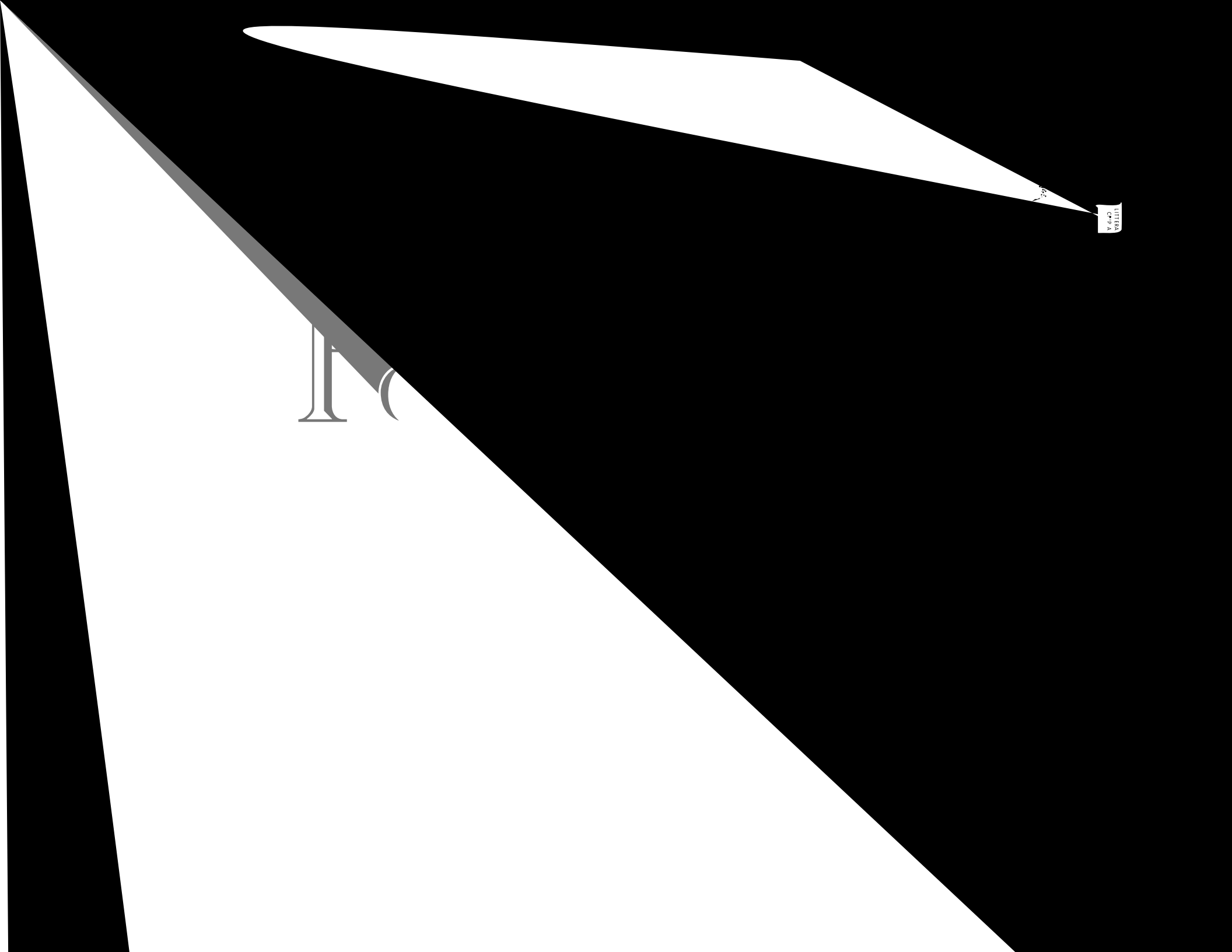
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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 64 and 68

[CG Docket No. 02–278, FCC 03–153]

Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, we revise the current Telephone Consumer Protection Act of 1991 (TCPA) rules, and adopt new rules to provide consumers with several options for avoiding unwanted telephone solicitations. These new rules establish a national do-not-call registry, set a ma imum rate on the number of abandoned calls, require telemarketers to transmit caller ID information, and modify the Commission's unsolicited facsimile advertising requirements.

DATES: Effective August 25, 2003, e cept .0.6065 0 Tve Augus14os 0 TTj0 ,.2 0 0 (In this docuTcep5dy Tvrketers)Tju1 (TCa3[])(2)urrhich

4. A national do-not-call registry that is supplemented by the amendments made to our e isting rules will provide consumers with a variety of options for managing telemarketing calls. Consumers may now: (1) Place their number on the national do-not-call list; (2) continue to make do-not-call requests of individual companies on a case-by-case basis; and/or (3) register on the national list, but provide specific companies with e press permission to call them. Telemarketers may continue to call individuals who do not place their numbers on a do-not-call list and consumers with whom they have an established business relationship. We believe this result is consistent with Congress' directive in the TCPA that ''[i]ndividuals'' privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices.'' *CPA*, Section 2(9), in 7 FCC Rcd at 2744.

5. We agree with Congress that consistency in the underlying regulations and administration of the national do-not-call registry is essential to avoid consumer confusion and regulatory uncertainty in the telemarketing industry. In so doing, we emphasize that there will be one centralized national do-not-call database of telephone numbers. The FTC has set up and will maintain the national database, while both agencies will coordinate enforcement efforts pursuant to a forthcoming Memorandum of Understanding. The states will also play an important role in the enforcement of the do-not-call rules. The FTC has received funding approval from Congress to begin implementation of the national do-not-call registry. Because the FTC lacks jurisdiction over certain entities, including common carriers, banks, insurance companies, and airlines, those entities would be allowed to continue calling individuals on the FTC's list absent FCC action e ercising our broad authority given by Congress over telemarketers. In addition, the FTC's jurisdiction does not e tend to intrastate activities. Action by this Commission to adopt a national do-not-call list, as permitted by the TCPA, requires all commercial telemarketers to comply with the national do-not-call requirements, thereby providing more comprehensive protections to consumers and consistent treatment of telemarketers.

National Do-Not-Call Registry

6. Pursuant to our authority under 47 U.S.C. 227(c), we adopt a national do-not-call registry that will provide residential consumers with a one-step option to prohibit unwanted telephone solicitations. This registry will be maintained by the FTC. Consistent with the FTC's determination, the national registry will become effective on October 1, 2003. Subject to certain e emptions, telemarketers will be prohibited from contacting those consumers that register their telephone numbers on the national list. In reaching this conclusion, we agree with the vast majority of consumers in this proceeding and the FTC that a national do-not-call registry is necessary to enhance the privacy interests of those consumers that do not wish to receive telephone solicitations. In response to the widespread consumer dissatisfaction with telemarketing practices, Congress has recently affirmed its support of a national do-not-call registry in approving funding for the FTC's national database. H.R. J. Res. 2, 108th Congress at 96 (2003). H.R. REP. NO. 108–8 at 3 (2003), reprinted in 2003 U.S.C.C.A.N. 688, 670 (''[i]t is the strongly held view of the Committee that a national do-not-call list is in the best interest of consumers, businesses and consumer protection authorities. This legislation is an important step toward a one-stop solution to reducing telemarketing abuses.''). In so doing, Congress has indicated that this Commission shize tu.4 agreprohibit uus businesses s.

call lists. In 1992, it was estimated by some commenters that the cost of establishing such a list in the first year could be as high as $80 million. Congress has recently reviewed and approved the FTC's request for $18.1 million to fund the national do-not-call list. We believe that the advent of more efficient technologies and the e perience acquired in dealing with similar databases at the state level is responsible for this substantial reduction in cost.

9. Similarly, we believe that technology has become more proficient in ensuring the accuracy of a national database. The FTC indicates that to guard against the possibility of including disconnected or reassigned telephone numbers, technology will be employed on a monthly basis to check all registered telephone numbers against national databases, and remove those numb have be or reassig e le registr em affects of the registry teleph rs change hands c time. de that the retentio period the national and compa fic do-not-call reques will b ars. *F*3 *C O* , 68 4580 a anuary 29, 2003). Our rules p y required a company specif -call request to be honor n years. 47 CFR 64.120 vi). Five years is consis h the FTC's determina and ou ecord that reveals that curren r retention period for compa fic requests is too lon given in telephone numbers Consu st also register their d not-ca ts from either the

telemarketers that would be required to change their telephone numbers and administratively burdensome to implement. We also decline to adopt special directory markings of area white page directories because it would require telemarketers to purchase and review thousands of local telephone directories, at great cost to the telemarketers. We also note that telemarketers often compile solicitation lists from many sources other than local telephone directories. In addition, such directories do not include unlisted or unregistered telephone numbers and are often updated infrequently. We also note that the record in this proceeding provides little support for this option.

18. We now review the other requirements of 47 U.S.C. 227(c)(1). As required by section 227(c)(1)(B), we have evaluated AT&T Government Solutions, the entity selected by the FTC to administer the national database, and conclude that it has the capacity to establish and administer the national database. Congress has reviewed and approved funding for the implementation of that database. We believe that it is unnecessary to evaluate any other such entities at this time. We have considered whether different methods and procedures should apply for local telephone solicitations and small businesses as required by section 227(c)(1)(C). We conclude that the national do-not-call database takes into consideration the costs of those conducting telemarketing on a local or regional basis, including many small businesses. In particular, we note that the national do-not-call database will permit access to five or fewer area codes at no cost to the seller. Pursuant to section 227(c)(1)(D), we have considered whether there is a need for additional authority to further restrict telephone solicitations. We conclude that no such authority is required at this time. Pursuant to the Do-Not-Call Act, the Commission must report to Congress on an annual basis the effectiveness of the do-not-call registry. Should the Commission determine that additional authority is required over telephone solicitations as part of that analysis; the Commission will propose specific restrictions pursuant to that report. As required by section 227(c)(1)(E), we have developed regulations to implement the national do-not-call database in the most effective and efficient manner to protect consumer privacy needs while balancing legitimate telemarketing interests.

19. The FTC's decision to adopt a national do-not-call list is currently under review in federal district court. Because Congress has approved funding for the administration of the national list only for the FTC, this Commission would be forced to stay implementation of any national list should the plaintiffs prevail in one of those proceedings.

Exemptions

20. *E[illegible] B [illegible].* We agree with the majority of industry commenters that an e emption to the national do-not-call list should be created for calls to consumers with whom the seller has an established business relationship. We note that 47 U.S.C. 227(a)(3) e cludes from the

not-call requirements for entities such as newspapers, magazines, regional telemarketers, or small businesses. We find unpersuasive arguments that application of the national do-not-call database adopted herein will result in severe economic consequences for these entities. In particular, we note the e emptions adopted for calls made to consumers with whom the seller has an established business relationship and those that have provided e press agreement to be called. As noted, many consumers may also determine not to register on the national database. Telemarketers may continue to contact all of these consumers. We believe these e emptions provide telemarketers with a reasonable opportunity to conduct their business while balancing consumer privacy interests. Although we agree that newspapers and other entities may often provide useful information and services to the public, given our conclusion that adoption of the national do-not-call list will not unduly interfere with the ability of telemarketers to reach consumers, we do not find this to be a compelling basis to e empt these entities.

25. We find that the national do-not-call rules do not apply to calls made to persons with whom the marketer has a personal relationship. As discussed herein, a ''personal relationship'' refers to an individual personally known to the telemarketer making the call. In such cases, we believe that calls to family members, friends and acquaintances of the caller will be both e pected by the recipient and limited in number. In determining whether a telemarketer is considered a ''friend'' or ''acquaintance'' of a consumer, we will look at, among other things, whether a reasonable consumer would e pect calls from such a person because they have a close or, at least, firsthand relationship. If a complaining consumer were to indicate that a relationship is not sufficiently personal for the consumer to have e pected a call from the marketer, we would be much less likely to find that the personal relationship e emption is applicable. While we do not adopt a specific cap on the number of calls that a marketer may make under this e emption, we underscore that the limited nature of the e emption creates a strong presumption against those marketers who make more than a limited number of calls per day. Therefore, the two most common sources of consumer frustration associated with telephone solicitations—high volume and une pected solicitations—are not likely present when such calls are limited to persons with whom the marketer has a personal relationship. Accordingly, we find that these calls do not represent the type of ''telephone solicitations to which [telephone subscribers] object'' discussed in 47 U.S.C. 227(c)(1). Moreover, we conclude that the Commission also has authority to recognize this limited carve-out pursuant to 47 U.S.C. 227(c)(1)(E). This subsection provides the Commission with discretion in implementing rules to protect consumer privacy to ''develop proposed regulations to implement the methods and procedures that the Commission determines are the most effective and efficient to accomplish the purpose of this section.'' 47 U.S.C. 227(c)(1)(E). To the e tent that any consumer objects to such calls, the consumer may request to be placed on the telemarketer's company's company-specific do-not-call list. We intend to monitor these rules and caution that any individual or entity relying on personal relationships abusing this e emption may be subject to enforcement action.

26. In addition, we decline to e tend this approach beyond persons that have a personal relationship with the marketer. For e ample, Vector urges the Commission to adopt an e emption that covers ''face-to-face'' appointment calls to anyone known personally to the ''referring source.'' We note that such relationships become increasingly tenuous as they e tend to individuals not personally known to the marketer and thus such calls are more likely to be une pected to the recipient and more voluminous. Accordingly, referrals to persons that do not have a personal relationship with the marketer will not fall within the category of calls discussed above.

27. We also decline to establish an e emption for calls made to set ''face-to-face'' appointments . We conclude that such calls are made for the purpose of encouraging the purchase of goods and services and therefore fall within the statutory definition of telephone solicitation. We find no reason to conclude that such calls are somehow less intrusive to consumers than other commercial telephone solicitations. The FTC has reviewed this issue and reached the same conclusion. In addition, we decline to e empt entities that make a '' '' number of commercial telemarketing calls. In contrast to Congress' rationale for e empting nonprofit organizations, we believe that such commercial calls continue to be une pected to consumers even if made in low numbers. We do not believe the costs to access the national database is unreasonable for any small business or entity making a '' '' number of calls.

28. In response to the *Telephone Consumer Protection Act of 1991,* Further Notice of Proposed Rulemaking, CG Docket No. 02–278, FCC 03–62 published at 68 FR 16250, April 3, 2003 (FNPRM) a few commenters contend that any new rules the Commission adopts would not apply to entities engaged in the business of insurance, because such rules would conflict with the McCarran-Ferguson Act. The McCarran-Ferguson Act provides that ''[t]he business of insurance * * * shall be subject to the laws of the * * * States which relate to the regulation * * * of such business.'' 15 U.S.C. 1012(a). The McCarran-Ferguson Act further provides that ''[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance * * * unless such Act specifically relates to the business of insurance.'' 15 U.S.C. 1012(b). American Council of Life Insurers (ACLI) e plains that insurers' marketing activities are e tensively regulated at the state level. The Commission's proposal, ACLI argues, ''intrudes upon the insurance regulatory framework established by the states'' and, therefore, should not be applicable to insurers under McCarran-Ferguson.

29. The McCarran-Ferguson Act does not operate to e empt insurance companies wholesale from liability under the TCPA. It applies only when their activities constitute the ''business of insurance,'' the state has enacted laws ''for the purpose of regulating'' the business of insurance, and the TCPA would ''impair, invalidate, or supersede'' such state laws. 15 U.S.C. 1012(b). In the one case cited by commenters as addressing the interplay between McCarran-Ferguson and the TCPA, a federal district court dismissed a claim brought against two insurance companies under the TCPA for sending unsolicited facsimile advertisements. *Chair King, Inc.* v. *Houston Cas. Co.*, 1995 WL 1760037 (S.D. Tex. 1995), 131 F.3d 507 (5th Cir. 1997). The *Chair King* court found that the TCPA conflicted with a Texas law that prohibited untrue, deceptive, or misleading advertising by insurers and their agents. In its analysis, the court determined that insurance advertising was part of the ''business of insurance,'' and that the Texas law in question was enacted for the purpose of regulating the business of insurance. The court then concluded that because the TCPA

served by that carrier, we require carriers to make reasonable efforts to comply with this requirement. We note that failure to give such notice by the common carrier to a telemarketer served by that carrier will not e cuse the telemarketer from violations of the Commission's rules.

C s H G & E . v. P . . C . N. .,

41. We conclude that a national do-not-call registry is consistent with the First Amendment. We believe, like the FTC, that our regulations satisfy the criteria set forth in *C s H G & E . v. P . . C . N. .,* in which the Supreme Court established the applicable analytical framework for determining the constitutionality of a regulation of commercial speech. *C s H G & E . v. P . . C . N. .,* 447 U.S. 557 (1980). *K s M v. F C C ,* 46 F.3d 970 (9th Cir. 1995) (*M) s . ,* 515 U.S. 1161 (1995) (upholding ban on prerecorded telephone calls); *s M v. A B s E ,* 323 F.3d 649 (8th Cir. 2003) (*A B s E),* s . *f f* (upholding ban on unsolicited fa advertising) and *D s s v. F C C ,* 46 F.3d 54 (9th Cir.1995) (*D s s*) (upholding ban on unsolicited fa advertising). Our conclusion is also consistent with every Court of Appeals decision that has considered First Amendment challenges to the TCPA.

42. Under the framework established in *C s H ,* a regulation of commercial speech will be found compatible with the First Amendment if (1) there is a substantial government interest; (2) the regulation directly advances the substantial government interest; and (3) the proposed regulations are not more e tensive than necessary to serve that interest. *C s H ,* 447 U.S. at 566. Specifically, the Court found that ''[f]or commercial speech to come within the First Amendment, it at least must concern lawful activity and not be misleading. Ne t, it must be determined whether the asserted governmental interest to be served by the restriction on commercial speech is substantial. If both inquiries yield positive answers, it must then be decided whether the regulation directly advances the governmental interest asserted, and whether it is not more e tensive than is necessary to serve that interest.'' *I .* at 557. Under the first prong, we find that there is a substantial governmental interest in protecting residential privacy. The Supreme Court has ''repeatedly held that individuals are not required to welcome unwanted speech into their homes and that the government may protect this freedom.'' *F v. s ,* 487 U.S. 474, 485. *F C C v. R F , 438 . . 726, 748 (1978) (* [I]n the privacy of the home, * * * the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder.'').

43. In particular, the government has an interest in upholding the right of residents to bar unwanted speech from their homes. In *v. P O ,* the Supreme Court upheld a statute that permitted a person to require that a mailer remove his name from its mailing lists and stop all future mailings to the resident:

> The Court has traditionally respected the right of a householder to bar, by order or notice, solicitors, hawkers, and peddlers from his property. In this case the mailer's right to communicate is circumscribed only by an affirmative act of the addressee giving notice that he wishes no further mailings from that mailer. * * * In effect, Congress has erected a wall—or more accurately permits a citizen to erect a wall—that no advertiser may penetrate without his acquiescence.

v. P O , 397 U.S. 728 at 737–738 (1970).

44. Here, the record supports that the government has a substantial interest in regulating telemarketing calls. In 1991, Congress held numerous hearings on telemarketing, finding, among other things, that ''[m]ore than 300,000 solicitors call more than 18,000,000 Americans every day'' and ''[u]nrestricted telemarketing can be an intrusive invasion of privacy and, when an emergency or medical assistance telephone line is seized, a risk to public safety.'' Our record, like the FTC's, demonstrates that telemarketing calls are even more of an invasion of privacy than they were in 1991. The number of daily calls has increased five fold (to an estimated 104 million), due in part to the use of new technologies, such as predictive dialers. An overwhelming number of consumers in the appro imately 6,500 commenters in this proceeding support the adoption and implementation of a national do-not-call registry. In addition to citing concerns about the numerous and ever-increasing number of calls, they complain about the inadequacies of the company-specific approach, the burdens of such calls on the elderly and people with disabilities, and the costs of acquiring technologies to reduce the number of unwanted calls. Accordingly, we believe that the record demonstrates that telemarketing calls are a substantial invasion of residential privacy, and regulations that address this problem serve a substantial government interest.

45. Under *C s H '* second prong, we find that the Commission's regulations directly advance the substantial government interest. Under this prong, the government must demonstrate that ''the harms it recites are real and that its restriction will in fact alleviate them to a material degree.'' *F B v. s F , I .,* 515 U.S. 618, 626 (1995) (citations omitted). It may justify the restrictions on speech ''based solely on history, consensus, and ''simple common sense.'' *I .* at 628 (citation omitted). Creating and implementing a national do-not-call registry will directly advance the government's interest in protecting residential privacy from unwanted telephone solicitations. Congress, consumers, state governments and the FTC have reached the same conclusion. The history of state administered do-not-call lists demonstrates that such do-not-call programs have a positive impact on the ability of many consumers to protect their privacy by reducing the number of unwanted telephone solicitations that they receive each day. Congress has reviewed the FTC's decision to establish a national do-not-call list and concluded that the do-not-call initiative will provide significant benefits to consumers throughout the United States. We reject the arguments that because our do-not-call registry provisions do not apply to ta -e empt nonprofit organizations, our regulations do not directly and materially advance the government interest of protecting residential privacy. ''Government [need not] make progress on every front before it can make progress on any front.'' *s v. E f B f C , ,* 509 U.S. 418, 434 (1993). *M v. FCC,* 46 F.3d at 975 (''Congress may reduce the volume of telemarketing calls without completely eliminating the calls.'').

46. We believe that the facts here are easily distinguishable from those in *v. C B C ,* 514 U.S. 476 (1995) and *C C C v. D N ,* 507 U.S. 410 (1993). In *C ,* the Court struck down a prohibition against disclosure of alcoholic content on labels or in advertising that applied to beer but not to wine or distilled spirits, finding that ''the irrationality of this unique and puzzling regulatory framework ensures that the labeling ban will fail to achieve [the Government's interest in combating strength wars.]'' In *D N ,* the Court struck down an ordinance which banned 62 newsracks containing commercial publications but did not ban 1,500–2,000 newsracks containing

newspapers, finding that ''the distinction bears no relationship to the particular [aesthetic] interests that the city has asserted.'' Here, Congress' decision to e clude ta -e empt nonprofit organizations from the definition of telemarketing in the TCPA was both rational and related to its interest in protecting residential privacy. The House Report finds that ''the record suggests that most unwanted telephone solicitations are commercial in nature. * * *[T]he Committee also reached the conclusion, based on the evidence, that '' calls [from ta -e empt nonprofit organizations] are less intrusive to consumers because they are more e pected. Consequently, the two main sources of consumer problems '' high volume of solicitations and une pected solicitations—are not present in solicitations by nonprofit organizations.'' H.R. Rep. No. 102–317, at 16 (1991).

47. Commenters in our record also e press the concern that subjecting ta -e empt nonprofit organizations to the national do-not-call requirements may sweep too broadly because it would prompt some consumers to accept blocking of non-commercial, charitable calls to which they might not otherwise object as an undesired effect of registering on the national database to stop unwanted commercial solicitation calls. Both the Eighth and the Ninth Circuits in *A* and *D* found that the provisions of the TCPA, which bans unsolicited commercial fa es but not non-commercial fa es, directly advance a substantial government interest, and we believe that the same distinction may be applied to the national do-not-call registry.

48. We find under the third prong of the *C* test that our proposed regulations are not more e tensive than necessary to protect residential privacy. The Supreme Court has made clear that with respect to this prong, ''the differences between commercial speech and noncommercial speech are manifest.'' *F*, 515 U.S. 618, 632. The Court held that:

> [T]he least restrictive means test has no role in the commercial speech conte t. What our decisions require, instead, is a fit between the legislature's ends and the means chosen to accomplish those ends, a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served * * * [T]he e istence of numerous and obvious less-burdensome alternatives to the restriction on commercial speech is certainly a relevant consideration in determining whether the fit between the ends and means is reasonable.

In *F*, the Supreme Court found that a prohibition against lawyers using direct mail to solicit personal injury or wrongful death clients within 30 days of an accident was not more e tensive than necessary to ''protect * * * the privacy and tranquility of personal injury victims and their loved ones against intrusive, unsolicited contact by lawyers.'' *I* . at 624. Similarly, the Ninth Circuit has found that the TCPA's ban on prerecorded telemarketing calls constitutes a ''reasonable fit'' with the government's legitimate interest in protecting residential privacy. *M*, 46 F.3d at 975.

49. Here, we find that our regulations meet the requirements of *C* *H* ' third prong. Pursuant to our regulations, we adopt a single, national do-not-call database that we will enforce jointly with the FTC. Our rules mandate that common carriers providing telephone e change service shall inform their subscribers of their right to register on the database either through a toll-free telephone call or over the Internet. Furthermore, telemarketers and sellers must gain access to telephone numbers in the national database and will be able to do so by means of a fully automated, secure Web site dedicated to providing information to these entities. In addition, sellers will be assessed an annual fee based upon the number of area codes they want to assess, with the ma imum annual fee capped at $7,250. Our rules also provide that the national database will be updated continuously, and telemarketers must update their lists quarterly. We find that our regulations are a reasonable fit between the ends and means and are not as restrictive as the bans upheld in the cases cited. In *F*, the Supreme Court upheld an ban against lawyers using direct mail to solicit personal injury or wrongful death clients within 30 days of an accident. Similarly, the Ninth Circuit has upheld the TCPA's ban on prerecorded telemarketing calls, and both the Eighth and Ninth Circuit have upheld the TCPA's ban on unsolicited fa es. Here, our regulations do not absolutely ban telemarketing calls. Rather, they provide a mechanism by which individual consumers may choose not to receive telemarketing calls. We also note that there are many other ways available to market products to consumers, such as newspapers, television, radio advertising and direct mail. *F*, 515 U.S. at 633–34. In addition, there simply are not ''numerous and obvious less-burdensome alternatives'' to the national do-not-call registry. The record clearly demonstrates widespread consumer dissatisfaction both with the effectiveness of the current company-specific rules that are currently in place and the effectiveness and e pense of certain technological alternatives to reduce telephone solicitations. We also note that many of the ''burdens'' of the national do-not-call registry—issues concerning its costs, accuracy, and privacy—have been addressed by advances in computer technology and software over the last ten years. Thus, we find that our regulations implementing the national do-not-call registry are consistent with the First Amendment and the framework established in *C* *H* .

50. Furthermore, we reject the arguments that the *C* *H* framework is not appropriate and that strict scrutiny is required because the regulations implementing the national do-not-call list are content-based, due to the TCPA's e emptions for non-profit organizations and established business relationships. For support, commenters cite to *D* *N* , 507 U.S. 410, in which the Court struck down Cincinnati's ordinance which banned newsracks containing commercial publications but did not ban newsracks containing newspapers. The Court found that the regulation could neither be justified as a restriction on commercial speech under *C* *H* , nor could it be upheld as a valid time, place, or manner restriction on protected speech. *C* *C* v. *D* *N* *I* ., 507 U.S. 410 at 430 (1993). The Court e plained that ''the government may impose reasonable restrictions on the time, place or manner of engaging in protected speech provided that they are adequately justified ''without reference to the content of the regulated speech'.'' *I* . at 428 (citation omitted). In this case, the Court held that the City's ban which covered commercial publications but not newspapers was content-based. *I* . at 429. ''It is the absence of a neutral justification for its selective ban on newsracks that prevents the city from defending its newsrack policy as content neutral.'' *I* . at 429–30.

51. Here, however, there was a neutral justification for Congress' decision to e clude non-profit organizations. Congress found that ''the two sources of consumer problems—high volume of solicitations and une pected solicitations—are not present in solicitations by nonprofit organizations.'' H.R. Rep. No. 102–317, at 16 (1991). Congress also made a similar finding with respect to solicitations based on established

business relationships. *I* . at 14. Consumers are more likely to anticipate contacts from companies with whom they have an e isting relationship and the volume of such calls will most likely be lower. Furthermore, as the Eighth Circuit noted when it distinguished the *D N* case in upholding the TCPA's ban on unsolicited fa es that applies to commercial speech but not to noncommercial speech, ''the government may regulate one aspect of a problem without regulating all others.'' *M* . v. *A B F* , 323 F.3d at 656 n.4 (v. *E B* . *C* ., 509 U.S. 418 at 434). Thus, we believe it is clear that our do-not-call registry regulations may apply to commercial solicitations without applying to ta - e empt nonprofit solicitations, and that such regulations are not subject to a higher level of scrutiny. Indeed, we agree with the FTC that regulation of non-profit solicitations are subject to a higher level of scrutiny than solicitations of commercial speech *F C O* , 68 FR at 4636, n. 675, *M* v. *D* , 453 U.S. 490, 513 (1981) and *B* , v. , 122 S.Ct. 2080, and ''greater care must be given [both] to ensuring that the governmental interest is actually advanced by the regulatory remedy, and [to] tailoring the regulation narrowly so as to minimize its impact on First Amendment rights.'' *F C O* , 68 FR at 4636.

C F C D - N -C

52. We conclude that harmonization of the various state and federal do-not-call programs to the greatest e tent possible will reduce the potential for consumer confusion and regulatory burdens on the telemarketing industry. An underlying concern e pressed by many commenters in this proceeding is the potential for duplication of effort and/or inconsistency in the rules relating to the state and federal do-not-call programs. Congress has indicated a similar concern in requiring the Commission to ''ma imize consistency'' with the FTC's rules. We find that the use of a single national database of do-not-call registrants will ultimately prove the most efficient and economical means for consumer registrations and access for compliance purposes by telemarketing entities and regulators.

53. The states have a long history of regulating telemarketing practices, and we believe that it is critical to combine the resources and e pertise of the state and federal governments to ensure compliance with the national do-not-call rules. In fact, the TCPA specifically outlines a role for the states in this process. See 47 U.S.C. 227(e) and (f). In an effort to reconcile the state and federal roles, we have conducted several meetings with the states and FTC. We e pect such coordination to be ongoing in an effort to promote the continued effectiveness of the national do-not-call program. We clarify the respective governmental roles in this process under the TCPA. We intend to develop a Memorandum of Understanding with the FTC in the near future outlining the respective federal responsibilities under the national do-not-call rules. We note that a few commenters have e pressed concern that the FTC and this Commission may adopt separate national do-not-call lists. We reiterate here that there will be only one national database.

54. *D* . We conclude that the use of a single national do-not-call database, administered by the vendor selected by the FTC, will ultimately prove the most efficient and economical means for consumer registrations and access by telemarketers and regulators. The establishment of a single database of registrants will allow consumers to register their requests not to be called in a single transaction with one governmental agency. In addition, telemarketers may access consumer registrations for purposes of compliance with the do-not-call rules through one visit to a national database. This will substantially alleviate the potential for consumer confusion and administrative burden on telemarketers that would

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and specifically prohibits preemption of state law in certain instances. States and consumers note that state do-not-call regulations have been a successful initiative in protecting consumer privacy rights. In addition, several commenters note the importance of federal and state cooperation in enforcing the national do-not-call regulations. The record also indicates that states have historically enforced their own state statutes within, as well as across state lines. The statute also contains a savings clause for state proceedings to enforce civil or criminal statutes, and at least one federal court has found that the TCPA does not preempt state regulation of autodialers that are not in actual conflict with the TCPA. Van *B* *f* v. *M* *s* , 59 F.3d 1541, 1547–48 (8th Cir. 1995).

57. The main area of difference between the state and federal do-not-call programs relates to the e emptions created from the respective do-not-call regulations. Some state regulations are less restrictive by adopting e emptions that are not recognized under federal law. For e ample, some states have adopted e emptions for insurance agents, newspapers, or small businesses. In addition, a few states have enacted laws that are more restrictive than the federal regulations by not recognizing

e empt nonprofit organizations. We note that some ta -e empt nonprofit organizations have determined to honor voluntarily specific do-not-call requests. Other organizations may find it advantageous to follow this e ample.

70. Finally, to make clear our determination that a company must cease making telemarketing calls to a customer with whom it has an established business relationship when that customer makes a do-not-call request, we amend the company-specific do-not-call rules to apply to any call for telemarketing purposes. We also adopt a provision stating that a consumer's do-not-call request terminates the established business relationship for purposes of telemarketing calls even if the consumer continues to do business with the seller.

Interplay of Sections 222 and 227

71. We first note that the fact that a telecommunications carrier has current CPNI about a particular consumer indicates that the consumer is a customer of that carrier. In that situation, there e ists an established business relationship between the customer and the carrier. 47 CFR 64.1200(f)(4). The established business relationship is an e ception to the national do-not-call registry. However, based on the evidence in the record and as supported by numerous commenters, we confirm our tentative conclusion that if a customer places her name on a carrier's do-not-call list, that request must be honored even though the customer may also have provided consent to use her CPNI under section 222. By doing so, we ma imize the protections and choices available to consumers, while giving ma imum effect to the language of both statutes. At the outset, the average consumer seems rather unlikely to appreciate the interrelationship of the Commission's CPNI and do-not-call rules. Allowing CPNI consent to trump a do-not-call request would, therefore, thwart most consumers' reasonable e pectations about how a company-specific do-not-call list functions. Equally important, permitting a consumer's CPNI consent to supercede a consumer's e press do-not call request might undermine the carrier's do-not-call database as the first source of information about the consumer's telemarketing preferences.

72. Because we retain the e emption for calls and messages to customers with whom the carrier has an established business relationship, the determination that a customer's CPNI approval does not trump her inclusion on a do-not-call list should have no impact on carriers' ability to communicate with their customers via telemarketing. Carriers will be able to contact customers with whom they have an established business relationship via the telephone, unless the customer has placed her name on the company's do-not-call list; whether the customer has consented to the use of her CPNI does not impact the carrier's ability to contact the customer via telemarketing.

73. We are not persuaded by the arguments of those commenters who urge the Commission to find that CPNI consent should trump a customer's request to be placed on a do-not-call list or similarly, that CPNI consent equates to permission to market ''without restriction.'' We note that the Concerned Telephone Companies assert that CPNI consent equates to ''consent to market [illegible] based on [customers'] CPNI.'' Concerned Telephone Companies Comments at 2 (emphasis added). The Commission finds no support for this assertion in any Commission order or statutory provision and, we specifically determine that CPNI approval does not equate to unlimited consent to market without restriction.

74. Similarly, a number of commenters argue that a customer's CPNI authorization ''covers a number of forms of marketing, including telemarketing.'' AT&T Wireless Reply Comments at 26–27. However, such assertions ignore the plain fact that CPNI approval deals specifically with a carrier's use of a customer's personal information, and only indirectly pertains to or arguably ''authorizes'' marketing to the customer. Do-not-call lists, on the other hand, speak directly to customers' preferences regarding telemarketing contacts. Accordingly, we are convinced that a customer's do-not-call request demonstrates more directly her willingness (or lack thereof) to receive telemarketing calls, as opposed to any indirect inference that can be drawn from her CPNI approval.

75. Additionally, we disagree with those commenters who claim that allowing CPNI approval to trump a consumer's request to be on a national or state do-not-call list gives consumers greater fle ibility. A carrier's established business relationship with a customer e empts the carrier from honoring the customer's national do-not-call request. However, as stated above, CPNI consent is not deemed to trump a carrier-specific do-not-call list request. For similar reasons, we decline to make a distinction based on what type of CPNI consent (opt-in versus opt-out) received, as some commenters urge.

76. We do not allow carriers to combine the e press written consent to allow them to contact customers on a do-not-call list with the CPNI notice in the manner that AT&T Wireless describes. However, we do allow carriers to combine in the same document CPNI notice with a request for e press written consent to call customers on a do-not-call list, provided that such notices and opportunities for consumer consent are separate and distinct. That is, consumers must have distinct choices regarding both whether to allow use of their CPNI and whether to allow calls after registering a do-not-call request, but carriers may combine those requests for approval in the same notice document. Finally, we find a distinction based on the type of CPNI consent unnecessary here, as carriers can avail themselves of the established business relationship e ception to contact their e isting customers, irrespective of the type of CPNI consent obtained.

77. Similarly, we agree with those commenters who advise against using a time element to determine whether a customer's do-not-call request takes precedence over the customer's opt-in approval to use her CPNI, because adding a time element would unnecessarily complicate carrier compliance and allow carriers to game the system. In particular, the New York State Consumer Protection Board (NYSCPB) argues that ''enrollment on a national do-not-call list should take precedence over the prior implied consent through the 'opt-out' procedure, but that the latest in time should prevail regarding 'opt-in' consents.'' NYSCPB Comments at 5. Because we determine that carriers steral dou(uwdisagree minemme whoe

While we do not believe any communication would amount to an established business relationship for purposes of telemarketing calls, we do not think the definition should be narrowed to only include situations where a purchase or transaction is completed. The nature of any inquiry must, however, be such to create an e pectation on the part of the consumer that a particular company will call them. As confirmed by several industry commenters, an inquiry regarding a business's hours or location would not establish the necessary relationship as defined in Commission rules. By making an inquiry or submitting an application regarding a company's products or services, a consumer might reasonably e pect a prompt follow-up telephone call regarding the initial inquiry or application, not one after an e tended period of time. Consistent with the FTC's conclusion, the Commission believes three months should be a reasonable time in which to respond to a consumer's inquiry or application. Thus, we amend the definition of ''established business relationship'' to permit telemarketing calls within three (3) months of an inquiry or application regarding a product or service offered by the company.

83. We emphasize here that the definition of ''established business relationship'' requires a voluntary two-way communication between a person or entity and a residential subscriber regarding a purchase or transaction made within eighteen (18) months of the date of the telemarketing call or regarding an inquiry or application within three (3) months of the date of the call. Any seller or telemarketer using the EBR as the basis for a telemarketing call must be able to demonstrate, with clear and convincing evidence, that they have an EBR with the called party.

84. *D* *P* . The Commission also invited comment on whether to consider modifying the definition of ''established business relationship'' so that a company that has a relationship with a customer based on one type of product or service may not call consumers on the do-not-call list to advertise a different service or product. Industry commenters believe an EBR with a consumer should not be restricted by product or service, but rather, should permit them to offer the full range of their services and products. Consumer advocates who commented on the issue maintain that a company that has a relationship based on one service or product should not be allowed to use that relationship to market a different service or product. The Commission agrees with the majority of industry commenters that the EBR should not be limited by product or service. In today's market, many companies offer a wide variety of services and products. Restricting the EBR by product or service could interfere with companies' abilities to market them efficiently. Many telecommunications and cable companies, for e ample, market products and services in packages. As long as the company identifies itself adequately, a consumer should not be surprised to receive a telemarketing call from that company, regardless of the product being offered. If the consumer does not want any further calls from that company, he or she may request placement on its do-not-call list.

85. *A* *E* . *A* (*E* 47 *CF* -1 1 1 0972 ((E

local customer base, and therefore would be able to telemarket new services to all those customers, regardless of whether they were on the national do-not-call registry, because of the established business relationship e emption. New competitors, on the other hand, would be restricted from calling those same consumers.

88. One approach would be to narrow the ''established business relationship'' relationship

fundraising efforts. Consistent with section 227, a ta -e empt nonprofit organization that conducts its own fundraising campaign or hires a professional fundraiser to do it, will not be subject to the restrictions on telephone solicitations. If, however, a for-profit organization is delivering its own commercial message as part of a telemarketing campaign (*n .*, encouraging the purchase or rental of, or investment in, property, goods, or services), even if accompanied by a donation to a charitable organization or referral to a ta -e empt nonprofit organization, that call is not

f . Such calls, whether made by a live telemarketer or using a prerecorded message, would not be entitled to e empt treatment under the TCPA. Similarly, an affiliate of a ta -e empt nonprofit organization that is itself not a ta -e empt nonprofit is not e empt from the TCPA rules when it makes telephone solicitations. We emphasize here, as we did in the 2002 Notice, that the statute and our rules clearly apply already to messages that are predominantly commercial in nature, and that we will not hesitate to consider enforcement action should the provider of an otherwise commercial message seek to immunize itself by simply inserting purportedly ''non-commercial'' content into that message. A call to sell debt consolidation services, for e ample, is a commercial call regardless of whether the consumer is also referred to a ta -e empt nonprofit organization for counseling services. Similarly, a seller that calls to advertise a product and states that a portion of the proceeds will go to a charitable cause or to help find missing children must still comply with the TCPA rules on commercial calls.

Automated Telephone Dialing Equipment

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94. *A* *D* *f* *E* . The record demonstrates that a predictive dialer is equipment that dials numbers and, when certain computer software is attached, also assists telemarketers in predicting when a sales agent will be available to take calls. The hardware, when paired with certain software, has the capacitys will go to9A call tores onva. T2pai2s, hhasostake

''communication''

using predictive dialers must maintain records that provide clear and convincing evidence that the dialers used comply with the three (3) percent call abandonment rate, ''ring time'' and two-second-transfer rule.

to name and telephone number, along with a notice to the called party that the call is for ''telemarketing purposes.'' The message may not be used to deliver an unsolicited advertisement. As long as the message is limited to identification information only, it will not be considered an ''unsolicited advertisement'' under our rules. We caution that additional information in the prerecorded message constituting an unsolicited advertisement would be a violation of our rules, if not otherwise permitted under 47 CFR 64.1200(a)(2).

Established Business Relationship

112. While the TCPA prohibits telephone calls to residential phone lines using an artificial or prerecorded voice to deliver a message without the prior e press consent of the called party, the Commission determined that the TCPA permits an e emption for established business relationship calls from the restriction on artificial or prerecorded message calls to residences. The record reveals that an established business relationship e emption is necessary to allow companies to contact their e isting customers. Companies currently use prerecorded messages, for e ample, to notify their customers about new calling plans, new mortgage rates, and seasonal services such as chimney sweeping and lawn care. Therefore, prerecorded messages sent by companies to customers with whom they have an established business relationship will not be considered ''abandoned'' under the revised rules, if they are delivered within two (2) seconds of the person's completed greeting. Similarly, any messages initiated with the called party's prior e press consent and delivered within two (2) seconds of the called person's completed greeting are not ''abandoned'' calls under the new rules. Such messages must identify the business, individual or entity making the call and contain a telephone number that a consumer may call to request placement on a do-not-call list. We recognize that the established business relationship e ception to the prohibition on prerecorded messages conflicts with the FTC's amended rule. However, for the reasons described above, we believe the current e ception is necessary to avoid interfering with ongoing business relationships.

Time Limits

113. The Commission also adopts a requirement that telemarketers allow the phone to ring for 15 seconds or four (4) rings before disconnecting any unanswered call. This standard is consistent with that of the FTC, similar to current DMA guidelines, and used by some telemarketers already. One industry commenter asserted that telemarketers often set the predictive dialers to ring for a very short period of time before disconnecting the call; in such cases, the predictive dialer does not record the call as having been abandoned. The practice of ringing and then disconnecting the call before the consumer has an opportunity to answer the phone is intrusive of consumer privacy and serves only to increase efficiencies for telemarketers. Moreover, in discussing the interplay between the FTC's rules with the Commission's rules, very few commenters opposed the ''ring time'' requirement adopted by the FTC, or raised any particular concerns about how it might work in the TCPA framework. Therefore, given the substantial interest in protecting consumers' privacy interests, as well as Congress's direction to ma imize consistency with the FTC's rules, we have determined to adopt the 15 second or four (4) ring requirement.

114. Finally, consistent with the FTC's rules, the Commission has determined that telemarketers must maintain records establishing that the technology used to dial numbers complies with the three (3) percent call abandonment rate, ''ring time,'' and two-second rule on connecting to a live sales agent. Telemarketers must provide such records in order to demonstrate compliance with the call abandonment rules. Only by adopting a recordkeeping requirement will the Commission be able to enforce adequately the rules on the use of predictive dialers.

115. The TCPA seeks primarily to protect subscribers from unrestricted commercial telemarketing calls, and therefore e empts calls or messages by ta -e empt nonprofit organizations from the definition of telephone solicitation. Therefore, the Commission has determined not to e tend the call abandonment rules to ta -e empt nonprofit organizations in the absence of further guidance from Congress. Because this will result in an inconsistency with the FTC's rules, we will discuss the call abandonment rules in the report due to Congress within 45 days after the promulgation of final rules. Do-Not-Call Act, Section 4. However, the call abandonment rules will apply to all other companies engaged in telemarketing, and the e istence of an established business relationship between the telemarketer and consumer will not be an e ception to these rules. For these entities, the call abandonment rules will become effective on October 1, 2003. We decline to establish an effective date beyond October 1, 2003, which is consistent with the date that telemarketers must comply with the FTC's call abandonment rules. This should permit telemarketers to make any modifications to their autodialing equipment or purchase any new software to enable them to comply with the three (3) percent call abandonment rate, the prerecorded message requirement and the two-second-transfer rule.

Wireless Telephone Numbers

Scope of Prohibition

116. We affirm that under the TCPA, it is unlawful to make using an automatic telephone dialing system or an artificial or prerecorded message to any wireless telephone number. 47 U.S.C. 227(b)(1). Both the statute and our rules prohibit these calls, with limited e ceptions, ''to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other common carrier service, or any service for which the called party is charged.'' 47 U.S.C. 227(b)(1)(A)(iii). This encompasses both voice calls and te t calls to wireless numbers including, for e ample, short message service calls, provided the call is made to a telephone number assigned to such service. Congress found that automated or prerecorded telephone calls were a greater nuisance and invasion of privacy than live solicitation calls. Moreover, such calls can be costly and inconvenient. The Commission has long recognized, and the record in this proceeding supports the same conclusion, that wireless customers are charged for incoming calls whether they pay in advance or after the minutes are used. Wireless subscribers who purchase a large ''bucket'' of minutes at a fi ed rate nevertheless are charged for those minutes, and for any minutes that e ceed the ''bucket'' allowance. This ''bucket'' could be e ceeded more quickly if consumers receive numerous unwanted telemarketing calls. Moreover, as several commenters point out, telemarketers have no way to determine how consumers are charged for their wireless service.

117. Although the same economic and safety concerns apply to all telephone solicitation calls received by wireless subscribers, the Commission has determined not to prohibit all live telephone solicitations to wireless numbers. We note, however, that the TCPA already prohibits live solicitation calls to wireless numbers using an autodialer. 47 U.S.C. 227(b)(1). The national do-not-call database will allow for the registration of wireless telephone

numbers for those subscribers who wish to avoid live telemarketing calls to their wireless phones. Wireless subscribers thus have a simple means of preventing most live telemarketing calls if they so desire. Registration on the do-not-call database will not prevent calls from entities that have an established business relationship with a wireless subscriber. Wireless subscribers who receive such live calls can easily make a company-specific do-not-call request. Moreover, relying on the do-not-call database to control live telephone solicitations recognizes that prohibiting such calls to wireless numbers may unduly restrict telemarketers' ability to contact those consumers who do not object to receiving telemarketing calls and use their wireless phones as either their primary or only phone.

118. The Commission's rules provide that companies making telephone solicitations to residential telephone subscribers must comply with time of day restrictions and must institute procedures for maintaining do-not-call lists. 47 CFR 64.1200(e). We conclude that these rules apply to calls made to wireless telephone numbers. We believe that wireless subscribers should be afforded the same protections as wireline subscribers.

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119. Based on the evidence in the record, we find that it is not necessary to add rules to implement the TCPA as a result of the introduction of wireless Local Number Portability (LNP) and thousands-block number pooling. The TCPA rules prohibiting telemarketers

common carriers using SS7 and offering or subscribing to any service based on SS7 functionality are required to transmit the CPN associated with an interstate call to connecting carriers. 47 CFR 64.1600, 64.1601. Regardless of whether SS7 is available, a LEC at the originating end of a call must receive and be able to transmit the ANI to the connecting carrier, as the ANI is the number transmitted through the network that identifies the calling party for billing purposes. The term ''ANI'' refers to the delivery of the calling party's billing number by a local e change carrier to any interconnecting carrier for billing or routing purposes, and to the subsequent delivery to end users. 47 CFR 64.1600(b). ANI is generally inferred by the switch. Each line termination on the telco switch corresponds to a different phone number for ANI. Thus, we determine that telemarketers must ensure that either CPN or ANI is made available for all telemarketing calls in order to satisfy their caller ID requirements. Whenever possible, CPN is the preferred number and should be transmitted. Provision of Caller ID information does not obviate the requirement for a caller to verbally supply identification information during a call. 47 CFR 64.1200(e)(iv). Consistent with the FTC's rules, CPN can include any number associated with the telemarketer or party on whose behalf the call is made, that allows the consumer to identify the caller. This includes a number assigned to the telemarketer by its carrier, the specific number from which a sales representative placed a call, the number for the party on whose behalf the telemarketer is making the call, or the seller's customer service number. Any number supplied must permit an individual to make a do-not-call request during regular business hours for the duration of the telemarketing campaign.[3]

126. Some commenters state that it is not technically feasible for telemarketers to transmit caller ID information when using a private branch e change (PBX) and typical T–1 trunks. As noted by National Association of State Utility Consumer Advocates, the Commission's rules e empt from the current caller ID rules, PBX and Centre systems which lack the capability to pass CPN information. Regardless of whether a call is made using a typical T–1 trunk or an ISDN trunk, ANI is transmitted to the Local E change Carrier for billing purposes. With both PBX and Centre systems, the carrier can determine the billing number from the physical line being used to make a call, even if the billing number is not transmitted along that line to the carrier. We are cognizant of the fact that with PBX and Centre systems, the billing number could be associated with multiple outgoing lines. Nevertheless, telemarketers using PBX or Centre systems are required under the new rules not to block ANI, at a minimum, for caller ID purposes.

127. We recognize that ISDN technology is preferred, as it presents the opportunity to transmit both CPN and ANI. However, in situations where e isting technology permits only the transmission of the ANI or charge number, then the ANI or charge number will satisfy the Commission's rules, provided it allows a consumer to make a do-not-call request during regular business hours. By allowing transmission of ANI or charge number to satisfy the caller ID requirement, we believe that carriers need not incur significant costs to upgrade T–1 and ISDN switches. For these same reasons, we also believe that mandating caller ID will not create a competitive advantage towards particular carriers. As typical T–1 technology is upgraded to ISDN technology, we e pect that telemarketers will increasingly be able to transmit the preferred CPN instead of ANI or charge number.

128. Finally, the record strongly supports a prohibition on blocking caller ID information. Both National Consumers League and National Association of State Utility Consumer Advocates state that there is no valid reason why a telemarketer should be allowed to intentionally block the transmission of caller ID. We conclude that the caller ID requirements for commercial telephone solicitation calls do not implicate the privacy concerns associated with blocking capability for individuals. 47 CFR 64.1601(b). We recognize that absent a prohibition on blocking, a party could transmit CPN in accordance with the new rules and simultaneously transmit a request to block transmission of caller ID information. Thus, the Commission has determined to prohibit any request by a telemarketer to block caller ID information or ANI.

129. The TCPA seeks primarily to protect subscribers from unrestricted commercial telemarketing calls. Therefore, the Commission has determined not to e tend the caller ID requirements to ta -e empt nonprofit organizations. However, the caller ID rules will apply to all other companies engaged in telemarketing, and the e istence of an established business relationship between the telemarketer and the consumer shall not be an e ception to these rules. For all covered entities, the effective date of the caller ID requirements will be January 29, 2004. This will provide telemarketers a reasonable period of time to obtain or update any equipment or systems to enable them to transmit caller ID information. We decline to e tend the effective date beyond January 29, 2004, which is consistent with the date on which telemarketers are required to comply with the FTC's caller ID provision.

Unsolicited Facsimile Advertisements

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130. The Commission has determined that the TCPA requires a person or entity to obtain the prior e press invitation or permission of the recipient before transmitting an unsolicited fa advertisement. This invitation or permission must be in writing and include the recipient's signature. The term ''signature'' in the amended rule shall include an electronic or digital form of signature, to the e tent that such form of signature is recognized as a valid signature under applicable federal law or state contract law. The recipient must clearly indicate that he or she consents to receiving such fa ed advertisements from the company to which permission is given, and provide the individual or business's fa number to which fa es may be sent.

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[3] This would mean 9 a.m.–5 p.m. Monday through Friday. A seller or telemarketer calling on behalf of a seller must be able to record do-not-call requests at the number transmitted to consumers as caller ID. Therefore, if the person answering the calls at this number is not the sales representative who made the call or an employee of the seller or telemarketer who made the call, or if the telemarketer is using an automated system to answer the calls, the seller is nevertheless responsible for ensuring that any do-not-call request is recorded and the consumer's name, if provided, and telephone number are placed on the seller's do-not-call list at the time the request is made.

eliminating the EBR e emption for facsimile advertisements would interfere with ongoing business relationships, raise business costs, and limit the flow of valuable information to consumers. They urge the Commission to amend the rules to provide e pressly for the EBR e emption. Conversely, the majority of consumer advocates argue that the TCPA requires companies to obtain e press permission from consumers—even their e isting customers—before transmitting a fa to a consumer. Some consumer advocates maintain that the Commission erred in its 1992 determination that a consumer, by virtue of an established business relationship, has given his or her e press invitation or permission to receive fa es from that company. They urge the Commission to eliminate the EBR e emption, noting that Congress initially included in the TCPA an EBR e emption for fa es, but removed it from the final version of the statute.

132. We now reverse our prior conclusion that an established business relationship provides companies with the necessary e press permission to send fa es to their customers. As of the effective date of these rules, the EBR will no longer be sufficient to show that an individual or business has given their e press permission to receive unsolicited facsimile advertisements. The record in this proceeding reveals consumers and businesses receive fa es

that the equipment have the capacity to transcribe te t or messages onto paper, and that computer fa servers and personal computers have that capacity.

143. We conclude that fa es sent to personal computers equipped with, or attached to, modems and to computerized fa servers are subject to the TCPA's prohibition on unsolicited fa es. However, we clarify that the prohibition does not e tend to facsimile messages sent as email over the Internet. The record confirms that a conventional stand-alone telephone facsimile machine is just one device used for this purpose; that developing technologies

system of records subject to the Privacy Act. 5 U.S.C. 552(a); 47 CFR 0.551 ﬀ . For these reasons, the Commission agreed to release the complaints on a rolling basis only after personal information was redacted. In response to ATA's FOIA request, the Commission has thus far provided appro imately 2,420 redacted complaints.

157. We agree with commenters that the increasing number of inquiries and complaints about telemarketing practices should not form the basis upon which we revise or adopt new rules under the TCPA. Rather, such information can be considered in determining whether to seek comment on the effectiveness of any of its rules. Other considerations included: the Commission's own enforcement e perience; the amount of time that had passed since the Commission undertook a broad review of the TCPA rules, during which time telemarketing practices have changed significantly; and the actions by the FTC to consider changes to its telemarketing rules, including the establishment of a national do-not-call registry. We note that, even in the absence of any such complaints, the Commission is required by the Do-Not-Call Act to complete the TCPA rulemaking commenced last year. We disagree with commenters who suggest that parties must have access to all of the complaints referenced in the NPRM in order to be able to have a meaningful opportunity to participate in this proceeding. It is not the e istence of the complaints, or the number of complaints, that led the Commission to institute this proceeding to consider revision of its TCPA rules. Rather, our TCPA rules have been in place for more than ten years. We opened this proceeding to determine ''whether the Commission's rules need to be revised in order to more effectively carry out Congress's directives in the TCPA.'' 2002 Notice, 17 FCC Rcd at 17461, para. 1. In any event, since September 2002, consumers, industry, and state governments have filed over 6,000 comments in this proceeding, during which time the Commission e tended the comment periods twice and released an FNPRM in order to ensure that parties had ample opportunity to comment on possible FCC action. The substantial record compiled in this proceeding, along with the Commission's own enforcement e perience, provides the basis for the actions we take here today.

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158. The Do-Not-Call Act requires the Commission to transmit reports to

[5] The RFA, 5 U.S.C. 601–612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Public

permission to send fa ads must be in writing, include the recipient's signature, and clearly indicate the recipient's consent to receive such ads. In addition, we have clarified when fa broadcasters are liable for the transmission of unlawful fa advertisements.

164. We believe the rules the Commission adopts in the Order strike an appropriate balance between ma imizing consumer privacy protections and avoiding imposing undue burdens on telemarketers. In addition, the Commission must comply with the Do-Not-Call Act, which requires the Commission to file an annual report to the House Committee on Energy and Commerce and the Senate Committee on Commerce, Science and Transportation. This report is to include: (1) An analysis of the effectiveness of the registry; (2) the number of consumers included on the registry; (3) the number of persons accessing the registry and the fees collected for such access; (4) a description of coordination with state do-not-call registries; and, lastly, (5) a description of coordination of the registry with the Commission's enforcement efforts.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

165. There were no comments filed in direct response to the IRFA. Some commenters, however, raised issues and questions about the impact the proposed rules and policies would have on small entities. Telemarketers maintained that ''telemarketing is used to introduce consumers to novel and competitive products and services,'' often offered by small businesses. Some commenters insisted that business-to-business telemarketing is essential for small businesses. They indicated that they rely on fa broadcasting as a cost-effective form of advertising. On the other hand, other small businesses have requested that the Commission allow their telephone numbers to be included on any national do-not-call list and urged the Commission to adopt rules protecting them from unsolicited fa es. The rules adopted herein reflect not only the difficult balancing of individuals' privacy rights against the protections afforded commercial speech, but the difficult balancing of the interests of small businesses that rely on telemarketing against those that are harmed by unwanted telephone calls and facsimile transmissions. The amended rules should reduce burdens on both consumers and businesses, including small businesses.

166. *N s n D -N s -G L* . As discussed more e tensively in the Order, some commenters opposed the adoption of a national do-not-call registry, stating that company-specific do-not-call lists adequately protect consumer privacy. Other commenters supported the establishment of a national do-not-call registry, arguing that ''further regulation is needed because the current system does little or nothing to protect privacy in the home.'' Privacy Rights Clearinghouse (Privacy Rights) at 2. National Federation of Independent Business (NFIB) ''believes that significant burdens are being placed upon businesses of all sizes in order to comply with the regulations * * *, but that small businesses bear the brunt of those burdens.'' NFIB Comments at 1. NFIB suggested that women, minorities and small businesses will be affected disproportionately by any new restrictions. And, some commenters maintained that businesses, including small businesses, will suffer a reduction in telemarketing sales as a result of the establishment of a national do-not-call list. Small Business Survival Committee (SBSC), while opposed to a national do-not-call list, nevertheless offered a recommendation that would make such a list less onerous for small businesses. SBSC suggested e empting local calls that might result in a face-to-face transaction from the do-not-call list requirements. National Association of Insurance & Financial Advisors also encouraged e empting calls which result in face-to-face meetings and recommended an e emption for those businesses that make a n n n number of calls.

167. The Commission received comments arguing that a national do-not-call list ''would be cumbersome'' and too e pensive for small businesses to use. Direct Selling Association specifically indicated that a national do-not-call list would increase businesses' start-up costs if they were required to purchase the list. In addition, Mortgage Bankers Association of America (MBA) maintained that many small lenders use referrals from e isting customers, not large lists, to attract new business. Such referrals, MBA suggested, will be difficult to scrub against a national do-not-call list. Some commenters suggested that an option to help reduce the cost of a national do-not-call list for small businesses would be to offer smaller pieces of the list to small businesses.

168. Yellow Pages Integrated Media Association urged the Commission to continue to e empt business-to-business calls from a national do-not-call list, because small businesses benefit tremendously by advertising in yellow pages and on-line. However, other commenters requested that small businesses be allowed to include their telephone numbers on the national do-not-call list. One small business commenter stated that ''* * * telemarketing * * * interferes with business operations, especially small business operations * * *.'' Mathemaesthetics, Inc. (Mathemaesthetics) Comments at 6. Another commenter argued that ''people that work from home * * * should not have to be bothered with telemarketing calls that would impact their job performance and potentially their ability to make a living.'' David T. Piekarski Comments (Docket No. 03–62) at 1–2. Finally, some have assured the Commission that a national do-not-call list would be manageable and feasible to maintain. NCS Pearson, Inc. (NCS), for e ample, maintained that even e tremely small telemarketers could gain access to the do-not-call list at a reasonable cost using the Internet.

169. *s 3 -F N s A C - n n L s s C n s* . The Commission sought comment on whether to consider any modifications that would allow consumers greater fle ibility to register on company-specific do-not-call lists. We specifically asked whether companies should be required to provide a toll-free number and/or Web site that consumers can access to register their names on do-not-call lists. Some commenters argued that it would be costly if small, local businesses were required to design and maintain Web sites or provide toll-free numbers for consumers to make do-not-call requests. In addition, they maintained that businesses should not be required to confirm registration of a consumer's name on a company's do-not-call list. Confirmations by mail, they stated, would be e pensive for a business and probably perceived by the consumer as ''junk mail.''

170. *E s n B n s n* . One issue raised by commenters as particularly burdensome for small business was monitoring e isting business relationships and do-not-call requests. NFIB stated that members have found requests by e isting customers to cease contacting them ''unwieldy and difficult * * * to translate as a business practice.'' NFIB Comments at 2. ''An individual who continues to interact with a [sic] these small businesses following a 'do not contact' request does not sever the business relationship s * * *''. NFIB Comments at 2. According to

Consumers might not easily recognize that the telemarketer calling represented a small business and that they must then allow a longer period of time for their do-not-call requests to be processed.

191. The Commission also determined to reduce the retention period of do-not-call records from 10 years to five years. This modification should benefit businesses that are concerned about telephone numbers that change hands over time. They argue that a shorter retention requirement will result in do-not-call lists that more accurately reflect those consumers who have requested not to be called. Finally, we considered allowing small businesses additional time to scrub their customer call lists against the national do-not-call database. The FTC's rules require telemarketers to scrub their lists every 90 days. For the sake of consistency, and to avoid confusion on the part of consumers and businesses, the Commission determined to require all businesses to access the national registry and scrub their calling lists of numbers in the registry every 90 days.

192. *E* . We have modified the current definition of ''established business relationship'' so that it is limited in duration to 18 months from any purchase or transaction and three months from any inquiry or application. The revised definition is consistent with the definition adopted by the FTC. We concluded that regulating the duration of an established business relationship is necessary to minimize confusion and frustration for consumers who receive calls from companies they have not contacted or patronized for many years. There was little consensus among industry members about how long an established business relationship should last following a transaction between the consumer and seller. We believe the 18-month timeframe strikes an appropriate balance between industry practices and consumer privacy interests. Although businesses, including small businesses must monitor the length of relationships with their customers to determine whether they can lawfully call a customer, we believe that a rule consistent with the FTC's will benefit businesses by creating one uniform standard with which businesses must comply.

193. *G A* . In the 2002 Notice, the Commission requested information on the use of predictive dialers and the harms that result when predictive dialers abandon calls. In response, some small businesses urged the Commission to adopt a ma imum rate of zero on abandoned calls. They described their frustration over hang-up calls that interrupt their work and with answering the phone ''only to find complete silence on the other end.'' Mathemaesthetics Comments at 6. Most industry members encouraged the Commission to adopt an abandonment rate of no less than five percent, claiming that this rate ''minimizes abandoned calls, while still allowing for the substantial benefits achieved by predictive dialers.'' WorldCom Reply at 18–19. The Commission has determined that a three percent ma imum rate on abandoned calls balances the interests of businesses that derive economic benefits from predictive dialers and consumers who find intrusive those calls delivered by predictive dialers. We believe that this alternative, a rate of three percent, will also benefit small businesses that are affected by interruptions from hang-ups and ''dead air'' calls.

194. The three percent rate will be measured over a 30-day period, rather than on a per day basis. Industry members maintained that a per day measurement would not account for short-term fluctuations in marketing campaigns and may be overly burdensome to smaller telemarketers. We believe that measuring the three percent rate over a longer period of time will still reduce the overall number of abandoned calls, yet permit telemarketers to manage individual calling campaigns effectively. It will also permit telemarketers to more easily comply with the recordkeeping requirements associated with the use of predictive dialers.

195. *A* . The record reveals that facsimile advertising can both benefit and harm small businesses with limited resources. The small businesses and organizations that rely upon fa ing as a cost-effective way to advertise insist that the Commission allow facsimile advertising to continue. Other small businesses contend that facsimile advertising interferes with their daily operations, increases labor costs, and wastes resources such as paper and toner. The Commission has reversed its prior conclusion that an established business relationship provides companies with the necessary e press permission to send fa es to their customers. Under the amended rules, a business may advertise by fa with the prior e press permission of the fa recipient, which must be in writing. Businesses may obtain such written permission through direct mail, Web sites, or during interaction with customers in their stores. This alternative will benefit those small businesses, which are inundated with unwanted fa advertisements.

196. *A C* . Lastly, the Commission has determined not to require businesses to provide a Web site or toll-free number for consumers to request placement on company-specific do-not-call lists or to respond affirmatively to do-not-call requests or otherwise provide some means of confirmation that consumers have been added to a company's do-not-call list. Several commenters indicated that such requirements would be costly to small businesses. Although we believe these measures would improve the ability of consumers to register do-not-call requests, we agree that such requirements would be potentially costly to businesses, particularly small businesses. Instead, we believe that the national do-not-call registry will provide consumers with a viable alternative if they are concerned that their company-specific do-not-call requests are not being honored. In addition, consumers may pursue a private right of action if there is a violation of the do-not-call rules. This alternative should reduce, for small businesses who engage in telemarketing, both the potential cost and resource burdens of maintaining company-specific lists.

197. *C* : The Commission will send a copy of the Order, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act, 5 U.S.C. 801(a)(1)(A). In addition, the Commission will send a copy of the Order, including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the Order and FRFA (or summaries thereof) will also be published in the **Federal Register**.

Ordering Clauses

198. Accordingly, pursuant to the authority contained in Sections 1–4, 222, 227, and 303(r) of the Communications Act of 1934, as amended; 47 U.S.C. 151–154, 222 and 227; and 47 CFR 64.1200 of the Commission's rules, and the Do-Not-Call Implementation Act, Public Law 108–10, 117 Stat. 557, the Report and Order and the Commission's rules 64.1200, 64.1601, a amended as s56 for Rule Changes. Effe 2003, e cep6 for 47 which contains the rules, which will g October 1, 2003; 47