STATE OF NEW **YORK**
EXECUTIVE DEPARTMENT
STATE CONSUMER PROTECTION BOARD

George E. Pataki
Governor

May M. Chao
Chairperson **and** Executive Director

March 26, 2002

Donald S. Clark, Secretary
Office of the Secretary
Room 159
Federal Trade Commission
600 Pennsylvania Avenue, N.W.,
Washington, DC 20580

Re: Proposed rulemaking to amend the Telemarketing Sales Rule, 16 CFR Part 310, FTC Rule Number R411001

Dear Secretary Clark:

Introduction

The New York State Consumer Protection Board ("NYCPB") respectfully submits the following comments and responses to the questions posed in the FTC's Notice of Proposed Rulemaking ("NOPR") to amend the Federal Trade Commission's ("FTC's") Telemarketing Sales Rule ("TSR"), 16 CFR Part 310, Rule Number R411001. The NYCPB's comments chiefly concern the proposal to create a central Do Not Call telemarketing Registry ("Registry"), which would allow consumers to **put** their telephone number or numbers on a national Registry to prevent most unwanted telemarketing sales calls, and be maintained by the FTC.

Discussion

The NYCPB fully supports the FTC's efforts to'expand the opportunity for consumers to prevent unwanted telemarketing sales calls. The CPB is charged with administering and enforcing New York's **Do** Not Call law (see, McKinney's New York General Business Law ("GBL") § 399-z, effective April 1, 2001). Based on our experience under New York's Do Not Call law, the NYCPB has found that consumers welcome this type of protection. In fact, our Do Not Call Registry currently contains about 2,000,000 numbers. The overwhelming response that we have received from consumers is that the number of unwanted calls has decreased dramatically, and consumers have achieved

enhanced levels of privacy in their homes, thanks to New York's Do Not Call law. We believe that the FTC's efforts in this regard can only improve consumer protection in this area, and we welcome the FTC's initiative. We believe that the New York experience under our Do Not Call law may be helpful to the FTC in its efforts.

A. New York's Do Not Call law and rules.

On October 12, 2000, New York State Governor George E. Pataki signed the New York State Do Not Call law. The law, and the rules adopted to administer the Do Not Call program, became effective on April I , 2001. Pursuant to GBL § 399-z **(2)** and 21 New York Code of Rules and Regulations ("NYCRR") §§ 4602.2 and 4602.3, eligible New York State consumers may register for inclusion on the Do Not Call Registry for **a** term of three years from the start of the next quarter following the date of enrollment (see, 21 NYCRR § 4602.2(g)). Consumers may sign up for the Registry by using the Internet, **by** telephone or by a paper application sent via U.S. mail, or by a facsimile transmission. The list of Registry enrollees is updated quarterly, and may be purchased from the NYCPB for a calendar yearly fee of $500.00 for electronic Internet access or CD-ROM (see, 21 NYCRR §§ 4602.5(a), (b), (c) and (d)).

The New York Do Not Call law in relevant part prohibits any telemarketer or seller to make or cause to be made any unsolicited telemarketing sales call after a thirty-day grace period from when the then current Registry is published, and after a consumer's name and telephone number appear on the Registry (see, GBL § 399-z (3) and 21 NYCRR §§ 4602.5(f) and 4603.1(a) (1) and (2)). The NYCPB has authority upon a complaint, or upon its own initiative, to conduct an inquiry as to the sufficiency of any alleged violations (see, 21 NYCRR § 4603.1(b)). The NYCPB has authority to assess a fine not to exceed $2,000 for each Do Not Call violation. Each call is a separate offense for penalty and enforcement purposes (see GBL § 399-z (6) (a) and 21 NYCRR §§ 4603.1(a) and 4603.4(a)).

The law and rules provide for several exemptions and exceptions. The exemptions generally include not-for-profits, charitable, religious, and political organizations (see, 21 NYCRR §4602.6(d)). The exceptions generally include calls made in response to an express written or verbal consumer request; an established business relationship which is ongoing; an existing customer relationship within the last 18 months, unless the customer has requested not to be called; and requests for a face-to-face meeting rather than concluding a sale over the telephone (see, 21 NYCRR §4603.2(a)).

B. The Interaction of New York's Do Not Call Law and the Federal Do Not Call Program.

The NYCPB has been enforcing the New York Do Not Call law since May 2001, and we are pleased to share our experiences in administering the law with the FTC with a view toward future cooperation. As we view the FTC proposal, it is apparent that the proposed national and New York State Do Not Call Registries are expected to exist concurrently, since Congress has not attempted to preempt state authority in this regard (see, NOPR at 15). With respect to enforcement, if consumers are on both the national and New York State Registries, it appears as though they will be able to seek redress for unsolicited telemarketing sales calls under the amended TSR, which are the subject of these comments, as well as New York State's Do Not Call law in many instances. While the proposed rulemaking would have no direct effect upon New York State's Do Not Call program, it may to lead to consumer confusion, i.e., consumers

may likely confuse their rights and remedies under state and federal law, may register with the FTC, but file complaints with the NYCPB, and vice versa. Thus, we anticipate the need for close cooperation between the administration of New York's Do Not Call program, and the federal Do Not Call Registry when it is established in early 2003.

It is unclear as to where consumers would be best advised to file complaints in every circumstance, receive answers to questions, and generally receive relief from unwanted telemarketing sales calls. Based on the comments we have received in administering New York's Do Not Call law, it is clear that consumers are sincerely grateful for the ability to stop most of these calls, subject to certain exemptions and exceptions in our law and rules, by listing their names and phone numbers on the NYCPB's Registry. The proposed federal Do Not Call Registry will certainly add an additional layer of protection and enforcement for consumers, but should be designed to work in conjunction with existing laws for the states that already have Do Not Call programs. We urge the FTC to work cooperatively with those states, such as New York, to ensure that consumers have access to a seamless complaint processing system that will secure the most efficacious remedy for their complaints, whether state or federal. The FTC proposal does not sufficiently clarify matters regarding the cooperation that would be needed between the states and federal agencies to administer a national Registry. To that end, we suggest that a referral system, as well as other appropriate measures, be considered to avoid consumer confusion and frustration. Specific measures are beyond the scope of the present comments to discuss in detail, but the NYCPB will work cooperatively with the FTC staff to explore this potential area of cooperation, and to ensure the success of the federal initiative in this regard.

The FTC has also not addressed the specifics of under what circumstances enforcement on the federal level would take place. In some cases, the calls would be jurisdictional to the FTC, and in others, the Federal Communications Commission ("FCC"), or other federal agencies, which are not currently proposing any national Registry for their jurisdictional calls.[1] These non-jurisdictional entities would include common carriers (long-distance phone companies and airlines), credit unions, banks, and insurance companies operating under state regulation. The FTC's limited jurisdictional reach could be supplemented by appropriate coordination with other state or federal agencies, such as the FCC, to ensure complete coverage, and perhaps additional rulemaking by other concerned agencies. We recommend that a greater degree of federal cooperation be explored in this regard by the potentially affected agencies, FTC, FCC, state regulators where applicable, etc.

There is also a further need for FTC coordination with the various states' consumer protection agencies, attorneys general, or other state agencies assigned to administer Do Not Call programs. In some states, such programs are administered by consumer protection agencies, such as the NYCPB. In others, the state attorney general has such responsibility. Any rules adopted should be sufficiently flexible to accommodate these divergences, particularly regarding enforcement arrangements.

Further, various states, such as New York, have exemptions and exceptions to their laws. Thus, on a given complaint, enforcement jurisdiction may lie only with the FTC, if

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[1] See, the concurring statement of FTC Commissioner Orson Swindle, where the problem of which entities are covered by the FTC's jurisdiction, and which are not, is discussed.

otherwise exempted or excepted under state law. Alternatively, state laws may be more stringent than the proposed FTC rules, in which event a complaint would probably be referred to the state in question by the FTC. In short, the various states' Do Not Call programs, and their laws and exceptions, should be integrated into the workings of a national Registry program, and work smoothly together. These matters should hopefully be addressed prior to any federal Do Not Call Registry implementation. To that end, we pledge our best efforts to work cooperatively with the FTC.

New York also notes that the question of jurisdiction for interstate telemarketing calls remains unclear, as it relates to the states. For instance, New York now has jurisdiction over interstate calls provided they terminate in New York (see, GBL § 399-z(1)(d)(ii)), which the proposed rule would supplement, and not preempt. What would occur if the aggrieved consumer complained to both federal and state officials for such calls? This question is explored in more depth in our attached responses to the FTC's questions. It is clear from the questions posed by the FTC that many areas of concern have yet to be addressed, yet should be to ensure the smooth functioning of any national Do Not Call Registry.

Conclusion

We hope that our comments regarding New York's experience with our Do Not Call law and rules, as well as our responses to the FTC's questions, are helpful in assisting the FTC in executing a comprehensive, effective national Do Not Call Registry. We would be glad to assist the FTC in any way that we can to further our mutual goal of enhanced consumer protection from unwanted telemarketing sales calls.

For further coordination regarding these matters, as well as any questions that you may have, please contact our General Counsel, James F. Warden, Jr., at **(518) 486-3934.**

Very truly yours,

May Chao

May M. Chao
Chairperson and Executive Director

MMC/ds

Enclosure – Response to Section IX Questions

FEDERAL TRADE COMMISSION

NOTICE OF PROPOSED RULEMAKING TO AMEND THE TELEMARKETING SALES RULE 16 CFR PART 310

FTC FILE NUMBER R411011

RESPONSE TO SECTION IX QUESTIONS BY THE NEW YORK STATE CONSUMER PROTECTION BOARD

May M. Chao
Chairperson and Executive Director

James F. Warden, Jr.
General Counsel

Lisa Renee Harris
Deputy General Counsel

Dated: March 26, 2002
Albany, New York

NEW YORK STATE CONSUMER PROTECTION BOARD
5 EMPIRE STATE PLAZA, SUITE 2101
ALBANY, NEW YORK 12223-1556
(518) 474-3516
http://www.consumer.state.ny.us

NEW YORK STATE CONSUMER PROTECTION BOARD

RESPONSES TO THE TELEMARKETING SALES RULE ("TSR")

QUESTIONS FOR COMMENT (SECTION IX)

REGARDING 16 CFR PART 310, FTC FILE NUMBER R411001

The New York State Consumer Protection Board ("NYCPB") submits the following responses in answer to the Federal Trade Commission's ("FTC's, or Commission's") questions in Section IX of the January 22, 2002 Notice of Proposed Rulemaking ("NOPR") regarding the establishment of a national Do Not Call telemarketing sales Registry. Please also refer to the March 26, 2002 cover letter accompanying these question responses where some of the more important issues to the NYCPB, as well as details of the New York Do Not Call program, are highlighted.

We have not attempted to answer all of the questions posed, but only those in which New York consumers have a substantial Do Not Call interest. In the main, our responses concern the proposed national Do Not Call Registry, and the interaction of that proposed program with New York's existing Do Not Call law. For the convenience of the FTC, we have reproduced the questions the NYCPB addresses, followed by the NYCPB's responses.

General Questions for Comment:

Please provide comment, including relevant data, statistics, consumer complaint information, or any other evidence, on each different proposed change to the Rule. Regarding each proposed modification commented on, please include answers to the following questions:

(a) What is the effect (including any benefits and costs), if any, on the consumer?

RESPONSE:

The NYCPB strongly supports federal measures to empower consumers to stop unsolicited telemarketing sales calls that invade the privacy of their homes. The creation of a national Registry is a welcome addition in the prevention of unsolicited sales calls to the existing protection offered by New York's Do Not Call law and rules (see, the March 26, 2002 cover letter enclosed herewith for an overview of the New York Do Not Call program).

First, New York does not charge a fee for consumer registration, although that is the practice in some other states. We would recommend that any federal Registry also be free to consumers. This would ensure that maximum consumer participation is achieved.

Second, under the proposed national Registry scheme, it is New York's understanding that the proposed amendments will not alter the legal status, or otherwise preempt the operation of, New York's Do Not Call law (see, McKinney's New York General Business Law ("GBL") 399-z). Accordingly, New York consumers will have the option of enrolling on the FTC Registry, the New York Do Not Call Registry, or both. This should provide enhanced options to consumers.

Third, with respect to the filing of complaints and responsiveness to consumer questions, consumers will have several options. Consumers can contact their states' Do Not Call program administrator (in New York, the NYCPB), the FTC, or the Federal Communications Commission (FCC), depending on the nature of the potential violation. Each agency and program will have established its own database and consumer responsiveness protocol. The FTC proposes no cross-reference service to allow states to assist consumers who call them with issues, questions or concerns regarding their status on the national Registry. For example, a consumer on the national Registry, but not on the state Registry, might lodge a complaint with the NYSCPB, or vice versa. It is probable that consumers may register with the FTC, but complain to us, even though they may not be registered in New York. In fact, the NYCPB noticed an increase in our consumer complaint calls when the FTC merely announced its suggested Registry, so the potential for consumer confusion as to the appropriate agency from which to seek relief should not be taken lightly. The NYCBP suggests that a collaborative network of technical and administrative assistance support the national Registry program that would provide a seamless complaint process regardless of which agency – federal or state -- the consumer contacts. While it may be premature to deal with such questions at this stage of the proceeding, we would recommend that the FTC anticipate such problems and concerns, and provide resolutions, at an appropriate time.

Fourth, New York State's Attorney General ("NYAG") is currently expressly empowered to take action on behalf of aggrieved residents in federal or state courts under existing law, and such powers will now include Do Not Call violations based on complaints from consumers who are on the national Do Not Call registry (see, **15** U.S.C. § 6103; 16 CFR § 310.7), while the NYSCPB does not bring such actions. This would increase the NYAG's Do Not Call role, thus serving to exacerbate consumer confusion concerning which agency is primarily responsible for enforcement of New York State's Do Not Call law. As a practical matter, both the NYAG and NYCPB are involved in consumer complaint resolution, and we cooperate fully on matters of mutual interest according to the NYCPB's enabling legislation (see, McKinney's New York Executive Law ("Executive Law") § 553(3)(b)). However, the NYCPB has jurisdiction over Do Not Call violations. Our concern is that a proper consumer education program, and a comprehensive enforcement roadmap, should be provided to consumers as they seek to enforce their rights under the new federal program. Without such a program and roadmap, consumers may become frustrated and confused with a system that is attempting to aid them.

* * *

Questions on Proposed Specific Changes:

In response to each of the following questions, please provide: (1) detailed comment, including data, statistics, consumer complaint information and other evidence, regarding the problem referred to in the question; (2) comment as to whether the proposed changes do or do not provide an adequate solution to the problems they were intended to address, and why; and (3) suggestions for additional changes that might better maximize consumer protections or minimize the burden on industry.

* * *

C. Deceptive Telemarketing Acts or Practices:

The primary jurisdiction for federal and state court actions regarding deceptive acts and practices in New York lies with the NYAG, although the NYCPB does administratively resolve many such complaints when brought to our attention. See, GBL § 349, and Executive Law §§ 63(12) and 553(3)(b)). In particular, we do substantial work in mediating disputes between consumers and businesses. Additionally, the NYCPB Executive Director has been directed to act as the State Director of Consumer Protection to coordinate consumer protection efforts among federal and state agencies. See, Executive Order No. 45, issued November **13,** 1996. As explained previously, the NYCPB works with the NYAG on matters of mutual interest resolving complaints as to acts and practices depending on which agency is best suited to resolve the particular complaint. As a general matter, the proposed Rules in 16 **CFR** § 310.3 seem well designed to protect consumers, and would address many of the complaints that the NYCPB has received regarding deceptive acts and practices.

D. Abusive Telemarketing Acts or Practices:

Generally, the proposed Rule in 16 CFR § 310.4 would afford substantial protection to consumers. However, calls from registered charitable organizations are specifically permitted under our rules, while the proposed federal Rule appears to be stricter in that regard as a result of the USA PATRIOT Act (see, 21 NYCRR § 4602.6(d) and 16 CFR §§ 310.4(b)(1)(iii)(A) and (B). Effectively, the New York exemptions in this regard would become violations for federal purposes, since telemarketers on behalf of charitable organizations would be at risk of federal violations even if exempt under New York State rules. The NYCPB would probably refer such calls to the FTC for enforcement action.

* * *

3. The proposed Rule prohibits blocking or altering the transmission of caller identification ("Caller ID") information, but allows altering the Caller ID information to provide the actual name of the seller or charitable organization and the seller's or charitable organization's customer or donor service number.

(a) What costs would this provision impose on sellers? On charitable organizations? On telemarketers? Are those costs outweighed by the benefits the provision would confer on consumers and donors?

RESPONSE:

The NYCPB has no information regarding the costs for such a system. However, such a requirement would greatly facilitate identifications of alleged Do Not Call violators. Callers are supposed to provide this information now under existing New York law, which simply prohibits intentional blocking. For someone who breaks the law, enforcement is with the NYAG (see, GBL § 399-p(6-a)). However, unless the consumer receives information during the call such that the caller can be identified, enforcement is difficult precisely because of the blocking. It is equally difficult to enforce potential Do Not Call violations for the same reasons.

(b) Have significant numbers of consumers used Caller ID information to contact sellers, telemarketers, or charitable organizations to make "do-not-call" requests?

RESPONSE:

Generally, our information is that a minority of complainants are able to capture this information. When it is reported for complaint purposes, it is often very helpful in our enforcement efforts. This is particularly so for firms that may employ several outside telemarketers, and enables our enforcement staff to trace the telemarketer and/or seller that made the call, or caused the call to be made.

* * *

(d) How are telemarketing firms currently meeting the regulatory requirements in States that have passed legislation requiring the transmission of full caller identification information by telemarketers?

RESPONSE:

See the response to D(3)(a). The NYCPB has had some complaints in this regard, but not a significant number in relation to the total Do Not Call complaints that we have received.

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(g) Would it be desirable for the Commission to propose a date in the future by which all telemarketers would be required to transmit

Caller ID information? If so, what would be a reasonable date by which compliance could be required? If not, why not?

RESPONSE:

Transmission of Caller ID information would undoubtedly facilitate Do Not Call enforcement on both the state and federal level. We have no information on the time frame or costs that would be involved should such a requirement be imposed on the telemarketing industry.

(h) Does the proposed Rule provide adequate protection against misleading or deceptive information by allowing for alteration to provide beneficial information to consumers, **i.e.**, the actual name of the seller and the seller's customer service number, or the charitable organization and the charitable organization's donor service number? What would be the costs and benefits if the Rule were simply to prohibit any alteration of Caller ID information that is misleading? Should the proposed Rule make any exceptions to the prohibition on altering Caller ID information?

RESPONSE:

The proposed Rule would not provide adequate protection unless it was aggressively enforced. For example, if a company does not comply with the Rule and does not identify itself or identifies itself in way that is useless or misleading to consumers, effective complaints could not be made since no information is provided within the caller ID system. Enforcement of this requirement would be difficult at best. Generally, the information the NYCPB finds most useful for enforcement purposes are the names and numbers of the telemarketers and sellers when that information is captured through Caller ID.

4. The proposed Rule would prohibit a seller or a telemarketer acting on behalf of a seller or charitable organization, from denying or interfering with the consumer's right to be placed on a "do-not-call" list or registry. Is this proposed provision adequate to address the problem of telemarketers hanging up on consumers or otherwise erecting obstacles when the consumer attempts to assert his or her "do-not-call" rights? What alternatives exist that might provide greater protections?

RESPONSE:

The NYCPB has encountered several instances where consumers have met difficulties in attempting to be put on Do Not Call lists. This is particularly so when the call may be a recorded message. We have been told by consumers that while there is

usually a number to call to be put on a Do Not Call list during the recorded message, it is often busy, or is not toll-free. Hopefully, the advent of the federal Do Not Call Registry, coupled with the efforts of the various states, may result in increased scrutiny of procedures that will ease the difficulties in consumers' ability to access private Do Not Call lists.

5. The proposed Rule would establish a national "do-not-call" registry maintained by the Commission.

* * *

(b) Is the restriction on selling, purchasing or using the "do-not-call" registry for any purposes except compliance with §§ 310.4(b)(1)(iii) adequate to protect consumers? Will this provision create burdens on industry that are difficult to anticipate or quantify? What restrictions, if any, should be placed on a person's ability to use or sell a "do-not-call" database to other persons who may use it other than for the purposes of complying with the Rule?

RESPONSE:

Generally, the proposed Registry should only be used for its intended purpose -- as a Do Not Call list. This is the approach that has been adopted in New York. Specifically, 21 NYCRR §§ 4602.4 (a) and (b) generally provide that the information on the Registry should be used only for the purpose of promoting the Do Not Call program, and that use of the Registry information for purposes not permitted by the regulations is subject to the penalty and enforcement provisions of the law. We would recommend a similar approach for the proposed federal Registry.

In some instances, we have had requests for other uses of the New York Registry, e.g., for securing addresses and names for other purposes than Do Not Call. We have uniformly denied such requests.

(c) Would a list or database of telephone numbers of persons who do not wish to receive telemarketing calls have any value, other than for its intended purpose, for sellers and telemarketers?

RESPONSE:

Yes. Most of our information in this area is anecdotal. However, we have been told that some telemarketers could use this information as a Call rather than Do Not Call list. Apparently, the theory is that persons who would enroll on a Do Not Call list may have higher than average incomes, and that they are more attractive sales prospects notwithstanding the presence of their names on a Do Not Call Registry. Obviously,

such sales tactics would result in enforcement action should the NYCPB receive a complaint.

Another potential use is to match names with telephone numbers for unlisted numbers. The address can then generally be derived from other sources by the person seeking to compile the information. Our law requires that a name and number be listed (see GBL § 399-z(3)). We have put information on our website to alert consumers to this problem (http://www.consumer.state.nv.us), but it is possible that the federal Registry, depending on what information is required, could raise similar privacy concerns.

(d) How long should a telephone number remain on the central "do-not-call" registry? Should telephone numbers that have been included on the registry be deleted once they become reassigned to new customers? Is it feasible for the Commission to accomplish this? If so, how? If not, should there be a "safe harbor" provision for these reassigned numbers?

RESPONSE:

The NYCPB's rules provide that telephone numbers remain on the registry for three years, and we anticipate notification to consumers during our re-enrollment period (see 21 NYCRR § 4602.2(g)). In order to preserve the most up to date telephone numbers on a national Registry, the registration term should be limited to three years due to the mobile population of the United States. In addition, allowing consumers to take an affirmative action to continue their registration minimizes the problems of having inaccurate or stale telephone numbers on the list, which eases the administrative burdens on both New York State, as well as the telemarketing community that uses the Do Not Call list of names. Similar considerations will affect the proposed federal Registry.

Any plan to remove "reassigned" telephone numbers from a national registry would require extensive cooperation from extremely conscientious consumers and the telemarketing industry in every locality of the United States. Without this cooperation, there would be no methodology to determine that the telephone number had been reassigned. Further, New York requires that any removals from the Registry be in writing, or through an electronic signature (see 21 NYCRR § 4602.2(e)). Many consumers will take this step to restore privacy for an unlisted number when such consumers determine they are better served by not being on the Do Not Call Registry. Most will simply re-register a new number if they do not port their existing telephone number. We may or may not be informed that the old number is obsolete. Therefore, as a practical matter, the only way to keep a Registry reasonably current is through a periodic re-registration process, coupled with honoring individual written consumer requests for listing changes.

Further, should the FTC undertake the burden of attempting to track the continuous status of reassigned numbers, we would recommend a consumer education campaign to that end, which would have to be repeated often to remain effective. This campaign in part would provide information that explains to consumers that their telephone numbers on the national Do Not Call list should be updated if changed, and provide instructions on how to add or remove such numbers. We assume in this regard that the number, rather than the name, will be the primary identifier (see, 21 NYCRR § 4602.5(f)).

Finally, if a telemarketer has used his or her best efforts to comply with the Rule, and inadvertently calls a reassigned number, there should be a safe harbor provision (see, 21 NYCRR § 4603.3 in that regard).

(e) Who should be permitted to request that a telephone number be placed on the "do-not-call" registry? Should permission be limited to the line subscriber or should requests from the line subscriber's spouse be permitted? Should third parties be permitted to collect and forward requests to be put on the "do-not-call" registry? What procedures, if any, would be appropriate or necessary to verify in these situations that the line subscriber intends to be included on the "do-not-call" registry?

RESPONSE:

Any person who calls from the telephone they wish to register should be permitted to register that residential telephone number. New York allows consumers to sign up for the Registry from any telephone, via the Internet, through the U.S. mail, or by facsimile transmission. It has been New York's experience that allowing consumers to enter personal information that cannot be immediately verified creates invalid consumer applications due to missing, misprinted or mistakenly keyed (in the case of the Internet) information. The result bars consumers from placing their telephone number or numbers on the Registry. Although the NYCPB does its best to correct invalid applications, it creates a heavy administrative burden to do so. Therefore, only allowing consumers to sign up for a national Registry using the telephone that corresponds with the telephone number they wish to have entered would be the most effective and efficient system. This would be similar to procedures used by credit card companies to periodically require consumers to re-validate their credit cards using their home telephones. Further, since the purpose of the national Registry is for consumer protection, and would generally not preclude most business-to-business calls, home registration would provide a further check on registrations.

New York's experience has been that allowing third parties to collect and forward registrations causes administrative difficulties, but that registrations are achieved in this way that may not otherwise occur. Sometimes the information is incomplete, and this requires additional administrative actions to complete the

registrations. In addition, delivery of third party information may be delayed allowing consumers to believe they are on the list when in fact their registration has not been received. Overall, however, our Registry would not have achieved the degree of consumer registration it has achieved without third party assistance.

New York suggests that should a national Registry be established, consumers should only be permitted to sign up by using the telephone from which they wish to register. This approach would maintain security and information integrity, avoid mis-information problems, and eliminate delays. Third parties, particularly elected representatives, could facilitate this process by periodic communications with their constituents regarding the availability of the national Registry. Such communications could include instructions regarding registration, but would not include the actual distribution and receipt of enrollment forms for forwarding to the FTC.

(9 What security measures are appropriate and necessary to ensure that only those persons who wish to place their telephone numbers on the "do-not-call" registry can do so? What security measures are appropriate and necessary to ensure that access to the registry of numbers is used for TSR compliance? What are the costs and benefits of these security measures?

RESPONSE:

Ensuring a secure environment for potentially millions of telephone numbers will require that the FTC have the technology to establish an automated registration and verification system that has the capability to detect telephone numbers that are not authorized to be registered, and provide appropriate security for proper numbers that are registered. The federal system should require that consumers be obligated to register from the telephone number they wish to add to the national Registry, and verify such registration via the Internet, or by calling a toll-free telephone number reserved for verification purposes only. Additionally, the FTC should provide a separate toll-free telephone number or link on the Internet (using an electronic signature) for those consumers who wish to remove their telephone number or numbers from the national Registry. As previously noted, New York requires that such removal be in writing, but if the home telephone procedure we recommend is undertaken by the FTC, there would be no need for the written de-listing requirement provided the request is from the registered home telephone number.

The automated system should be equipped to detect when a consumer **is** trying to register an unauthorized telephone number. For example, if a consumer **is** attempting to register a business, emergency, or other unauthorized telephone number, the automated system should transfer the caller to an appropriate abort message and terminate the call.

A substantial financial investment would be required to support a complex automated system that would be able to detect unauthorized numbers, as there are millions of emergency numbers, business prefixes, information services numbers and the like that would have to be programmed into the system to trigger an abort message. In addition, a default registration and support system would have to be established for those persons without touchtone telephone service. The automated and the default system would have to be supported by live administrative personnel that would register those consumers without touch tone telephone service and/or access to a computer for verification purposes as stated above. The administrative personnel would also be responsible for answering questions and taking complaints, as well as responding generally to consumer Do Not Call needs.

With regard to the security *of* the Registry data, if consumers are able to verify their registrations via the Internet, an Internet firewall along with the latest security software, would have to be installed to protect unauthorized access to the list of Registry telephone numbers. As explained more fully below in response to question (j), those entities that acquire the list of Registry telephone numbers may manipulate the Registry data or otherwise use the information for purposes other than for TSR compliance. For the FTC to enhance compliance with § 310.4 (b) (1)(i), the NYCPB suggests that those who request and receive the list be required to enter into a use agreement, restricting such use to TSR compliance only. This approach may limit unintended use of national Registry data.

(g) Should consumers be able to verify that their numbers have been placed on the "do-not-call" registry? If so, what form should verification take?

RESPONSE:

The NYCPB has found that an operator assisted verification process is very time consuming and administratively taxing. Accordingly, we now have a system in place for consumers to directly verify their registrations without contacting us. Therefore, New York advises that consumers should be able to verify their registration by calling from their residential telephone to a toll-free number, which would be reserved for verification of registration status only. New York also suggests that consumers be able to verify their status via the Internet. For example, consumers should be able to enter the telephone number they believe to be registered, and verification should appear on the screen with the date and time the registration was entered,

(h) Should the "do-not-call" program allow consumers to specify the days or time of the day that they are willing to accept telemarketing calls? What are the costs and benefits of allowing such selective opt-out/opt-in?

RESPONSE:

Trying to enforce a time or day specific telemarketing prohibition for millions of individual consumers would certainly maximize consumer choice, but might well be administratively unmanageable, extremely costly, and ineffective. Some smaller telemarketers may not have the equipment to effectively comply with the Rule. The costs for the personnel and technical support that would be necessary to not only create, but update such information whenever a consumer feels that one time of the day is better than another to receive calls, would be probably be considerable.

Additionally, such a plan might result in an additional burden in processing complaints. Consumers may or may not remember the times and days they were not supposed to be called, and such data would have to verified in any event by the FTC in processing the complaint.

Further, this approach might put an insuperable burden on the telemarketing industry, and stiffen resistance to the entire concept of a Do Not Call Registry. The technical and administrative burden could be particularly acute on smaller telemarketing firms.

Another problem that will need to be addressed is how this proposed exception would work with respect to the states. For example, consumer A has placed her residential telephone number on the New York State Registry as well as the national Registry. Consumer A has submitted written telemarketing authorization for company X during certain days and hours of the day to the FTC. Company X calls consumer A, and consumer A subsequently files a complaint against company X with the FTC as well as the NYCPB. Company X subsequently advises the FTC that they have authorization to call the consumer and submits a copy of such authorization to the FTC, but such submission is unavailing in New York, which does not have a days/hours option. Thus, the Company may be liable under New York law, since the consumer is on the New York Registry, but not in violation of federal law. The question becomes, does the FTC then submit such a complaint to the NYCPB, or does the FTC simply dismiss such complaint as invalid? Will records be kept of such complaints and by whom? As the NYCPB has indicated earlier, the process for this approach is unclear and would require a cooperative effort between the states and the federal agencies along with an educational campaign, so that consumers are not confused about the applicable state and federal exceptions regarding each do not call program. While such a provision would maximize consumer choice, it would also potentially maximize consumer confusion.

For this particular option, it would appear that the potential for consumer confusion, as well as the burden on the industry (which can only be paid for by higher prices to consumers), would generally not be cost-effective in meeting consumer needs. The NYCPB recommends that the days/hours option not be adopted.

(j) Some states with centralized statewide "do-not-call" list programs charge telemarketers for access to the list to enable them to "scrub" their lists. In addition, some of these states charge consumers a fee for including their names and/or phone numbers on the statewide "do-not-call" list. Have these approaches to covering the cost of the state "do-not-call" list programs been effective? What have been the problems, if any, with these two approaches?

RESPONSE:

New York does not charge consumers a fee to be placed on the Registry, and we believe this should be the federal practice as well to maximize consumer enrollment, and minimize intrusive telemarketing sales calls.

As to telemarketers, New York provides access to its Registry for a fee of $500.00. Registry sales are anticipated to fund the program. This fee does not give access to telemarketers so that they may reproduce the Registry or information contained within the Registry for purposes other than compliance with GBL § 399-z. Pursuant to 21 NYCRR § 4602.4 (b), and 21 NYCRR § 4602.5 (e), Registry purchasers are strictly prohibited from re-selling or redistributing the list outside the parameters of the rules and regulations. However, detection of violators in this regard has proven elusive. The reason is that Do Not Call violations from consumers are received through our complaint process, but we normally do not receive any complaints regarding list scrubbers. Most of our information in this regard is received through calls to the NYCPB asking whether the telemarketer must purchase our list, as well as the scrubbed list they have already purchased. It is only then that we become aware of violations, and can pursue the matter with the list scrubber. Further, re-selling of lists, in addition to being against our rules, directly impacts the revenues that support the Do Not Call program. The NYCPB is currently addressing the re-selling issue through our enforcement efforts.

The scrubbing process, based on the information we have received, is integral to the proper functioning of the telemarketing industry, and is particularly vital to some of the smaller firms. Based upon our information and belief, a common practice is for data management firms to provide targeted prospect lists for telemarketing campaigns, e.g., names and telephone numbers of persons who have recently purchased homes for greater than $300,000 in Westchester County. As an added service, these firms remove or "scrub" the names of individuals whose names appear on various state Do Not Call lists, including New York's, before delivering such prospect lists to their customers. Call blocking firms, on the other hand, utilize Registry information to block outbound calls made by a telemarketer. These services are offered in a number of different forms, such as blocking systems installed at the customer's place of business; telemarketing sales calls routed through the blocking company's system; or the service is offered through the telemarketer's telecommunications provider.

In New York, purchase of the Registry is not required by our law or rules, but companies that do not purchase the Registry cannot avail themselves of the "safe harbor" provisions of our rules (see 21 NYCRR § 4603.3(1)). The enforcement issue is that telemarketers using a properly scrubbed list will not make unsolicited calls to consumers, so we do not receive complaints. Thus, most of our information for enforcement purposes for list scrubbing is anecdotal. New York requires that both the seller and ultimate user of such information purchase a copy of our Registry.

6. What should be the interplay between the national "do-not-call" registry and centralized state "do-not-call" requirements? Would state requirements still be needed to reach intrastate telemarketing? Would the state be pre-empted in whole or in part? If so, to what degree? Should state requirements be pre-empted only to the extent that the national "do-not-call" registry would provide more protection to consumers? Will the national "do-not-call" registry have greater reach than state requirements with numerous exceptions?

RESPONSE:

By necessity, the interplay between the states and a national Do Mot Call Registry would have to be extensive. The interplay in part would be required to clearly define the boundaries of the state and national laws and programs, as well as to establish an administrative network of support between the state and federal agencies. The existing and proposed enforcement provisions also envision a substantial role for the attorney general's office in each state. The NYCPB recommends that an extensive consumer education campaign be undertaken to ensure a seamless interplay between the state and federal Do Not Call programs in responding to registration and complaint issues to avoid consumer confusion. The cover letter to these comments discusses these issues as well.

New York law currently encompasses both interstate and intrastate calls as long as they terminate in New York. The NYCPB believes that approach should continue, and that the FTC's proposed Registry should constitute an additional option for consumers. Indeed, absent amendment of our enabling legislation (see, GBL § 399-z(1)(d)), or explicit federal pre-emption, which we do not recommend, and do not believe has occurred, the NYCPB will continue to enforce our law with regard to both interstate and intrastate calls (see, NOPR at 15).[1] Consumers in New York State, as well as Governor Pataki and the New York Legislature, have been very supportive of the New York Do Not Call program. Consumers now rely on the privacy protections of

[1] The FTC refers to the proposed national Registry as an "option" for consumers, and other options would presumably include listing on a state Registry as well. The FTC also notes that some states may rescind their own provisions dealing with interstate calls when the Rule becomes effective, but are apparently not required to do so (see, NOPR at 77, 117).

the law to prevent unwanted telemarketing sales calls, and the methods by which those ends are met.

As to the preemption issue, the NYCPB discerns no intent in the instant rulemaking proceeding to preempt the various state Do Not Call programs, nor has any such intent been expressed by Congress. Generally, state actions regarding acts and practices are not preempted by FTC action, unless such state action is inadequate, or counterproductive to the Commission's regulations (see, American Financial Services Ass's v. Federal Trade Commission, 767 F.2d 957 (D.C. Cir. 1985), cert. denied 475 U.S. 1011, 106 S.Ct. 1185, 89 L.Ed. 2d 301 (1986)). The FTC relies for its authority to establish the federal Do Not Call Registry on the provisions of the Telemarketing Consumer Fraud and Abuse Protection Act ("the Act") (see 15 U.S.C. §§ 6101-6108, and the NOPR at 9). The principal provisions of the Act are summarized in the NOPR (at 3). While these include general directions prohibiting a pattern of unsolicited calls that would invade a consumer's privacy, restrictions on the hours of the day and night when telephone calls may be made, and disclosure requirements, there is no explicit authorization to establish a national Do Not Call Registry, nor any authorization to preempt any State Do Not Call efforts or legislation.[2]

As a general matter, to the extent Congress has not explicitly preempted state law, such preemption does not occur, even where such preemption could occur (see, AT&T Corp v. Iowa Utilities Board, 525 U.S. 366, 199 S.Ct. 721, 731, n. 8 (1999)) ("Insofar as Congress has remained silent, however, § 152(b) continues to function," referring to the state powers reservation clause in the FCC legislation). See, 47 U.S.C. § 152(b)), and Louisiana Public Service Commission v. FCC, 476 U.S. 355, 375-376, 106 S.Ct. 1890, 90 L.Ed.2d 369 (1986), where the court noted: "Thus, we simply cannot accept an argument that the FCC may nevertheless take action which it thinks will best effectuate a federal policy. An agency may not confer power upon itself. To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress. This we are both unwilling and unable to do."

Simply put, Congress has not explicitly preempted any state laws that establish and maintain Do Not Call Registries in favor of a similar federal approach for either interstate calls terminating in the state, or intrastate calls. In the absence of such

[2] The Act does not explicitly authorize the establishment of a federal Do Not Call Registry. However, such an action may be taken by the FTC under the traditional latitude afforded agencies in interpreting their own legislation (see Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S.Ct. 2778, 81 L. Ed. 694(1984)), as well as the inherent flexibility of agencies in fashioning remedies that may not have been explicitly anticipated in their enabling legislation in response to "changes in the marketplace" (NOPR at 9, 51-52). However, as will be discussed, such latitude does not extend to the preemption of state laws that are not inconsistent with federal efforts.

statutory preemption, the FTC cannot take such action through its present rulemaking proceeding.[3]

In order to preempt state Do Not Call Registries, the FTC must show that the Supremacy Clause of the United States Constitution, Article VI, Clause Two, has been invoked by Congress in the Act, and that the following preemption tests have been met:

(a) Congress expresses a clear intent to preempt state law;

(b) There is outright or actual conflict between state and federal law;

(c) Compliance with both federal and state law is in effect physically impossible;

(d) There is implicit in federal law a barrier to state regulation;

(e) Congress has legislated comprehensively, occupying the field with no room for the states to supplement federal law;

(f) State law stands as an obstacle to the accomplishment and execution of the full objectives of Congress; and,

(g) Congress has delegated the authority to the FTC to preempt state law.

See, Louisiana v. PSC, supra, 476 U.S. 355, 369, 370, where these tests are summarized, and the various authorities discussed (citations omitted). See also Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 715 (1985), which states that the assumption is "that the historic police powers of the states were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[4] Further, the FTC's rulemaking authority (see, the discussion in the NOPR at 9) is irrelevant unless jurisdiction lies. See AT&T v. Iowa Utilities Board, op. cit., 525 U.S. 366, 119 S.Ct. 721, 730 (1999). In short, with regard to jurisdiction, what is not clearly federal is clearly state jurisdiction by operation of Hillsborounh.

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[3] Indeed, Congress is well aware of states' efforts with regard to the establishment of Do Not Call registries, had an opportunity to recently act in this area (the Act was amended by the USA PATRIOT Act on October 25, 2001 as Public Law 107-560), and did not act to preempt state Do Not Call legislation, but did strengthen federal powers in this regard. Thus, both federal and state action in this area to protect consumers continues to prevail.

[4] See also Jones v. Rath Packing Co., 430 US. 519, 525 (1977), and Medtronic, Inc. v. Lohr, 518 US. 470, 116 S.Ct. 2240, 2250 (1996). a. People of the State of New York v. FCC, 267 F.3d 91, 102 (2d Cir. 2001), where the Louisiana standard of an explicit grant of Congressional authority was upheld, but found to be present because of the explicit grant of federal authority in 47 U.S.C. § 251(e). There is no such explicit grant of authority in the FTC's enabling legislation with regard to state Do Not Call laws.

The better view, given the prior relationships between the states and the federal government on the Do Not Call issue, is that federal authority prevails only when some state action would defeat the purpose of the Act, and the federal authority to preempt is explicitly granted. The various state Do Not Call laws, including New York's, have furthered the purposes of the Act, not frustrated them, by protecting consumers from unwanted telemarketing sales calls. Therefore, since the FTC has not shown any Congressional intent to totally exclude state action in this area (and indeed, the FTC is not attempting preemption, but simply seeking comments on this issue (see NOPR at 129)), the FTC's salutary actions in expanding consumer protection from unwanted telemarketing sales calls are properly viewed as additional protections for consumers, and not preemptive of existing state laws.

However, the clearly overlapping jurisdiction between the proposed federal Rule, and existing state laws, may pose practical administrative challenges that should be the subject of federal-state discussions, and the possible development of administrative protocols. The FTC has not clearly defined the distinction between interstate and intrastate calls in its NOPR,[5] nor has it indicated in very specific terms how a joint enforcement effort on the same complaint would be handled. For example, a New York consumer who is registered on both the New York and the national Registry receives a phone call from a telemarketer in Kansas and calls the NYCPB to file a complaint. Should New York take appropriate enforcement action on the call, and also refer it to the FTC? This would expose the telemarketer to potential liability for double violations. Is that the FTC's intent, or would state action be sufficient for the FTC's purposes? If New York State knew the FTC was acting in a particular case, a wise use of our administrative resources might be to defer to the federal action, at least for interstate calls. The NYCPB has no current position on these issues, but certainly will have to develop one when the proposed federal Do Not Call Registry becomes a reality. Would such matters be resolved on a case-by-case basis? Additionally, how would or could New York verify that the consumer is registered on the national Registry, and how would that complaint be referred? What additional administrative and financial responsibilities will be placed on the states to ensure that interstate complaints are referred to the appropriate federal office, if that ultimately proves to be the best use of joint federal-state action with regard to Do Not Call complaints? Would enforcement actions be delayed to the detriment of consumers because of the necessity of federal-state coordination on interstate complaints?

These matters may well have solutions, but have not been fully considered. As a practical matter, these various questions beg for answers.

As stated above, consumers rely on the existing Do Not Call programs around the country, including New York, for relief from unwanted telemarketing sales calls. Each state has addressed its unwanted telemarketing sales calls issue with a law that fits the needs and lifestyles of the consumers it serves, including various exemptions and exceptions that fit the needs of its citizens and the telemarketing community that

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[5] 15 U.S.C. § 6101 refers to telemarketing only across state lines.

does business with those citizens. The national Registry may potentially prohibit a wider range of unwanted telemarketing sales calls, but such added protection should be carefully coordinated with existing state enforcement efforts.

7. What procedures could ensure that telephone numbers placed on the "do-not-call" registry by consumers who subsequently change their numbers do not stay on the registry? Can information be obtained from the local exchange carriers or other telecommunications entities that would enable this to be done, and if so, how? If not, why not?

RESPONSE:

See the response to question 5(d), supra.

8. What procedures could be established to update numbers in the "do-not-call" registry when the area codes associated with those numbers change?

RESPONSE:

New area codes would have to be entered into national Registry automated registration system as they are created or changed. This process would then allow the automated system to recognize telephone numbers with the new area codes. With respect to those numbers already in the system, New York suggests that the automated registration system be created with an area code change program referencing the areas' telephone prefixes so that groups of area codes can be changed at once instead having administrative personnel update each registration record. Such a transition should be done automatically, and made transparent to the consumer when and if they check their registrations through a toll-free number, or through the Internet. Generally, the recognition systems installed recognize both area codes for a period of a year during the transition.

9. The proposed Rule would permit consumers or donors who have placed their names and/or telephone numbers on the central "do-not-call' registry to provide to specific sellers or charitable organizations express verifiable authorization to receive telemarketing calls from those sellers or telemarketers acting on behalf of those sellers or charitable organizations. (Specific sub-questions a. through e. follow).

RESPONSE:

The responses for sub-questions 9. a. through 9. e. are essentially a variant of Question D(5)(h) regarding opt-out/opt-in, only with respect to the receipt of calls rather than restrictions on calling times. **As** discussed earlier, the technical problems and costs of implementing such a system might be prohibitive. Permitted calls are probably better addressed through exemptions or exceptions rather than on an ad hoc per call basis. See our discussion of Question D(5)(h), supra, for some of the considerations that are involved.

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This concludes the NYCPB responses to the FTC questions. Should the FTC require any clarification of our responses, or require any additional information, please contact our General Counsel, James F. Warden, Jr. at (518) 486-3934, or at the address shown on the March 26, 2002 cover letter accompanying these responses.