weighed the detailed criteria specified by Congress in the TCPA to determine whether or not it should establish a national “do-not-call” (“DNC”) database. The Commission concluded that establishing such a regime would be costly, cumbersome, unduly intrusive upon legitimate business and marketing practices and, ultimately, unnecessary to protect consumers’ interests.

The Commission faces an extraordinarily high burden to reverse its 1992 decision not to implement a national do-not-call list. The Commission must “supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.”³ In fact, there is a presumption “*against* changes in current policy that are not justified by the rulemaking record.”⁴ Nothing has so changed in the decade since the FCC implemented the TCPA that it justifies the profound shift in policy that this Commission may be contemplating or that the Federal Trade Commission (“FTC”) – without statutory authority – is contemplating.

Any notion that unsolicited telemarketing calls are generally offensive to the American public simply is not borne out by fact. Telemarketing is a legitimate business and communication tool that produced over \$296 billion in sales last year. Consumers buy many different types of goods and services offered by phone. They also make repeat purchases by phone. Some of the largest users of telemarketing include banks and financial institutions, telephone and cable companies, and insurance companies. In many cases, the products that companies sell and the terms on which they are marketed are heavily regulated. Magazine and newspaper publishers, and charitable, religious, and political organizations also make extensive use of the phone for purposes that involve the sale of goods or services.

The Commission explains that its NPRM is prompted in part by increased consumer complaints⁵ and, thus, perhaps believes that the number of complaints about

³ *Motor Vehicle Ass’n. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (rejecting agency’s decision to reverse course in a rulemaking because of lack of record evidence and reasoned analysis).

⁴ *Id.* (emphasis in original).

⁵ *NPRM* at ¶¶ 4, 49.

telephone solicitation is proof that the current system of company-specific lists does not work. This is wrong. The presence of complaints is a sign that consumers are aware of the law and their rights, that they understand how to file complaints, and possibly that the Commission must enforce its existing regulations more aggressively. For instance, the Commission has not imposed fines on businesses that have violated the company-specific do-not-call requirements. The recent *Fax.com* case, on the other hand, is an example of aggressive enforcement that is likely to lead to increased compliance with regulations dealing with “junk” faxes.⁶ Indeed, the lack of enforcement against telemarketers for violations of the current, company-specific DNC rules would indicate that the Commission believes they are working.

Moreover, the complaints logged by the FCC, the FTC, and states make up an infinitesimally small percentage of the total calls made. The Commission notes that for the two-year period from January 1, 2000 through December 31, 2001, it received approximately 11,000 complaints. Based on the data set forth in the NPRM, this represents *less than one hundredth of one percent* of telephone solicitation calls made during this period. And, the reality is that a very large number of these complaints has nothing to do with compliance with DNC requirements.

There is a further reality: A shift from the existing company-specific regulatory program to a national DNC list would not materially reduce the number of complaints that the Commission receives. It would obviously have no effect on complaints about other TCPA issues. Moreover, even DNC-related complaints are not a function of the type of do-not-call regime imposed. They are purely and simply a function of the number

⁶ Fax.com, Inc., *Notice of Apparent Liability for Forfeiture*, 17 FCC Rcd. 15927 (2002).

of calls that are made. Undoubtedly, the absolute number of DNC-related complaints that the Commission has received has increased since the TCPA was first implemented. So have the number of names on The DMA's TPS list. During that same period, however, the population has increased; the number of telephone solicitation calls made has increased; the number of industries and non-profit and political organizations using telemarketing has increased; publicity about DNC lists and consumers' rights has increased; and the sales volume resulting from telemarketing calls has increased. The rate of increase in complaints is nowhere near proportionate to the increased sales rate.

The question of cost must also be taken into account. The evidence before the FCC in 1992 showed that the cost of establishing a national list far outweighed any benefits it might provide consumers. Technological advances may have reduced the start-up costs somewhat, although the FTC's \$12 million estimate is unsubstantiated and unrealistic. Nonetheless, there will be a cost to the list manager, to marketers, and to the public. Ironically, and irrationally, these costs ultimately will be borne by consumers who *do* want to receive information about goods and services by telephone and who *do* purchase in response to those calls.

In balancing the costs and benefits of a governmentally-imposed nationwide DNC program, the Commission must also recognize that imposing a more sweeping DNC program will inevitably mean sacrificing jobs that employ millions of people. In 2001, the telemarketing industry that markets to consumers was estimated to affect 4.1 million jobs.⁷ No matter how it is framed, a governmentally imposed nationwide program will result in increased compliance costs. Increased administrative costs will ultimately

⁷ WEFA Group, Economic Impact: U.S. Direct and Interactive Marketing Today, 2002 forecast.

translate into higher priced goods and services, higher unemployment, and delayed recovery in industries – such as telecommunications and magazines – which have been very hard hit by the recent economic downturn.

Given the variety and breadth of economic interests that would be affected, The DMA is not in a position to estimate the full cost of a national list, but we have not seen anything to suggest that any benefits of a national list now outweigh its cost. Again, the balance of interests has not changed since the Commission’s initial decision to adopt company-specific DNC requirements.

The vast majority of telemarketing calls are made by legitimate marketers offering legitimate goods and services to the public. As required by the Commission’s rules, these companies maintain policies and procedures to ensure that consumers who do not wish to receive calls from them are placed on their DNC lists. Organizations that use telemarketing as a medium of communication have business reasons – quite independent of the risk of legal sanctions – to see to it that their policies and procedures are followed. To the extent that there are non-exempt companies that are systematically ignoring or seeking to evade the TCPA rules, the solution lies in enforcement, and there is no evidence of a pattern or practice of violation by legitimate marketers.

Moreover, we believe that the real concern underlying consumers’ DNC complaints is not principally one of outright noncompliance. It is one of timing: Consumers expect that a do-not-call request will instantaneously translate into a cessation of calls from that particular marketer or from a family of companies under common ownership. That does not happen now, and it would not happen if the Commission adopted a national do-not-call list. As experience with statewide lists demonstrates, there is an unavoidable interval between the time a consumer requests not to be called and the

time that the state compiles or updates its data and the information is incorporated into marketers' databases and acted upon. Further, the risk of errors and omissions is greatly compounded under a national, governmentally controlled DNC program. Just recently, a "glitch" in a state computer resulted in the inadvertent omission from the statewide list of thousands of consumers who thought that they had been placed on that statewide list. These problems will persist – and be magnified – with a national do-not-call list, just as it does in the states that have adopted statewide do-not-call regimes.

In short, adopting a national DNC list would "go after a gnat with a sledgehammer."⁸ The solution to the modest problem of consumer complaints is not a new list, but much more aggressive – and narrowly tailored – enforcement of the current rules.

(b) There May Be Alternatives to Bolster the Existing Rules

The Commission asks whether there are changes to its rules, short of adopting a national DNC list, that might make the existing company-specific regime more effective and more amenable to meaningful enforcement. The DMA believes that the idea of requiring marketers (and their service bureaus) to transmit caller ID information (either an identifiable telephone number or a company logo) is worthy of further exploration. On the other hand, the idea of coupling such a requirement with a unique identifier – which amounts to a special access code – is unworkable, unlawful, and unconstitutional.

⁸ *Brandywine-Main Line Radio, Inc. v. FCC*, 473 F.2d 16, 64 (D.C. Cir. 1972) (Bazelon, dissenting).

i. *Mandatory Caller ID*

The FTC is considering, and several states now have, rules to prohibit persons making what the TCPA defines as a “telephone solicitation” from blocking or circumventing the transmission of caller ID information (a rule The DMA fully supports). A related proposal, which this Commission has raised in this proceeding, is whether or not such a requirement should be taken a step further by affirmatively requiring “telemarketers” to transmit caller ID information. In principle, The DMA does not oppose the adoption of such a requirement. Yet, before the Commission takes that step it should seek further comment regarding the costs and consequences of a specific proposal for such a requirement.

It is probably technologically feasible now for most marketers and service bureaus to generate a logo or telephone number in connection with telephone solicitation calls. By itself, that is not a sufficient basis for the FCC to mandate transmission of caller ID.

First, there is the question of cost. Marketers and service bureaus may not be able economically to generate caller ID information because of the expense of changing, upgrading, or replacing existing equipment, software, and network configurations that they now use. Small marketers and service bureaus may be the most dramatically affected.

Second, it is far from clear that requiring marketers to use caller ID is going to achieve the Commission’s objective of permitting a broad segment of the American population to know who is calling them. Generating caller ID information is only the first step in the process. It is equally important, in terms of the purpose of such a requirement, that the information actually gets passed to the called party. It is extremely

unclear how much of the country is now served by SS7, upon which caller ID depends. The Commission needs to determine the size of the population that lives in communities served by central offices that do not have the capability to pass caller ID information. The Commission also needs to assess how many telephone subscribers actually subscribe to caller ID in markets where it is available.

Third, the Commission needs to consider carefully the technological and practical challenges of a mandatory caller ID requirement and how to address them. For instance, in some situations it may be desirable for the calling party to display a telephone number that consumers can actually call to reach a customer service representative rather than the originating line. This may be especially important for service bureaus calling on behalf of multiple clients, or in joint marketing arrangements. It is not clear, however, that this is feasible. If companies are permitted or required to transmit a name or logo, the Commission needs to consider appropriate protections for their intellectual property rights. The Commission must also take into account the relationship between caller ID and any limit on call abandonment or the use of answering machine detection. For example, as a general rule, marketers should not be subject to liability for repeatedly disconnecting multiple calls to a single number if those calls are not answered by a live person, even though caller ID would indicate they have tried several times to reach that consumer.

A mandatory caller ID requirement, therefore, has promise as a method to bolster the existing company-specific DNC list rules. But without answers to these and related questions, it is premature for the Commission to decide that mandatory caller ID is an appropriate supplement to the existing DNC program.

ii. *Unique Identifiers*

A related suggestion that the Commission advanced in its NPRM is assigning a unique identifier – a special access code or “SAC” – which telemarketers would be required to generate as part of caller ID. This is not only unworkable, but also unlawful. Mandatory caller ID may be defensible as a time, place, and manner constraint upon speech. A mandatory “telephone solicitation” identifier imposes a vague standard and amounts to compelled speech, and is, therefore, potentially unconstitutional.⁹

There is no definition of “telemarketer” in the TCPA. Nor is there any practical way to objectively identify a telemarketer. As the Commission learned in the course of its toll-free number proceedings, the Census Bureau assigns industry identifiers by the business in which a company is engaged, not by the means it chooses to market its goods. Banks are not telemarketers, they are engaged in the provisions of financial services; cable operators, telephone companies, retail merchants, realtors, and others are not telemarketers, either. There are just no objective standards to which the Commission can refer to decide who would be subject to a unique identifier requirement. There also is no evidence that carriers have the capability to offer or support the use of unique identifiers.

The definitional problem is compounded by a lack of explicit statutory authority empowering the Commission to impose a unique identifier requirement on businesses that use the telephone to promote their goods and services. The TCPA does authorize the Commission to consider the use of “telephone network technologies” as a means of enabling residential telephone subscriber to avoid receiving telephone solicitations to which they object.¹⁰ This provision probably would serve as the basis for the

⁹ *Miami Herald v. Tornillo*, 418 U.S. 241(1974).

¹⁰ 47 U.S.C. § 227(c)(1)(A).

Commission's contemplated imposition of a mandatory caller ID requirement. Yet, requiring a unique identifier goes further: It rests on the premise that all telephone solicitation calls are objectionable to all residential subscribers. That is a conclusion that the TCPA and its legislative history simply will not support. If Congress had intended the Commission to establish a global single "sponsor identification" requirement for all businesses engaged in making telephone solicitations calls, it would have done so explicitly.¹¹ In the circumstances, the unique identifier concept is not only unworkable and unlawful; it fails to pass muster under the First Amendment to the Constitution.

2. The Commission Should Modify the Rules Governing Retention of DNC Lists

The current TCPA rules provide that company-specific do-not-call requests "must be honored for 10 years from the time the request is made."¹² The DMA maintains that, given the tremendous turnover in telephone numbers, this period should be shortened to five years. Marketers also should be allowed to cross-reference numbers with the Postal Service's National Change of Address ("NCOA") system to verify that a number has not been reassigned.

In its *Memorandum Opinion and Order* in 1995, the Commission changed the requirement that company-specific do-not-call lists be maintained in perpetuity to a ten-year retention period.¹³ At that time, the Commission rejected a request for a five-year retention period, noting that although no parties suggested a 10-year period, "we believe

¹¹ Compare, e.g., 47 U.S.C. § 317.

¹² 47 C.F.R. § 64.1200(e)(2)(vi).

¹³ Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, *Memorandum Opinion and Order*, 10 FCC Rcd. 12391, ¶¶ 14-15 (1995).

that a five-year period...would not adequately account for the privacy needs of residential telephone subscribers.”¹⁴ The facts show that this determination must be re-examined.

Forty million Americans change their address every single year; approximately 16 percent of the U.S. population changes phone numbers every year. Numbers are often reassigned to new customers 90 days after the previous customer leaves that number.¹⁵ The life span of a telephone directory in an urban area is no more than six months. Marketers and consumers are both harmed by a ten-year retention period with such a high turnover of numbers. Marketers are deprived of a legitimate potential contact when a person who has asked to be placed on a do-not-call list moves and a new customer receives that number. Customers who wish to receive calls but who are assigned a phone number on a do-not-call list are similarly harmed because they cannot receive the calls.

Many states that have imposed statewide do-not-call requests have recognized the mobility of Americans and require annual renewal of requests to be placed on such lists. The DMA proposes a more moderate period of five years. A DNC request once every five years is hardly a significant burden on a consumer. In a five year period, a marketer’s products or services may significantly change and a consumer may change his or her mind about being on that company’s do-not-call list. On the other hand, a phone number that is wrongfully off-limits – in the sense the person who has the number is not the person who requested to be placed on the do-not-call list – for an additional five years

¹⁴ *Id.* ¶ 15.

¹⁵ Commissioner Abernathy has noted the high rate of churn in her dissent suggesting forbearance for more than one year or even permanently in the wireless portability proceeding. Verizon Wireless’s Petition for Partial Forbearance from the Commercial Mobile Radio Services Number Portability Obligation and Telephone Number Portability, *Memorandum Opinion and Order*, 17 FCC Rcd. 14972 (01-184) (Abernathy, dissenting) (“Based on Commission data, we have not seen any significant decline in churn over time. Nor has any party to this proceeding produced any evidence of a significant decline in churn in any market segment or region of the country.”).

is a potential lost customer, which places a very high and unreasonable burden on industry.

B. THE COMMISSION SHOULD RETAIN THE CURRENT DEFINITION OF “ESTABLISHED BUSINESS RELATIONSHIP”

The Commission has asked whether it should narrow the current definition of an “established business relationship (“EBR”). The answer is no. The exemption is statutory and Congress included it for Constitutional as well as policy reasons. Although there might be an initial impulse to limit the scope of an EBR as a means of reducing complaints, doing so would be contrary to the terms and purposes of the statute, needlessly complicate the administration of the rules, stifle legitimate business, and undermine consumer expectations.

The TCPA defines “telephone solicitation” as “the initiation of a telephone call or message *for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services*, which is transmitted to any person, but *such term does not include* a call or message . . . to any person with whom the caller has an established business relationship.”¹⁶ The structure of the definition demonstrates that regardless of how an EBR is defined, a business is allowed to encourage the purchase or rental of goods or services that it offers. There is nothing in the definition that indicates that the solicitation must be or should be “related” to the transaction or inquiry upon which the EBR is based. Rather, the EBR provision exempts any call made by a marketer to any person with whom the marketer has a business relationship. Therefore, any effort to define EBR narrowly to encompass, for example, only “related” goods or services, is contrary to the language and purpose of the TCPA.

¹⁶ 47 U.S.C. § 227(a)(3) (emphasis added).

The broad scope of the EBR exemption is not accidental. Congress realized that a business relationship may arise because a consumer has purchased a particular product from a multi-product firm, and that neither the marketer nor its customer should be artificially cut off from other products offered by the same company which may – or may not – be “related” to the original purchase. Congress also recognized that some consumers might not want to receive calls regarding products “unrelated” to the transaction that gave rise to the EBR. The solution was to put control in the hand of the consumer: The consumer can always instruct the merchant to place his or her name on the merchant’s DNC list, despite the existence of the business relationship. As the Commission and courts have recognized,¹⁷ in the context of a company-specific list, this request effectively terminates the EBR, the EBR exemption (although not the underlying business relationship or contract) for purposes of future calls, regardless of whether the subsequent call involves a product that is “related” to the original transaction.

The existing opt-out arrangement moots a further difficulty with the attempt to narrow the EBR definition: How is the term “related” to be defined? Is offering fishing gear to a consumer who purchased a sleeping bag “related” or not? Is offering a DVD to a club member who purchased a book upon which the DVD is based a “related” transaction? Most importantly, is there to be a different “relatedness” test for telephone companies subject to the Commission’s CPNI rules than there is for other businesses subject only to the TCPA? If so, how is that difference to be justified? The short answer is that any attempt to narrow the scope of the EBR by reference to the content of a call, or the type of product or service involved is, if not unlawful, certainly bad policy.

¹⁷ See, e.g., *Charvat v. Dispatch Consumer Serv., Inc.*, 76 N.E.2d 829 (Ohio 2002).

The Commission also questions whether or not there should be a temporal limit on EBR. A temporal limit will needlessly complicate a clear rule. As an initial matter, we note once again that if Congress had intended to limit the duration of an EBR, it would have provided the Commission with a statutory basis to do so. A temporal limit on the duration of an EBR is not simply a time, place, and manner restriction on speech. It would interfere with contract and business relationships between marketers and their *existing* customers.

Moreover, there is no reasonable means to establish a “clock” – to determine when the relationship begins and ends – that will apply across all the industries that use the phone to relate to their customers. Different business models require different periods of time. For example, a lawn care company may only call customers at the start of the growing season. A magazine company may contact a customer at the end of multi-year subscription. A clothing company may call at the start of a sale. Thus, the time that companies and consumers consider to be a useful EBR may range from a few weeks to a few years. The variation is so great that any attempt by regulators to establish uniform temporal limits is invariably subjective and arbitrary.

In states that have tried to create narrow temporal limits on EBR, the regulations have become complicated, difficult to administer, and virtually impossible to enforce. They also reflect considerable differences.¹⁸ The Commission should maintain regulations that are simple for businesses and consumers to follow, that are enforceable, that provide clear guidance, and that promote reasonable business opportunities.

¹⁸ See, e.g., Arkansas – 36 months (Act 1465 § 3(e)); California – pending proposal of 1 year for seasonal goods, 30 days for non-seasonal goods, plus other limits for various other goods and services; Colorado – 18 months (Colo. Rev. Stat. § 6-1-903(7)); Kansas – 6 months (Kan. Stat. Ann. § 50-670); Missouri – 180 days (Mo. Rev. Stat. § 407.1095); Oklahoma – 24 months (Okla. Stat. 15 § 775B.2.3); Tennessee – 12 months (Tenn. Code Ann. § 65-4-401).

Furthermore, one definition of EBR should apply throughout the regulations. Forcing marketers to utilize multiple definitions of EBR will needlessly complicate administration and compliance efforts, triggering fresh consumer complaints. There is no evidence that the existing definition does not work; it should be retained.

C. THE COMMISSION MUST EXERCISE ITS EXCLUSIVE JURISDICTION OVER THE USE OF PREDICTIVE DIALERS

This Commission is the only regulatory agency authorized and empowered to regulate predictive dialers. If the Commission determines that the record in this proceeding demonstrates a need for regulatory limits on predictive dialers, The DMA believes that a cap of 5% of answered calls per day is a reasonable limit on abandoned calls. At all events, there is no valid reason to set a rate lower than 3% within a 30-day period. Most importantly, the Commission should clarify that its standards – including a decision *not* to impose new rules, if that is the case – preempt any other regulations that purport to govern the use of predictive dialers used to place interstate calls.

1. The FCC Has Sole Authority to Regulate Predictive Dialers as Customer Premises Equipment (CPE)

The Commission asks whether predictive dialers are “automated telephone dialing systems” within the meaning of the TCPA. There is no global answer to this question. The statutory definition turns on whether the device is “capable” of generating numbers for random or sequential dialing. There are a number of different types of dialers in the market; a number of companies – including many of the largest telemarketers and service bureaus – use proprietary systems. Some dialers are capable of being programmed for sequential or random dialing; some are not. Fundamentally, however, whether or not

predictive dialers are technically covered by the definition of “autodialer” in the TCPA, they are plainly CPE and, therefore, within the FCC’s exclusive jurisdiction.

The Communications Act of 1934, as amended (“Communications Act” or “Act”), gives this Commission plenary jurisdiction to “regulat[e] interstate and foreign . . . communications by wire and radio.”¹⁹ The FCC also has jurisdiction over facilities that are incidental to the transmission of interstate wire communications.²⁰ The Act, however, also provides that, with certain exceptions – notably including implementation of the TCPA – it shall not “be construed to apply or to give the Commission jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier.”²¹ Thus, Congress granted the Commission exclusive jurisdiction over “interstate communications”²² while generally preserving jurisdiction over “intrastate communications” for the states. When, however, communications facilities are jointly used for both inter- and intrastate communications, the Commission may and has preempted state regulation of intrastate activities to promote and protect the achievement of federal policies.

¹⁹ 47 U.S.C. § 151. *See also id.* § 152(a).

²⁰ *Id.* § 153(52). The Communications Act defines “wire communication” as “the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services . . . incidental to such transmission.”

²¹ *Id.* § 152(b).

²² The Communications Act defines an “interstate communication” to include communications or transmissions from any State or U.S. possession or territory to any other State, possession, or territory. *Id.* § 153(22)

In particular, the Commission long ago preempted state efforts to regulate customer premises equipment, or “CPE,” that are inconsistent with FCC standards.²³ CPE is defined as “equipment employed on the premises of a person (other than a carrier) to originate, route, or terminate telecommunications.”²⁴ Whether or not the Commission finds that they are a form of “autodialer” under the TCPA, predictive dialers are plainly CPE: They are located at a marketer’s (or its teleservices vendor’s) business location and they are designed and manufactured for the specific purposes of originating, routing, and terminating telecommunications. Thus, states (such as California) seeking to substantively regulate the operation of predictive dialers do so in conflict with the Commission’s longstanding policy of preempting state regulation of CPE.

The need for a single, national standard governing the operation of predictive dialers is compelling. This form of CPE is used jointly for inter- and intrastate communications and it is not feasible to separate them physically or as a regulatory matter. State regulation would effectively negate federal policy.²⁵

Like other forms of CPE, predictive dialers support both inter- and intra-state communications and are used “inseparably and interchangeably” for both types of calling. Predictive dialers are, for instance, routinely used to call past customers who are scattered throughout the country to offer a new or enhanced product or service, including

²³ See Amendment of Section 64.702 of the Commission’s Rules (Second Computer Inquiry), *Final Decision*, 77 F.C.C.2d 384 (1980), *recon.*, 84 F.C.C.2d 512, *further recon.*, 88 F.C.C.2d 384 (1981), *aff’d sub. nom.*, *Computer & Comm. Indus. Assoc. v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983)(“CCIA”).

²⁴ 47 U.S.C. § 153(14).

²⁵ See, e.g., *Texas Public Util. Comm’n v. FCC*, 886 F.2d 1325 (D.C. Cir. 1989) (upholding FCC preemption of state regulation of connection of private microwave system to the PSTN); *Illinois Bell Tel. Co. v. FCC*, 883 F.2d 104 (D.C. Cir. 1989) (upholding FCC preemption of state regulations relating to Centrex service); *North Carolina Util. Comm’n v. FCC*, 552 F.2d 1036 (4th Cir. 1977) (“NCUC II”), *cert. denied*, 434 U.S. 874 (1977) (same - customer-supplied telephones).

customers in the same state(s) where a marketer maintains its call center(s). A call to California might be followed by calls to New York, then to Ohio, to Arkansas, more to California, and so on. It would be unreasonably burdensome to require telephone marketers to maintain separate predictive dialing systems in order to “separate” inter- and intrastate calling capabilities. And such a policy would be particularly onerous – and expensive and unfair – for companies that maintain call centers in multiple states.

If, for instance, the FCC adopts a 5% cap on call abandonment, a marketer engaged in interstate marketing could not reasonably use one predictive dialing system to place calls into states that choose to adopt a lower rate, or to include a different time period or type(s) of calls to determine its actual abandonment rate. The only option would be to reprogram the system every single time it is going to place a call to a different state. That is simply unworkable in an interstate marketing context. Marketers would, in effect, be forced to divide every single marketing campaign virtually on a call-by-call basis. It would also render such systems useless, since any efficiency gains they offer would be lost, not least because of the need to make constant changes to the system. Furthermore, a marketer could not use the system *at all* in a state that purports to set an abandonment rate at zero, which not even manual dialing can achieve. Therefore, if the Commission decides to limit abandoned calls tied to predictive dialing, it must ensure that marketers can depend on uniform nationwide standards and, in particular, a predictable, consistent limit on call abandonment. The Commission must preempt any law or regulation that would establish a lower rate than the Commission adopts. Nothing would so negate a federal policy as a state requirement that purports to prohibit what federal standards expressly permit.

It is also impossible to segregate the interstate components of a regulatory scheme for predictive dialers. It is not feasible to separate interstate and intrastate calls for purposes of applying different rules to each, or for purposes of assessing or enforcing compliance with a myriad of inconsistent and potentially conflicting computational rules. Marketers can not, for instance, artificially “allocate” some portion of the operation of a predictive dialing system to intrastate calls while reserving some other part of it for interstate calls to determine whether or not they have satisfied an abandonment rate limit. There is simply no way to tease out rules that would apply only to interstate calls from those that could apply only to in-state calls. Thus, if states are permitted to impose different standards for predictive dialers, marketers would face a host of varying standards – which could even change within a single state depending on the type of product or service offered, who or when a marketer calls, or other factors – with which it would surely be impossible to comply without maintaining a separate system for every state, and perhaps for every calling campaign. As the Court explained in *CCIA*, “when state regulation of intrastate equipment or facilities would interfere with the achievement of a federal regulatory goal, the Commission’s jurisdiction is paramount and conflicting state regulations must necessarily yield to the federal regulatory scheme.”²⁶ The Commission must, therefore, make clear that any standards it adopts governing predictive dialers preempt different state requirements.²⁷

²⁶ *CCIA*, 693 F.2d at 214.

²⁷ Although these comments focus most heavily on the difficulties posed by the prospect of multiple state standards, The DMA also notes that the FCC’s exclusive jurisdiction over interstate communications and ancillary facilities pursuant to the Communications Act also precludes other federal agencies from regulating predictive dialers absent a specific grant of authority from Congress.

2. The TCPA Permits the FCC to Preempt State Regulation of Predictive Dialers

The TCPA specifically addresses the interplay between state and federal regulation of telemarketing practices and it permits this Commission to preempt state rules governing predictive dialers. In fact, it effectively compels the Commission to preempt other standards purporting to govern the operation of this CPE technology.

First, the TCPA allows the Commission to regulate intrastate calls: It establishes standards that apply not only to interstate but also to intrastate telephone solicitations.²⁸ When Congress amended the Communications Act to incorporate the TCPA, it amended section 2(b) of the Act to exclude the TCPA from the section 2(b) limitations on FCC authority to regulate intrastate activity. Specifically, section 2(b) states that “[e]xcept as provided in sections 223 through 227 [the TCPA] of this title” the Act may not be construed to give the FCC jurisdiction over intrastate communications.²⁹ Thus, Congress carved out an exception for the TCPA so that, notwithstanding the section 2(b) limitations that apply in other contexts, the TCPA expressly permits the Commission to adopt standards that govern intrastate activity.

Second, the TCPA expressly provides for the establishment of uniform technical operations for all autodialers. It provides that, “except for the standards” that the FCC

²⁸ See, e.g., *Texas v. American Blast Fax, Inc.*, 121 F. Supp. 2d 1085 (W.D. Tex. 2000).

²⁹ 47 U.S.C. § 152(b)(emphasis added). The TCPA also directed the FCC to consider, in assessing the viability of a national DNC database, whether or not different standards should apply to “local” calls, giving further indication that Congress was empowering the FCC to regulate them. *Id.* at § 227(c)(1)(C). See also 137 Cong. Rec. E793 (daily ed. Mar. 6, 1991) (statement of Rep. Markey) (“The legislation, which covers both intrastate and interstate unsolicited calls, will establish Federal guidelines that will fill the regulatory gap due to differences in Federal and State telemarketing regulations. This will give advertisers a single set of ground rules and prevent them from falling through the cracks between Federal and State statutes.”) (emphasis added).

adopts to govern the technical and procedural aspects of prerecorded messages, as well as separate provisions relating to a national database, the federal statute does not preempt certain state standards.³⁰ Since the TCPA provides that state laws are not preempted “except” as to, *inter alia*, technical and procedural requirements, it follows that state laws *are* wholly preempted to the extent that they seek to govern such matters. Thus, the TCPA affirmatively and explicitly preempts state standards that seek to regulate equipment that is governed by the Commission’s technical and procedural rules, which plainly includes automatic dialing systems – with or without predictive dialing capabilities.³¹

It would have been irrational for Congress to conclude that nationwide technical and procedural standards are necessary for equipment that generates pre-recorded messages, but that different and inconsistent technical and procedural rules could apply when the same equipment is used to route live operator calls, which Congress regarded as far less problematic. Congress did not act irrationally. It amended section 2(b) of the Act to refer to the TCPA to enable the Commission to adopt uniform technical and procedural standards for CPE regardless of whether it is used for pre-recorded calls or with live operators. The establishment of a call abandonment rate (including regulation of answering machine detection) is no less a technical or procedural standard than the “automatic release” requirement applicable to pre-recorded calls. Both are, therefore, subject to the Commission’s exclusive jurisdiction.

³⁰ 47 U.S.C. §§ 227(d), (e)(1).

³¹ *Id.* § 227(d)(1)(A) (prohibiting use of autodialers in a manner that does not comply with FCC technical standards) and § 227(d)(3) (requiring FCC to promulgate technical and procedural standards).

Third, the TCPA’s “savings” provision does not alter the Commission’s overarching and exclusive jurisdiction over interstate communications and CPE, including predictive dialers. The savings language in the TCPA does preserve states’ jurisdiction over some intrastate telemarketing activity by providing that neither the TCPA nor the Commission’s implementing regulations

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 message systems; or (D) the making of telephone solicitations.³²

Yet, when it enacted the TCPA, Congress was certainly well aware of the federal-state jurisdictional division it established - and maintains - in the Communications Act and the limits of states’ powers. The TCPA did not override or in any way disturb the Commission’s longstanding policy of preempting state regulation of CPE.

The fact that the TCPA grants state officials enforcement rights, as well as the TCPA’s legislative history, further underscore Congressional sensitivity to states’ lack of jurisdiction over interstate telemarketing activity; it is one of the key reasons Congress enacted the TCPA.³³ Similarly, Commission staff has previously explained that states have virtually no power to regulate interstate telemarketing. In 1998, the Chief of the Network Services Division of the FCC’s Common Carrier Bureau wrote to a member of the Maryland House of Delegates, in response to his request for clarification, and

³² *Id.* § 227(e)(1) (emphasis added).

³³ *See* Sen. Rep. No. 102-178 at 3 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1970 (“over 40 states have enacted legislation limiting the use of [prerecorded message devices] or otherwise restricting unsolicited telemarketing. The measures have had limited effect, however, because States do not have jurisdiction over interstate calls. Many States have expressed a desire for Federal legislation . . . to supplement their restrictions on intrastate calls.”); *id.* at 5, *reprinted in* 1991 U.S.C.C.A.N. at 1973 (“Federal action is necessary because States do not have jurisdiction to protect their citizens against those who use these machines to place interstate telephone calls.”).

concluded that the Communications Act “precludes Maryland from regulating or restricting interstate commercial telemarketing calls.”³⁴

At the same time, Congress departed from the longstanding policy of preserving to the states control over intrastate communications matters and, as we have pointed out, expressly amended Section 2(b) of the Communications Act to enable the Commission to establish a single national standard for both intrastate and interstate calls as to those matters where a national standard is, as a technological and policy matter, imperative.

Thus, there simply is no conflict between section 2(b) of the Communications Act as amended by the TCPA and the savings language subsection (e)(1) of the TCPA. The TCPA’s savings language does not trump the Commission’s plenary jurisdiction over CPE used for inter- and intrastate communications. States lack authority to establish standards for abandonment rates involving predictive dialers that are inconsistent with standards established by the FCC. The language and legislative history of the TCPA demonstrate that, to the extent that states retain jurisdiction over the use of predictive dialers under subsection (e)(1) of the TCPA, their jurisdiction is confined to regulating such matters as calling hours and disclosure requirements applicable to intrastate calls that are placed through the use of such customer premises equipment.³⁵ By contrast, under section 2(b) of the Communications Act, the Commission has exclusive jurisdiction over the operating standards – such as abandonment rates – that govern the use of the equipment for both inter- and intrastate calls.

³⁴ Letter from Geraldine A. Matisse, Chief, Network Services Division, Common Carrier Bureau, Federal Communications Commission, to Delegate Ronald A. Guns, House of Delegates (January 26, 1998).

³⁵ See *Head v. New Mexico Bd. of Examiners*, 374 U.S. 424 (1963).

3. The Commission Should Adopt a *Reasonable* Limit on Predictive Dialer Abandoned Calls

Predictive dialers enable a marketer to place more calls more efficiently by “predicting” when telephone sales representatives (“TSRs”) will be available to speak to a consumer and then placing calls at that rate. Thus, a predictive dialer is a dialing system that can use something greater than a 1:1 ratio of outbound telephone lines to the number of TSRs. The system is “intelligent,” and makes decisions about when to dial based on a myriad of factors such as average call length, percentage of pick-ups, time of day, available agents, and available system resources in an attempt to minimize average TSR wait time while limiting the percentage of calls that are “abandoned.” Predictive dialing helps enable TSRs to spend more time speaking with consumers who are interested in an offer than waiting for a connection or manually dialing calls. But it is not an exact science and sometimes a TSR will not be available to handle a call; when a TSR can not take a call the machine disconnects, which has become known as an “abandoned” call.

The DMA recognizes that despite the tremendous efficiencies of predictive dialing systems – which ultimately benefit consumers in the form of lower prices, fewer misdials, and improved quality controls – overly aggressive or careless use of this technology can annoy and frustrate consumers who too often get disconnected or find no one on the line when they answer a phone call. Too many abandoned calls also hurt conscientious telemarketers by eroding consumer confidence and goodwill.

As we have noted, The DMA *Guidelines for Ethical Business Practices* set high standards for ethical business practices; Article #41 of the guidelines governs the use of

predictive dialers.³⁶ After careful study and consideration, The DMA established a standard requiring members to maintain a call abandonment rate that is “as close to 0% as possible, and in no case should exceed 5% of answered calls per day in any campaign.” Telemarketers also should not “abandon the same telephone number more than twice within a 48-hour time period and not more than twice within a 30-day period of a marketing campaign.” This is a reasonable threshold that balances consumer concerns with marketers’ need for the efficiencies of predictive dialing technology.

When we adopted the guides, The DMA pledged to continue to examine these limits, and we continue to do so. Experience to date makes clear that a cap of less than 3% within a 30-day period is not realistic. It is not feasible to maintain abandonment rates of less than 3% and make meaningful use of the efficiency gains that the technology offers. Thus, while The DMA could support a reasonable limit on abandoned calls, the Commission must ensure that such a cap does not fall below 3% of answered calls within a 30-day period.

At the same time, the Commission must emphatically reject the suggestion advanced in the FTC proceeding that all abandoned calls be treated as a violation of the disclosure rules. Among other things, a call may be disconnected because the consumer hangs up within the permitted lag interval and the disclosures cannot be made in any meaningful way. Moreover, the practical effect of treating “dead air” (discussed below) and abandoned calls as violating the disclosure rules is to establish a zero abandonment rate. As The DMA’s guidelines recognize, such a level is an appropriate and laudable

³⁶ A complete set of the *Guidelines for Ethical Business Practices* is attached as **Exhibit 1**.

business goal. It is not, however, a practical objective given the current state of technology, and it can not and should not be established as a legal standard.

The Commission will need to spell out with precision what constitutes an “abandoned call” for purposes of its abandonment rate standard and how the abandoned call rate would be calculated. One type of abandoned call can occur when no customer representative is available to handle a call placed by a predictive dialer. A similar – but different – issue arises with the use of answering machine detection (“AMD”). AMD allows marketers to detect whether a live person or an answering machine has answered the call and to abandon the call if the intended recipient does not pick up the phone in person. Although the technology varies, it unquestionably creates the potential for an increase in “dead air.” Dead air, however, is not the same thing as an abandoned call. Moreover, as the AMD technology is perfected, the duration of dead air resulting from the use of AMD is likely to decline. The use of AMD can serve a legitimate business purpose while creating a minimal inconvenience or annoyance to consumers.

Nonetheless, the Commission may be concerned about the use of AMD to abandon calls that are picked up by the consumer. This practice, which is of relatively recent origin, seems principally to involve marketers who wish only to leave a pre-recorded message with the consumer’s answering machine or voice mail and, therefore, either abandon the call outright or (misleadingly) generate a “sorry wrong number” response if the call is answered by a live person. It is unclear why the few marketers using this practice believe it satisfies the spirit of the TCPA. Whatever the reason, the practice leads to a virtually 100 percent abandonment rate on answered calls.

The use of AMD for other purposes is more complex. Nonetheless, The DMA recognizes that there are consumers who find the dead air phenomenon offensive. There

is an alternative to an outright ban on AMD that should be equally effective. First, with caller ID there is less question about who is calling and leaving “dead air.” Second, treating calls with excessive periods of “dead air” as abandoned would satisfy legitimate consumer concerns without unduly impinging on proper use of technology. With current technology, it is not feasible to ensure that “dead air” will last less than five seconds. Yet, marketers recognize that consumers do not like dead air and frequently hang-up while waiting for a sales representative, and are constantly improving AMD and predictive dialing technology to reduce this time.

The DMA believes that the Commission should specify that the maximum permissible lag time is five seconds from the end of the called party’s greeting.³⁷ Any telephone solicitation call answered by a live person to which the marketer does not reply within that time should be deemed abandoned. Thus, calls involving excessive dead air would be counted in the numerator of the formula for determining an abandonment rate; the denominator should be all calls (including abandoned calls) answered by a live person. The Commission should then specify a reasonable limit – and not less than 3% within a 30-day period – as an acceptable cap on call abandonment.

Such a rule will raise additional questions about record-keeping requirements. Predictive dialers are not data storage units – they hold phone numbers to place calls. They can generate certain reports that include calls made, calls answered, and calls abandoned. A reasonable record retention period would allow the Commission or state authorities to investigate specific complains against marketers. We believe that a 12-month retention period would be reasonable. But, the Commission should not require

³⁷ Cf. Kan. Stat. Ann. § 50-670(1)(b)(6).

marketers to report all data generated on a regular basis; to do so would inundate the Commission with meaningless data. The issue is, once again, allowing for enforcement of reasonable and rational standards designed to curb abuses without stifling use of perfectly legitimate technology in furtherance of legitimate and valuable business and consumer interests.

D. THE COMMISSION DOES NOT NEED TO AMEND THE RULES GOVERNING PRE-RECORDED CALLS

The Commission's NPRM suggests that prerecorded calls should be limited to calls related to the purpose of an EBR on which they are based and that "dual purpose" calls should be regulated. Dual-purpose calls fit into two categories: Calls by nonprofits that utilize an affinity program and noncommercial calls that contain some commercial element. As discussed above, The DMA urges a single, broad definition of an EBR in all contexts. For dual-purpose calls, if the call is made by or on behalf of a nonprofit, it should be exempt. For calls with a commercial and a noncommercial purpose to those with whom the commercial marketer does not have an EBR, then the call to an individual on the DNC list can be made only if the marketer has properly obtained the called party's prior express consent. There is no need for the Commission to clarify this rule.

E. IT IS NOT NECESSARY TO REDEFINE "RESIDENTIAL" CALLS TO INCLUDE CALLS TO WIRELESS PHONES

The Commission has raised a number of questions relating to the prohibitions on placing certain calls to wireless numbers, and has asked whether or not it should rework the definition of a "residential" call to include wireless numbers, to ensure that such numbers are protected by the DNC provisions of the rules. We do not think that it is necessary to revise the definition, largely because the underlying goal of limiting calls to

wireless phones has been addressed. Specifically, The DMA recently announced that it has made arrangements to obtain (from Neustar, which administers the pool of numbers available as part of the North American Number Plan), and make available to telephone solicitors, wireless area codes and exchanges data. The service, which is akin to the TPS, will help marketers identify and suppress calls to wireless phone numbers.

PART II – COMMENTS REGARDING A NATIONAL DO-NOT-CALL LIST

The DMA has traditionally opposed a governmentally imposed national do-not-call list. We still do not believe that a nationwide list is necessary, because the current FCC company-specific requirements – enhanced by The DMA’s TPS – have been entirely effective in suppressing unwarranted telephone solicitations. Our experience confirms that self-regulation is still the best way to address issues in a broad and complex medium such as telephone marketing.

We recognize, however, that no-call lists are popular with state regulators and evidently have some appeal to both the FTC and this Commission. Perhaps this is because these lists may seem to be an easy way to enable consumers to reduce unwanted telephone solicitations and make enforcement simpler. In fact, they are more difficult and costly to develop and administer than most people probably assume. Similarly, we believe that enforcement is a more complex and nuanced issue than has been imagined. At the same time, marketers are facing unprecedented complexity in their efforts to honor a growing number of state DNC rules. Therefore, if the record in this proceeding leads the Commission to conclude that some form of national DNC list is justified, it must proceed with extreme care in the implementation of such a regime for policy, legal and,

above all, Constitutional reasons. We address the Constitutional issues in Section A, below.

Apart from Constitutional concerns, it may be possible to develop a nationwide DNC program that still allows for the success and growth of interstate commerce through telemarketing. We outline an affirmative proposal below. To do this, however, the Commission must – as a starting point – ensure that *any* nationwide DNC program achieves several core objectives. First, it is absolutely imperative that the Commission preempt state DNC requirements. Second, it is also critical that this Commission supersede any FTC requirement to subscribe to a national DNC list. Marketers absolutely must be able to go to one place to obtain one list and be assured that they will be in compliance nationwide. The proliferation of state lists – compounded now by the prospect of at least one and perhaps two national lists – is crippling to telemarketing. The patchwork of DNC obligations that regulators collectively are piling on telemarketing poses an unreasonable burden on interstate commerce and impermissibly restricts commercial speech. Third, the FCC must exempt calls to persons with whom the calling party has an established business relationship and calls by tax-exempt, non-profit entities.

If the Commission proceeds with a national DNC program, The DMA proposes a “Sum of the States” approach. We believe it will address these concerns, while also providing appropriate coverage for consumers. The Commission should also consider imposing different, less onerous requirements in special cases, such as local calls and for constitutionally-protected industries such as newspapers and magazines. We deal with these matters in Sections B and C, below. We further point out that, if the Commission decides to proceed with any form of a national DNC list, it will need to afford interested

parties the opportunity to comment on the specifics of such a proposal, a topic as to which the NPRM is entirely silent.

A. A NATIONAL DNC LIST REQUIREMENT OFFENDS THE FIRST AMENDMENT

The DMA addressed the First Amendment issues implicated by a nationwide DNC list in great detail in its comments before the Federal Trade Commission and they need not be repeated at length here. We attach relevant excerpts from those comments as **Exhibit 2³⁸** and incorporated them herein by reference. The standards under *Central Hudson* are familiar, plainly applicable to this Commission’s consideration of whether to develop a national DNC list, and compel the conclusion that a national DNC list can not withstand First Amendment scrutiny.

There are two fundamental problems with a governmentally imposed and controlled national list. First, if the only objective of such a list – and the only reason for its creation – is to reduce the absolute number of calls made to the American public, the governmental interest is itself unconstitutional. The government simply has no right to decide, directly or indirectly, how many telephone solicitation calls should be made in any given year or other period.

Second, a government-imposed national DNC list is both over- and under-inclusive. The only arguably defensible justification for the creation of a national DNC list is that the American public or a substantial segment of it regards unsolicited commercial or quasi-commercial telephone calls as an invasion of the “privacy” of their homes. But the facts simply do not support this proposition. What the public wants – and what the existing rules permit it to achieve – is the ability to pick and chose among

³⁸ See pp. 24-33.

the companies, tax exempt organizations, and (for that matter) political parties from which they wish to receive information. Congress itself recognized that the privacy interest that the TCPA is intended to protect is not absolute and “must be balanced in a way that protects the privacy of individuals *and* permits legitimate telemarketing practices.”³⁹ The imposition of a national DNC list does not balance these equal interests in any respect. Such a list is over-inclusive because it broadly suppresses commercial speech while, at the same time, puts consumers to the choice of receiving all telemarketing calls or none. The government simply does not have a “substantial” interest in such an outcome.⁴⁰

Furthermore, because of the structure of the TCPA, imposing a national DNC list is under inclusive and, therefore, cannot be said to “directly advance” the governmental interest asserted.⁴¹ The TCPA does not broadly govern uninvited telephone calls or even uninvited “commercial” calls. Rather, any national list created under the TCPA would only govern calls that fall within the definition of a “telephone solicitation.” As the NPRM itself makes clear, that means that entire categories of callers and categories of types of calls would not be subject to the requirement. In some cases, the exemption – *e.g.*, for an established business relationship, not-for-profit organizations and political parties and, potentially, the press – may themselves be constitutionally mandated. But

³⁹ TCPA, Pub. L. No. 102-243 § 2(9) (1991) (emphasis added).

⁴⁰ *Greater New Orleans Broadcasting Ass’n v. United States*, 527 U.S. 173, 186-87 (1999) (questioning whether governmental interest was substantial given inconsistent regulatory framework); *Central Hudson Gas & Electric Corp. v. Public Service Comm’n*, 447 U.S. 557, 569 (1980); *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1235 (10th Cir. 1999) (“[P]rivacy may only constitute a substantial interest if the government specifically articulates and properly justifies it.”).

⁴¹ *Central Hudson*, 447 U.S. at 564; *see also Elenfield v. Fane*, 507 U.S. 761, 771 (1993) (explaining that the government must show that “its restriction will in fact alleviate [the harm] to a material degree”).

the fact remains that these excluded calls represent a substantial percentage of the calls that residential subscribers receive now and would continue to receive even under a national DNC list regime. Because the Commission cannot re-write the statute to define more broadly the “precise interest” advanced by the Congress for creation of the TCPA, the result is that a national DNC list will be under-inclusive and, therefore, will not directly or materially advance the governmental interest concerned.

The protection of the “privacy” of residential subscribers only from unwanted “telephone solicitations” is constitutionally infirm for another reason. By statutorily limiting the list to certain kinds of commercial calls, Congress has placed “too much importance on the distinction between commercial and non commercial speech”⁴² and, in some cases, between speakers who are both engaged in commercial speech. In short, because a national DNC list is under-inclusive (and in some cases unavoidably under-inclusive for constitutional reasons) it will inevitably favor one type of speech over another in a fashion that the Constitution will not countenance.⁴³

Because a government-mandated national DNC list arguably fails the first, and plainly fails the second and third prongs of *Central Hudson*, it necessarily fails the fourth prong as well. Because a national DNC list would be over-inclusive, it would not be “narrowly tailored” to serve a significant governmental interest; because it would be under-inclusive, it would not be “tailored” to “directly advance” such an interest.⁴⁴

⁴² *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 424 (1993).

⁴³ *See id.* 415 (noting that the city of Cincinnati opted not to limit the number of newspaper racks containing traditional newspapers because of First Amendment concerns).

⁴⁴ *Greater New Orleans Broadcasting*, 527 U.S. at 183-84 (“The four parts of the *Central Hudson* test are not entirely discrete. All are important and, to a certain extent, interrelated: Each raises a relevant question that may inform a judgment concerning the other three.”).

B. CORE REQUIREMENTS OF A NATIONAL DNC PROGRAM

1. Preemption of State Requirements

Under the TCPA, state DNC requirements must yield to a national DNC database. Although the TCPA directed the Commission to consider different methods to enable consumers to avoid receiving unwanted telephone solicitations,⁴⁵ Congress specifically authorized the Commission to “require the establishment and operation of *a single national database*” of DNC requests.⁴⁶ Thus, Congress intended the Commission to preempt state regulation if the Commission opted to employ a nationwide database. Moreover, subsection(e)(2) of the TCPA provides that if the Commission decides to establish a national list, then:

a State or local authority may not, in its regulation of telephone solicitations, require the use of any database, list, or listing system that does not include the part of such single national database that relates to such state.”⁴⁷

Accordingly, states seeking to enforce DNC obligations must do so based on “their segment” of a national list.⁴⁸ The TCPA further provides that a limited set of more

⁴⁵ 47 U.S.C. § 227(c). As discussed more fully above, the Commission may also preempt conflicting DNC requirements under section 1 of the Communications Act, which gives the FCC plenary jurisdiction over interstate communications. 47 U.S.C. § 151.

⁴⁶ *Id.* § 227(c)(3)(emphasis added).

⁴⁷ *Id.* § 227(e)(2).

⁴⁸ *See also id.* § 227(c)(3)(J) (database must be designed to enable states to use it to enforce state law). An earlier bill passed by the House of Representatives, H.R.1304, included somewhat different language about the interplay between state and federal requirements than the final version that became the TCPA. Ultimately, however, the difference had little substantive effect. Section (f) of H.R. 1304 provided that if the FCC were to establish a national DNC database:

(2) . . . a State or local authority may not develop any different database or system for use in the regulation of telephone solicitations and may not enforce restrictions on telephone solicitations in any manner that is not based upon the requirements imposed by the Commission.

(3) State Enforcement Permitted.- Nothing in this section or in the regulations prescribed under this section shall prohibit the segmentation of the database or functionally equivalent method or procedure for use by State or local authorities, nor preempt any State or local authority from creating mechanisms to enforce compliance with the database or functionally equivalent system, or a segment thereof.

restrictive intrastate requirements are not preempted, but this “savings” clause is made “subject to,” and is, therefore, extinguished by, the preemptive force of subsection(e)(2) as it relates to a national DNC.⁴⁹

Congress, therefore, expected and intended the Commission to preempt other requirements to ensure that marketers would only have to obtain one list. The language – and legislative history – of the TCPA leave no doubt that Congress was mindful of the burdens that the TCPA would place on industry, and did not want them to be excessive.⁵⁰ Certainly Congress did not envision that marketers would be subject to duplicative or conflicting DNC obligations.

2. Superseding an FTC Do-Not-Call Program

The Commission also must, if it wishes to impose a national DNC standard, supersede any FTC do-not-call list. Above all, the FTC has no legal authority to adopt a national DNC list or require anyone to subscribe to it. The DMA briefed this issue extensively in its comments before the FTC; we have attached an excerpt of those

In comparison, by providing that a state may not “require the use of any database, list, or listing system that does not include the part of such single national database that relates to such state,” the TCPA merely simplified and melded subsections (f)(2) and (f)(3) of H.R. 1304 into a more streamlined and coherent provision. Yet, in substance, the TCPA still preempts state efforts to impose different requirements, and still permits states to enforce the federal standards.

⁴⁹ *Id.* § 227(e)(1).

⁵⁰ *See, e.g.*, H.R. Rep. No. 102-317 (1991), 9 CIS H. 36323 (“The Committee further believes that because state laws will be preempted, the Federal statute must be sufficiently comprehensive and detailed [to] ensure States (sic) interests are advanced and protected.”); 137 Cong. Rec. S16,204 (daily ed. Nov. 7, 1991) (statement of Sen. Gore) (“While the States remain free to adopt laws affecting intrastate communications, I am sure the Senator would join me in encouraging the States to adopt laws consistent with the Federal system to facilitate the telemarketers’ ability to comply fully with both the State and Federal laws regarding intrastate communications.”); 137 Cong. Rec. H11,311 (daily ed. Nov. 26, 1991) (statement of Rep. Rinaldo) (“To ensure a uniform approach to this nationwide problem, this bill would preempt the States from adopting a database approach, if the FCC mandates a national database. From the industry’s perspective, this preemption has the important benefit of ensuring that telemarketers are not subject to duplicative regulation.”)

comments in **Exhibit 2**⁵¹ and incorporate them herein by reference. In summary, the Telemarketing and Consumer Fraud and Abuse Prevention Act (“Telemarketing Act”)⁵² gives the FTC jurisdiction to promulgate regulations to proscribe “deceptive telemarketing” and “other abusive telemarketing” conduct. Neither of these mandates encompasses the formation of a national DNC list.

Similarly, this Commission may not simply mandate that entities subject to its jurisdiction comply with the FTC’s rule. This Commission has no power to delegate to other federal agencies its duties or powers under the TCPA and can not make compliance with the TCPA dependent on its assessment that a company has adhered to other agencies’ standards.⁵³ Even if the FTC had authority to create a DNC, it remains powerless to enforce its requirements against entities such as common carriers, banks, and others. Although it is theoretically possible for the FTC and this Commission to divide enforcement while retaining one DNC list and set of implementing regulations, in practice that approach would result in staggering disparity in the potential liability that various entities would face in the event of non-compliance. The FTC and FCC have very different enforcement tools at their disposal, and may seek and impose different sanctions. Different industry segments must not face different consequences for violating essentially the same federal standard. To the contrary, the TCPA permitted only the establishment of a “*single* national database” and then only if the FCC deemed it

⁵¹ See pp. 15-21.

⁵² 15 U.S.C. § 6101 *et seq.*

⁵³ See, e.g., Review of the Commission’s Broadcast and Cable Equal Employment Opportunity Rules and Policies, Second Report and Order and Third Notice of Proposed Rulemaking, MM Docket No. 98-204, ¶ 130, (Released Nov. 20, 2002)(“We can not merely assume that a broadly defined class of stations is necessarily subject in each instance to an effective alternative to our requirements, and, even if we could, reliance on such alternate programs would put us in the

necessary. Congress neither contemplated nor authorized two federal lists. Congress only authorized this Commission to adopt a national database, and it gave the Commission preemptive authority to do so.⁵⁴

3. State Jurisdictional Issues

The Commission requested comment regarding states' jurisdiction over out-of-state telemarketers.⁵⁵ Contrary to the assertions of state law enforcement officials,⁵⁶ states do not have jurisdiction to apply state laws covering telephone solicitations to interstate telephone calls. This conclusion reinforces the fact that, if it implements a national DNC database, the FCC must pre-empt state efforts to apply their state DNC rules to interstate and intrastate marketers.

Leaving aside the broad question of whether or not the states have jurisdiction over out-of-state marketers under the Due Process and Commerce Clauses of the Constitution, Congress has declined to grant the states such jurisdiction as they might otherwise have to impose state law requirements on telephone solicitation calls that originate in one state and terminate in another. It did so by enacting both the TCPA and

untenable position of having to resolve whether a broadcaster had violated requirements of other agencies in order to determine whether it was in compliance with our rules.”).

⁵⁴ Apart from the FTC's fundamental lack of power to impose a national DNC, an FTC database will not address many other issues that must be considered and resolved. Preemption of state lists is one, but there are others. For instance, as the Commission noted in the NPRM, it is bound to ensure that its database meets certain minimum criteria that the FTC is not, such as ensuring that carriers provide certain notices about consumers' right to be on the list (an obligation that the FTC has no jurisdiction to impose), as well as giving states appropriate access so that they may enforce compliance with the list. The FTC has not yet released its final rules, so it is difficult to offer complete comments on how the final rule might conflict with (or complement) an FCC database. The FTC might or might not speak to these concerns, and its final rules may raise more questions. At a minimum, if the FTC issues its final rules before this Commission acts on its own proposal, we urge this Commission to permit interested parties to submit additional comments regarding the impact of those rules on this proceeding.

⁵⁵ *NPRM* at ¶ 63.

the Telemarketing Act. The latter confers upon the FTC primary jurisdiction over interstate calls subject to the federal law and only empowers the states to enforce the federal standards adopted by the FTC with respect to such calls.

The TCPA makes even clearer that states lack power to apply their telephone marketing laws extra-territorially. A central reason for the enactment of the TCPA is that Congress concluded that the states do not and should not have jurisdiction over interstate communications.⁵⁷ The TCPA leaves unchanged the language of Section 2(a) of the Communications Act, which grants the FCC exclusive jurisdiction of “all interstate and foreign communication.”⁵⁸ It expressly provides that – in the absence of a national list -- the states may only impose a limited group of “more restrictive *intrastate* requirements” on telephone solicitation.⁵⁹ In short, the states can not now enforce their statutes except as to marketers over whom they have *in personam* jurisdiction and then only with respect to calls that originate and terminate within the same state.⁶⁰ If the FCC adopts a national DNC list, a state may enforce this Commission’s requirements as to all calls terminating in that state, but its jurisdiction to do so would arise under federal law, and federal substantive standards and any independent authority to establish “more restrictive” intrastate standards would expire by operation of section (e)(1) of the TCPA.

⁵⁶ *Id.*; Comments and Recommendations of the Attorneys General, filed in the FTC proceeding (*Telemarketing Sales Rule, Notice of Proposed Rulemaking*, Federal Trade Commission, 67 Fed. Reg. 4492 (January 30, 2002)), at 10.

⁵⁷ *See supra* note 33.

⁵⁸ 47 U.S.C. § 152(a).

⁵⁹ *Id.* § 227(e)(1).

⁶⁰ *C.f., Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

4. Exemptions for Non-Profit and Established Business Relationship Calls

If the Commission prohibits making telephone solicitations to persons identified on a national DNC list, it *must* as a matter of law exempt calls by tax-exempt non-profit organizations, as well as calls to “any person with whom the caller has an established business relationship.” Pursuant to the TCPA, such calls are by definition exempt from the term “telephone solicitation” and, thus, must also be exempt from any DNC requirements. As discussed below, The DMA believes that, under the TCPA, the Commission may and should consider adopting other limited exceptions. The EBR and non-profit exemptions, however, are expressly mandated by law and essential to The DMA’s proposal, as well as any other realistic proposal for a nationwide program. In addition, we note that some, but not all, states’ laws include non-profit or EBR exemptions and some of the exemptions are limited based on the duration of the relationship or other factors. Thus, we reiterate that the FCC must preempt state DNC rules, including those that do not include the TCPA exemption for non-profit and EBR calls as this agency defines those terms.

A consumer's request to be placed on a national DNC list should not terminate an EBR, nor should it preclude companies from forming new business relationships (except through telephone solicitations). A consumer should, however, be permitted to terminate an EBR exemption (for purposes of future telephone solicitations) by asking to be included on a company's DNC list. These requirements must apply to all calls covered by the TCPA.

C. A PROPOSAL FOR A "SUM OF THE STATES" DNC PROGRAM

1. The Basic Framework

If the Commission establishes a national DNC database, The DMA proposes that it be comprised of individuals whose names are included in the databases of the 27 states that have implemented their own statewide DNC laws. To complement this database, however, consumers residing in states that have not enacted their own DNC laws would be able to submit a DNC request to The DMA's TPS, at no cost to the consumer, which would become part of the DNC. In addition, companies engaged in telephone solicitation should still be required to maintain company-specific lists;⁶¹ among other things, this would ensure that consumers – including existing customers – are able to indicate that they do not want to receive calls from a particular organization without having to limit calls from all commercial firms.

Subject to certain standard criteria and conforming requirements to ensure uniformity for the national database, new DNC requests (*i.e.*, names, numbers, and addresses) could be added to the national database via the states, pursuant to procedures

⁶¹ As discussed above, however, the Commission should reduce the retention period for company specific lists from 10 years to five years.

that they have established. Updates to the national list could be made available to marketers or their agents as the states create them; each state would forward to the list administrator, in advance of the date on which the national list is to be updated, identifying information for each residential telephone subscriber in its state who wants to be added to the national list. Following release of the updated data, marketers would then update their own marketing data and remove individuals who are in the DNC database from their calling lists. The DMA proposes that names be maintained in the database for a period of 5 years. Any national list should also be available to all types of entities, as long as they certify that they will only use it to comply with the DNC requirements. For instance, companies that provide marketing prospects to direct sellers have interest in first “scrubbing” their prospect data against states’ DNC lists to assist their seller-clients in honoring state-level DNC requests. Some states, however, limit access to their list to a narrowly defined group of “telemarketers” or “telephone solicitors.” The Commission should preempt such limits and avoid them in establishing a national list.⁶²

The database should be verified the Postal Service’s NCOA data, which the DMA currently uses for the TPS, to match name, number, and address. Given the rate at which numbers turn over, it is essential that the database be refreshed often and with more than just a telephone number. Moreover, it is not enough to rely on automatic number identification (“ANI”) or bulk DNC submissions; they are subject to abuse and manipulation and are not sufficiently reliable to serve as a sole source of data for a valid DNC request.

⁶² See, e.g., Ky. Rev. Stat. Ann. §§ 367.46951-46999 (Michie, 2002) (access limited to “merchants” or “telemarketers;” “telemarketing companies” required to register with the Attorney General); Tenn. Comp. R. & Regs. Ch. 1220-4-11.01 (2001) (access limited to “telephone solicitors” who register with the Tennessee Regulatory Authority); Tex. Bus. & Com. Code Ann. §§ 43.002, 43.101 (West 2002) (access limited to “telemarketers”).

The Commission should outsource administration of the Sum of the States (or any other) DNC database. In fact, the TCPA *requires* the Commission to select an outside entity to run it, by providing that the Commission’s regulations “shall . . . specify a method by which the Commission will select an entity to administer such database.”⁶³ The legislative history is equally clear. The House Report accompanying H.R. 1304, a predecessor to what became the TCPA, states that by adopting this language (which was retained through enactment of the TCPA), “the Committee intends that the Commission contract out, or enter into other arrangements, for the development and administration of the national database, rather than administer it in-house.”⁶⁴ As discussed below, The DMA is willing to explore the possibility of serving as the list administrator.

The Sum of the States concept satisfies the requirements of the TCPA. As noted, the list can be and should be made widely available to promote compliance, yet the Commission can readily prohibit use of the list for any purposes other than furthering compliance with its DNC regulations. It would also satisfy the requirements of subsection (e)(2) of the TCPA, which provides that a state may not use any DNC database that does not include the part of a national database that relates to that state.⁶⁵ Because the Sum of the States database would be comprised of state lists, each state list would, by definition, include its segment of the national list.

The Sum of the States framework would be a less costly method of developing a national list than starting anew, since a sizable percentage, and maybe even most of the names that will eventually be included in it already are included in either a state list or the

⁶³ 47 U.S.C. § 227(c)(3)(A).

⁶⁴ H.R. Rep. No. 102-317 (1991), 9 CIS H. 36323.

⁶⁵ 47 U.S.C. § 227(e)(2).

TPS. It would enable telephone solicitors or their agents to obtain a list covering each state – and comply with state and federal legal requirements – from a single source and in a uniform format, which would help foster compliance. Enforcement would also be less burdensome for the Commission and for the states than it would be with other approaches. We anticipate that the states that do have DNC laws would be required to submit their lists to the national database and would, in turn, assume primary responsibility for enforcing the DNC requirements as to any prohibited calls to their citizens. Thus, the Sum of the States approach also allows for more effective state enforcement, since individual states would already possess their own segment of the national list, and would be authorized to enforce compliance of the federal standard for interstate calls without concern that they lack jurisdiction over interstate calls and out-of-state telephone solicitors.

2. Additional Proceedings and Public Comment

If the Commission adopts the Sum of the States framework (or for that matter if it decides to adopt a different type of nationwide DNC program), it would need to formulate a detailed proposal and issue it for further public comment, to refine and finalize an operational plan. The Commission would need to consider, for example, establishing acceptable formats for submitting names and other identification/verification data, privacy protections for the data, ensuring that the list administrator is reimbursed to cover its costs, as well as ensuring that states recoup their costs in supplementing the database with new names. The Commission would also need to consider means to help ensure access by person with disabilities.

In such proceedings, the Commission should also consider imposing alternative do-not-call requirements for certain industries or practices as permitted by the TCPA.

First, certain newspapers and magazines, which are the present-day equivalent of second-class mail permit holders, are statutorily entitled to special consideration. These entities do maintain company-specific DNC lists and should be required to continue to do so. However, the TCPA specifically allows the Commission to consider, among other things, whether different procedures or methods should apply to “small businesses or holders of second class mail permits.”⁶⁶ In the years since Congress enacted the TCPA, the U.S. Postal Service has abandoned the “second class mail” terminology, but it has retained the classification, which it now calls Periodicals. Because Periodicals enjoy favorable postage rates,⁶⁷ the standards to qualify for a Periodicals mailing permit are stringent,⁶⁸ not all “magazines” qualify and the Postal Service possesses and exercises the power to deny or revoke permits in appropriate cases.

These mailing permits exist because Congress recognized the core First Amendment value of a free and unfettered press. Congress empowered the FCC to impose less onerous do-not-call obligations for parallel reasons. Congress realized how closely the commercial activities of newspapers and magazines, including telephone solicitation, are tied to the freedom to express non-commercial news and opinion. Newspapers and magazines are necessarily dependent on commercial activity to support their non-commercial mission. And as a society we have reserved a special place for these publications given their importance in preserving one of this nation’s most cherished founding principles and fundamental rights. Thus, The DMA believes that it is

⁶⁶ 47 U.S.C. § 227(c)(1)(C).

⁶⁷ 39 U.S. § 3622(b)(8).

⁶⁸ They include, for instance, limitations on the amount of advertising that may be contained in an eligible publication. *Domestic Mail Classification Schedule* § 411.1 *et seq.*

appropriate for the Commission to consider exempting entities that hold Periodicals mailing permits from the obligation to subscribe to any national DNC database.

The TCPA also requires that the Commission consider alternatives to a national do-not-call list for “local telephone solicitations.”⁶⁹ The legislative history of this provision makes clear that the Commission is to consider less burdensome standards on certain local calls, even if made by large companies with branch offices.⁷⁰ While it is clear that Congress did not intend to empower the Commission to exempt completely all “local” calls, there is sound reason for the Commission to establish requirements that are less onerous than a national list for certain types of local marketers: Calls made by locally-based businesses in which the sale of goods or services is not completed and payment or authorization of payment is not required until after a face-to-face presentation or transaction.

While such calls may technically fall within the definition of a “telephone solicitation,” to which a national DNC list would otherwise apply, these calls differ from other solicitations because they meet two unique conditions. First, the purpose of such calls is not directly to sell goods or services over the phone, but merely to make arrangements for a face-to-face meeting, either at the consumer’s home or at the caller’s office, at which time the transaction will be more fully explained and consummated. Consumers are, of course, free to decline the opportunity for an appointment. Second,

⁶⁹ 47 U.S.C. § 227(c)(1)(C).

⁷⁰ *See, e.g.*, 137 Cong. Rec., S16204 (daily ed. Nov. 7, 1991) (colloquy between Senators Gore and Pressler). Senator Gore asked whether an identical provision in an earlier version of the TCPA would “apply to companies that conduct business locally...regardless of the specific type of business they conduct.” He used a national photographer with local offices as an example, and Senator Pressler confirmed that such a company would be covered by this provision.

the consumers are not dealing with an unknown merchant or an unknown entity.⁷¹ In fact, the colloquy between Senators Gore and Pressler in the TCPA's legislative history, which discusses the example of a national photographer with local offices, exactly fits both of these conditions. In that case, calls were made by the local branch office, hence local in character, and the transaction was not consummated until the consumer came to the studio. The identical considerations support an exemption from national DNC requirements for all businesses that are making local calls in which the transaction is not completed until after a face-to-face presentation.

Finally, the Commission must address the process of selecting an administrator for a national database either in a separate proceeding, or separate phase of this proceeding. The DMA is willing in principle to serve as administrator, given our extensive and successful experience with the TPS. As we noted above, The DMA has operated the TPS since 1985, consumers find it easy to use, and over 80-percent of TPS subscribers that we recently surveyed reported that it has reduced the number of unwanted solicitations that they receive. In addition, five states' DNC laws currently require marketers to obtain the TPS.⁷² In short, The DMA is uniquely qualified to serve as administrator and is willing to work with the Commission to examine that possibility.

⁷¹ *Id.* (noting that local businesses “become part of the community, and are subject to the scrutiny of the community, and must live by their reputation in the community”); see also 137 Cong. Rec. H11313 (Nov. 26, 1991)(statement of Rep. Cooper) (“[T]elemarketers making local calls already have an accountability within the community by virtue of their reputation as businesses and as individuals.”).

⁷² These five are; Connecticut, Conn. Gen. Stat. § 42.288a (2001); Maine, Me. Rev. Stat. Ann. Tit. 32 § 14716 (2002); Pennsylvania, 2002 Pa. Laws 24 (2002) (amending P.L.911, No.147); Vermont, Vt. Stat. Ann. 9 § 2464a(b)(2) (2002); and Wyoming, Wyo. Stat. Ann. § 40-12-301(a)(viii) (2001).

CONCLUSION

The TCPA and the Commission's current regulations achieve a delicate balance. They empower consumers to make meaningful choices, and give them the tools to ensure those choices are honored. They also vest regulators – federal and state – with authority to prevent abuses in the use of telemarketing. And, notwithstanding the burdens involved, they are flexible enough to allow for continued growth of telemarketing.

The Commission quite rightly notes that the marketplace has changed in the years since it first adopted its rules implementing the TCPA. Yet, we submit that nothing has changed so much that it warrants dramatic changes in the current regulatory regime. Experience has shown that the retention period for DNC requests is too long; it should be reduced to 5 years. And consumer mobility and number churn – which are on the rise with no signs of abating – make it important to allow companies to use NCOA to verify the continued accuracy of a DNC request. Consumers' use of wireless technology has expanded considerably, but The DMA has just announced a new program to make available data that will enable marketers to suppress wireless telephone numbers from their marketing databases. Thus, even this change in the market does not warrant a change to the existing regulations.

The Commission should step-up enforcement of the current DNC requirements, and its efforts to educate consumers about their right to ask a company not to call in the future. The DMA stands ready to explore ways in which it might partner with the Commission to enhance consumer outreach to achieve that goal. A national DNC list, however, simply is not necessary. Company-specific lists work. The TPS works. Indeed, the TPS is in many respects a “national” list that already exists and, moreover, one that

companies and non-profit organizations agree to honor voluntarily. A government-mandated DNC list would not be an improvement over the current regime.

Nonetheless, if the Commission proceeds with a national list, it must ensure that it establishes a truly *national* list: There must be a single database, with uniform exemptions for non-profit and established business relationship calls as mandated by the TCPA, that applies to calls throughout the country. States may be authorized to help protect their citizens from receiving unwanted telephone solicitations, but their individual and disparate requirements must yield to federal preeminence. The DMA's Sum of the States proposal would achieve these goals, and provide clear and predictable standards for both marketers and consumers. Short of leaving well enough alone, a Sum of the States approach is the best way to try to maintain the careful balance the Commission achieved 10 years ago.

Respectfully submitted,

Robert Wientzen
President & CEO
Gerald Cerasale
Senior Vice President, Government Affairs
The Direct Marketing Association, Inc.
1111 19th Street, N.W., Suite 1100
Washington, DC 20036
(202) 955-5030

Ian D. Volner
Heather L. McDowell
Ronald M. Jacobs
Venable, Baetjer, Howard & Civiletti
1201 New York Avenue, N.W., Suite 1000
Washington, DC 20005-3917
(202) 962-4800
Counsel for The DMA