

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

In the Matter of)	
)	
Rules and Regulations Implementing the)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991)	
)	

NOTICE OF PROPOSED RULEMAKING

Adopted: November 27, 2007

Released: December 4, 2007

Comment Date: (30 days after publication in the Federal Register).

Reply Comment Date: (45 days after publication in the Federal Register).

By the Commission: Chairman Martin, Commissioners Copps, Adelstein, Tate, and McDowell issuing separate statements.

I. INTRODUCTION

1. In this Notice of Proposed Rulemaking (Notice), we tentatively conclude that we should amend the Commission's rules under the Telephone Consumer Protection Act (TCPA)¹ to require telemarketers subject to our rules to honor registrations with the National Do-Not-Call Registry so that registrations will not automatically expire based on the current five year registration period.² We propose extending this requirement indefinitely to minimize the inconvenience to consumers of having to re-register their preferences not to receive telemarketing calls and to further the underlying goal of the National Registry to protect consumer privacy rights. We seek comment on this tentative conclusion and how to most effectively implement this proposed change.

II. BACKGROUND

2. On December 20, 1991, Congress enacted the TCPA, as codified in section 227 of the Communications Act of 1934, as amended, in an effort to address a growing number of telephone marketing calls and certain telemarketing practices Congress found to be an invasion of consumer privacy.³ In relevant part, the TCPA required the Commission to "initiate a rulemaking proceeding concerning the need to protect residential telephone subscribers' privacy rights"⁴ and specifically

¹ Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991), *codified at* 47 U.S.C. § 227 (TCPA). The TCPA amended Title II of the Communications Act of 1934, 47 U.S.C. § 201 *et seq.* See also 47 C.F.R. § 64.1200 *et seq.*

² 47 C.F.R. § 64.1200(c)(2).

³ See TCPA, Section 2(5), reprinted in 7 FCC Rcd 2736 at 2744.

⁴ 47 U.S.C. § 227(c)(1).

authorized the Commission to consider “the establishment and operation of a single national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations.”⁵

3. On July 3, 2003, the Commission revised the TCPA rules and adopted new rules to provide consumers with several options for avoiding unwanted telephone solicitations.⁶ In particular, the Commission established a National Do-Not-Call Registry, in conjunction with the Federal Trade Commission (FTC), to provide residential consumers with a one-step option to prevent unwanted telemarketing calls.⁷ The National Do-Not-Call Registry, which went into effect October 1, 2003, prohibits telemarketers from contacting those consumers who register their telephone numbers on the do-not-call list, unless the call falls within a recognized exemption.⁸ Pursuant to Commission regulations, telemarketers are required to honor such do-not-call registrations for a period of five years.⁹ The National Do-Not-Call Registry supplemented the long-standing company-specific do-not-call rules which require companies to maintain lists of consumers who ask not to be called by a particular company.¹⁰

4. The Commission also concluded that a “safe harbor” should be established for telemarketers that have made a good faith effort to comply with the national do-not call rules.¹¹ Consistent with the FTC’s rules, the safe harbor provides that a seller or an entity telemarketing on behalf of the seller will

⁵ 47 U.S.C. § 227(c)(3). *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 7 FCC Rcd 8752 (1992) (*1992 TCPA Order*) ; *see also* 47 C.F.R. § 64.1200.

⁶ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014 (2003) (*2003 TCPA Order*). The Commission’s action in the *2003 TCPA Order* responded in part to the Do-Not-Call Implementation Act signed into law on March 11, 2003, which required the Commission to issue a final rule in its ongoing TCPA proceeding within 180 days of enactment, and to consult and coordinate with the Federal Trade Commission to “maximize consistency” with the rules promulgated by the FTC. *See Do-Not-Call Implementation Act*, Pub. L. No. 108-10, 117 Stat. 557 (2003), *codified at* 15 U.S.C. § 6101.

⁷ *2003 TCPA Order*, 18 FCC Rcd at 14034, para. 28.

⁸ The Commission explained that calls that do not fall within the definition of “telephone solicitation” as defined in section 227(a)(3) are not restricted by the do-not-call rules. These include surveys, market research, and political and religious speech calls. The rules also do not prohibit calls by or on behalf of tax-exempt nonprofit organizations, calls to persons with whom the seller or telemarketer has an established business relationship (EBR), calls to businesses, and calls to persons with whom the marketer has a “personal relationship.” *2003 TCPA Order*, 18 FCC Rcd at 14039-40, para. 37.

⁹ 47 C.F.R. §64.1200(c)(2) (“No person or entity shall initiate any telephone solicitation, as defined in paragraph (f)(12) of this section, to: . . . (2) A residential telephone subscriber who has registered his or her telephone number on the national do-not-call registry of persons who do not wish to receive telephone solicitations that is maintained by the federal government. Such do-not-call registrations must be honored for a period of 5 years”). The Commission concluded that a five-year registration period coupled with a monthly purging of disconnected telephone numbers adequately balances the need to maintain accuracy in the national registry with any burden imposed on consumers to re-register periodically their telephone numbers. *See 2003 TCPA Order*, 18 FCC Rcd at 14036-37, para. 31.

¹⁰ 47 C.F.R. § 64.1200(d).

¹¹ *2003 TCPA Order*, 18 FCC Rcd at 14040, para. 38.

not be liable for violating the national do-not-call rules if it can demonstrate that, among other things, it uses a process to prevent telemarketing calls to any telephone number on the Registry and employs a version of the Do-Not-Call Registry obtained from the administrator no more than 31 days prior to the date any call is made.¹² The seller must also maintain records documenting this process.¹³

5. The opening of the National Do-Not-Call Registry was announced on June 27, 2003. That same day, consumers were permitted to begin registering their telephone numbers on the Registry online or by calling a toll-free number. Within the first three days of the Registry's operation, consumers had registered more than 10 million telephone numbers.¹⁴ As of June 2004, one year after opening registration to the public, the National Registry contained more than 62 million telephone numbers. Today, the National Do-Not-Call Registry contains over 145 million numbers.

6. On February 18, 2005, the Commission released a *Second Order on Reconsideration* addressing a number of petitions that raised questions related to the administration and operation of the National Do-Not-Call Registry.¹⁵ The Commission dismissed petitions to the extent they sought reconsideration of the rules establishing the National Do-Not-call Registry. It noted, however, that the Commission will continue to monitor closely the operation of the list to ensure its continued effectiveness.¹⁶

III. DISCUSSION

7. We tentatively conclude that we should amend our rules so that telemarketers will be required to honor registrations with the National Do-Not-Call Registry until the registration is cancelled by the consumer or the telephone number is removed by the database administrator because it was disconnected or reassigned.¹⁷ Under this tentative conclusion, consumer registrations will not expire after five years. We seek comment on this tentative conclusion and how to implement this rule change in coordination with the FTC.

8. The National Do-Not-Call Registry was adopted in large part to make it easier and more efficient for consumers to prevent unwanted telemarketing calls. As explained in Reports to Congress, the Commission believes the number of telephone numbers added to the Registry and the FCC's

¹² See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, 19 FCC Rcd 19215 (2004); 47 C.F.R. §64.1200(c)(2)(i)(D).

¹³ *Id.*

¹⁴ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Annual Report on the National Do-Not-Call Registry, 19 FCC Rcd 24002 (2004).

¹⁵ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Second Order on Reconsideration, 20 FCC Rcd 3788 at 3790-92, paras. 6-9 (2005) (*Second Order on Reconsideration*) (noting DMA petition arguing that keeping wireless numbers on the national list will burden high-volume callers who have already taken measures to eliminate wireless numbers from their marketing lists and contending that the list should not contain business numbers and Brown petition asking the Commission to determine that telemarketers must update their call lists on a daily basis using the National Do-Not-Call Registry).

¹⁶ *Id.* at para. 9.

¹⁷ See Proposed Rules, Appendix A.

experience in both helping to ensure compliance with the Registry and in enforcing the do-not-call rules are strong indicators that the Registry has been successful in curbing the number of unwanted telemarketing calls.¹⁸

9. Therefore, we are concerned that, starting June 28, 2008, five years after the opening of the Registry, as many as 10 million registered numbers will expire and be automatically removed from the database, unless consumers take steps to re-register the numbers.¹⁹ By August 2008, as many as 20 million additional numbers will potentially expire and be purged from the Registry. Such expirations will leave millions of consumers without protection against unwanted telemarketing calls—protections they have come to rely on since registering their numbers in 2003. Removing the current 5-year registration period will alleviate any burdens on consumers associated with re-registering numbers, including the time and effort necessary to register and the need to remember when to re-register. We believe requiring telemarketers to continue honoring do-not-call registrations will also minimize any consumer confusion resulting from a sudden increase in telemarketing calls received when registrations begin to expire next year. In addition, eliminating the need to re-register numbers every five years should lower the cost of operating the National Registry.

10. In adopting the National Registry, the Commission was mindful of concerns regarding the accuracy of the database.²⁰ Initially, the Commission determined that a re-registration requirement should be included given that telephone numbers change hands, are disconnected and reassigned over time.²¹ However, we believe the database administrator's use of technology to check all registered telephone numbers on a monthly basis and remove those numbers that have been disconnected or reassigned will maintain the database's high-level of accuracy.²² In addition, consumers will continue to be able to verify or cancel their registration status using either the telephone or Internet. Allowing consumers to verify their registration status or cancel their registrations at any time also enhances the accuracy of the National Registry.²³

¹⁸ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Annual Report on the National Do-Not-Call Registry, 19 FCC Rcd 24002 (2004); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Annual Report on the National Do-Not-Call Registry, 20 FCC Rcd 14306 (2005); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Annual Report on the National Do-Not-Call Registry, 22 FCC Rcd 999 (2007).

¹⁹ We note that several Members of Congress have recently introduced legislation to amend the Do-Not-Call Implementation Act to eliminate the automatic removal of telephone numbers registered on the Federal "do-not-call" registry. See Do-Not-Call Improvement Act of 2007, S.2096, 110th Cong., 1st Sess. (introduced Sept. 26, 2007) and Do-Not-Call Improvement Act of 2007, H.R. 3541, 110th Cong., 1st Sess. (introduced Sept. 17, 2007) (prohibiting any date of expiration for do-not-call registrations).

²⁰ *2003 TCPA Order*, 18 FCC Rcd at 14036, paras. 30-32.

²¹ *Id.*

²² See *Telemarketing Sales Rule, Final Rule*, Federal Trade Commission, 68 Fed. Reg. 4580 at 4640 (2003) (*FTC Order*).

²³ See *2003 TCPA Order*, 18 FCC Rcd at 14032, para. 22 n.102.

11. We recognize that absent a similar change in the FTC's policies,²⁴ numbers that have been in the Registry for five years may be purged by the database administrator beginning in June 2008, and that telemarketers will no longer have access to those numbers in order to avoid calling them. We note, however, that the FTC recently committed that "it will not drop any telephone numbers from the Registry based on the five-year expiration period pending final Congressional or agency action on whether to make registration permanent."²⁵ We envision working closely with the FTC to ensure that telephone numbers are not removed at the end of the 5-year registration period, and that telemarketers continue to have access to those numbers. We seek comment on how best to coordinate with the FTC to most effectively institute this rule change in a meaningful, consistent way.

12. In light of our tentative conclusion and the FTC's indication that it will retain registrations after the 5-year period, we believe the Registry will continue to operate as it does today. We therefore seek comment on what impact, if any, our proposed rule change would have on telemarketers, particularly small businesses.²⁶ Because telemarketers would be required to continue honoring do-not-call registrations as they do now, we tentatively conclude that the enhanced consumer privacy protections created by this proposed rule amendment, taken in conjunction with the benefits to the federal government in administering the National Registry, outweigh any potential impact.

IV. CONCLUSION

13. We tentatively conclude that requiring telemarketers to honor registrations on the National Do-Not-Call Registry indefinitely will greatly enhance consumer privacy interests. We seek comment on this tentative conclusion and on how best to coordinate this rule change with the FTC. We believe making registrations permanent adequately balances the need to maintain a high level of accuracy in the National Registry with the desire to have a simple and effective means to limit unwanted telemarketing calls.

V. PROCEDURAL MATTERS

A. *Ex Parte* Presentations

14. This proceeding shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.²⁷ Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one- or two-sentence description of the

²⁴ See *FTC Order*, 68 Fed. Reg. 4580 at 4640 ("The [FTC] has determined that consumer registrations will remain valid for five years, with the registry periodically being purged of all numbers that have been disconnected or reassigned").

²⁵ See Statement of The Federal Trade Commission, "Enhancing FTC Consumer Protection in Financial Dealings, with Telemarketers, and on the Internet," presented by Lydia Parnes, Director of the Bureau of Consumer Protection at the Federal Trade Commission, before the Committee on Energy and Commerce, Subcommittee on Commerce, Trade, and Consumer Protection, U.S. House of Representatives, October 23, 2007.

²⁶ See also *infra* Initial Regulatory Flexibility Analysis, Appendix B.

²⁷ 47 C.F.R. §§ 1.1200, 1.1206; *Amendment of 47 C.F.R. § 1.1200 et seq. Concerning Ex Parte Presentations in Commission Proceedings*, GC Docket No. 95-21, Report and Order, 12 FCC Rcd 7348 (1997).

views and arguments presented is generally required.²⁸ Other rules pertaining to oral and written presentations are set forth in Section 1.1206(b) of the Commission's rules as well.

B. Comment Filing Procedures

15. Pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. All filings related to this Notice of Proposed Rulemaking should refer to **CG Docket No. 02-278**. Comments may be filed using: (1) the Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's rulemaking Portal, or (3) by filing paper copies. *See* Electronic Filing of Documents in Rulemaking Proceedings, 63 Fed. Reg. 24,121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://www.fcc.gov/cgb/ecfs> or the Federal eRulemaking Portal: <http://www.regulations.gov>. Filers should follow the instructions provided on the website for submitting comments.
 - ECFS filers must transmit one electronic copy of the comments for CG Docket No. 02-278. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to ecfs@fcc.gov, and include the following words in the body of the message, "get form." A sample form and directions will be sent in response.
- Paper Filers: Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Marlene H. Dortch, Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554.

- The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, DC 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, S.W., Washington, DC 20554.

²⁸ 47 C.F.R. § 1.1206(b)(2).

16. Comments and reply comments and any other filed documents in this matter may be obtained from Best Copy and Printing, Inc., in person at 445 12th Street, S.W., Room CY-B402, Washington, DC 20554, via telephone at (202) 488-5300, via facsimile at (202) 488-5563, or via e-mail at FCC@BCPIWEB.COM. The pleadings will also be available for public inspection and copying during regular business hours in the FCC Reference Information Center, Room CY-A257, 445 12th Street, S.W., Washington, DC 20554, and through the Commission's Electronic Comment Filing System (ECFS) accessible on the Commission's Web site, <http://www.fcc.gov/cgb/ecfs>.

17. To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (TTY). This Notice can also be downloaded in Word and Portable Document Format at <http://www.fcc.gov/cgb/policy>.

18. Commenters who file information that they believe should be withheld from public inspection may request confidential treatment pursuant to Section 0.459 of the Commission's rules. Commenters should file both their original comments for which they request confidentiality and redacted comments, along with their request for confidential treatment. Commenters should not file proprietary information electronically. *See Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, Report and Order, 13 FCC Rcd 24816 (1998), *recon.*, 14 FCC Rcd 20128 (1999). Even if the Commission grants confidential treatment, information that does not fall within a specific exemption pursuant to the Freedom of Information Act (FOIA) must be publicly disclosed pursuant to an appropriate request. *See* 47 C.F.R. § 0.461; 5 U.S.C. § 552. We note that the Commission may grant requests for confidential treatment either conditionally or unconditionally. As such, we note that the Commission has the discretion to release information on public interest grounds that does fall within the scope of a FOIA exemption.

C. Initial Regulatory Flexibility Analysis

19. Pursuant to the Regulatory Flexibility Act of 1980, as amended (RFA),²⁹ the Commission's Initial Regulatory Flexibility Analysis is attached as Appendix B.

D. Paperwork Reduction Act Analysis

20. This document does not contain new or modified information collection requirements subject to the PRA of 1995, Public Law 104-13. In addition, it does not contain any new or modified "information collection burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198.³⁰

VI. ORDERING CLAUSES

21. Accordingly, IT IS ORDERED that, pursuant to Sections 1-4, 227, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 227 and 303(r); and Section 64.1200 of the Commission's rules, 47 C.F.R. § 64.1200, this Notice of Proposed Rulemaking in CG Docket No. 02-278 IS ADOPTED.

²⁹ *See* 5 U.S.C. §§ 601 *et seq.*

³⁰ 44 U.S.C. § 3506(c)(4).

22. IT IS FURTHER ORDERED that, pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on this Notice of Proposed Rulemaking on or before 30 days after publication in the Federal Register, and reply comments on or before 45 days after publication in the Federal Register.

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

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A**Proposed Rules**

Part 64 of the Code of Federal Regulations is amended as follows:

PART 64 – MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

1. The authority citation for part 64 as of October 1, 2006 continues to read as follows:

47 U.S.C. 154, 254(k); secs. 403(b)(2)(B)(c), Pub. L. 104-104, 110 Stat. 56. Interpret or apply 47 U.S.C. 201, 218, 222, 225, 226, 228, and 254(k) unless otherwise noted.

* * * * *

2. Section 64.1200(c)(2) is revised to read as follows:

(c) * * *

(1) * * *

(2) A residential telephone subscriber who has registered his or her telephone number on the national do-not-call registry of persons who do not wish to receive telephone solicitations that is maintained by the federal government. Any person or entity making telephone solicitations (or on whose behalf telephone solicitations are made) will not be liable for violating this requirement if:

(i) * * *

(A) * * *

(B) * * *

(C) * * *

(D) Accessing the national do-not-call database. It uses a process to prevent telephone solicitations to any telephone number on any list established pursuant to the do-not-call rules, employing a version of the national do-not-call registry obtained from the administrator of the registry no more than 31 days prior to the date any call is made, and maintains records documenting this process; and

* * * * *

APPENDIX B

Initial Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),¹ the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this Notice of Proposed Rule Making (Notice). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments provided in paragraph 23 of the item. The Commission will send a copy of this Notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).² In addition, the Notice and IRFA (or summaries thereof) will be published in the Federal Register.³

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

2. In 2003, the Commission released a Report and Order (*2003 TCPA Order*) revising the TCPA rules to respond to changes in the marketplace for telemarketing. Specifically, we established in conjunction with the FTC a National Do-Not-Call Registry for consumers who wish to avoid unwanted telemarketing calls. The National Do-Not-Call Registry supplements long-standing company-specific rules which require companies to maintain lists of consumers who have directed the company not to contact them by phone. The *2003 TCPA Order* required telemarketers to honor do-not-call registrations on the National Registry for five years. It also revised the company-specific do-not-call rules to reduce the retention period for such do-not-call requests from ten to five years. This Notice tentatively concludes to amend the Commission's rules so that registrations with the National Do-Not-Call Registry will not expire after a period of five years. Telemarketers will instead be required to honor such registrations until consumers cancel the registrations or the numbers are removed because they were disconnected or reassigned.

B. Legal Basis

3. The proposed action is authorized under Sections 1-4, 227, and 303(r) of the Communications Act of 1934, as amended; the Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394; and the Do-Not-Call Implementation Act, Pub. L. No. 108-10, 117 Stat. 557.

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

4. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.⁴ The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small

¹ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. § 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

² See 5 U.S.C. § 603(a).

³ See 5 U.S.C. § 603(a).

⁴ 5 U.S.C. § 603(b)(3).

organization," and "small governmental jurisdiction."⁵ In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.⁶ A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.⁷

5. The modifications to the regulations proposed in this item on telephone solicitation apply to a wide range of entities, including all entities that use the telephone to advertise. That is, the proposed rule changes would affect the myriad of businesses throughout the nation that use telemarketing to advertise. Thus, we expect that the proposals in this NPRM could have a significant economic impact on a substantial number of small entities, including the following:

6. *Interexchange Carriers.* Neither the Commission nor the SBA has developed a specific size standard for small entities specifically applicable to providers of interexchange services. The closest applicable size standard under the SBA rules is for Wired Telecommunications Carriers. Under that standard, such a business is small if it has 1,500 or fewer employees.⁸ According to the FCC's *Telephone Trends Report* data, 281 carriers reported that their primary telecommunications service activity was the provision of interexchange services.⁹ Of these 281 carriers, an estimated 254 have 1,500 or fewer employees, and 27 have more than 1,500 employees.¹⁰ Consequently, we estimate that a majority of interexchange carriers may be affected by the rules.

7. *Incumbent Local Exchange Carriers.* Neither the Commission nor the SBA has developed a small business size standard for providers of incumbent local exchange services. The closest applicable size standard under the SBA rules is for Wired Telecommunications Carriers. Under that standard, such a business is small if it has 1,500 or fewer employees.¹¹ According to the FCC's *Telephone Trends Report* data, 1,310 incumbent local exchange carriers reported that they were engaged in the provision of local exchange services.¹² Of these 1,310 carriers, an estimated 1,025 have 1,500 or fewer employees and 285 have more than 1,500 employees.¹³ Consequently, the Commission estimates that the majority

⁵ 5 U.S.C. § 601(6).

⁶ 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to the RFA, the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." 5 U.S.C. § 601(3).

⁷ Small Business Act, 15 U.S.C. § 632 (1996).

⁸ 13 C.F.R. § 121.201, NAICS code 517110.

⁹ FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, *Trends in Telephone Service*, at Table 5.3, p. 5 - 5 (May 2004) (*Telephone Trends Report*). This source uses data that are current as of October 22, 2003.

¹⁰ *Id.*

¹¹ 13 C.F.R. § 121.201, NAICS code 517110.

¹² *Telephone Trends Report*, Table 5.3.

¹³ *Id.*

of providers of local exchange service are small entities that may be affected by the rules and policies adopted herein.

8. *Wireless Service Providers.* In November of 2007, The SBA developed a small business size standard for small businesses in the category “Wireless Telecommunications Carriers (except satellite).”¹⁴ Under that SBA category, a business is small if it has 1,500 or fewer employees.¹⁵ Thus, under this category and the associated small business size standard, the great majority of firms can be considered small. For a census category that existed for a prior version of the NAICS codes, namely “Cellular and Other Wireless Telecommunications,” Census Bureau data for 2002 show that there were 1,397 firms in this category that operated for the entire year.¹⁶ Of this total, 1,378 firms had employment of 999 or fewer employees, and 19 firms had employment of 1,000 employees or more.¹⁷ Thus, under this category and size standard, the majority of firms can be considered small.

9. Ordinarily, we do not seek comment on the entities that must comply with proposed rules. However, the proposed rules in this document potentially could apply to any entity, including any telecommunications carrier, that uses the telephone to advertise. Thus, under these unusual circumstances, we seek comment on whether the approximately 4.44 million small business firms in the United States, as identified in SBA data, will need to comply with these rules, or whether it is reasonable to assume that only a subset of them will be subject to these rules given that not all small businesses use the telephone for advertising purposes.¹⁸ After evaluating the comments, the Commission will examine further the effect any rule changes might have on small entities not named herein, and will set forth our findings in the final Regulatory Flexibility Analysis.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

10. The Notice proposes to amend the National Do-Not-Call Registry rules to require telemarketers to honor registrations until consumers cancel their registrations. This proposed rule change will affect reporting, recordkeeping and other compliance requirements, as numbers currently registered will not be removed from the Registry after five years. However, as long as the FTC similarly changes its policies, we expect that telemarketers would continue to access the Registry and avoid calling numbers on the Registry as they are required to do so today.

¹⁴ 13 C.F.R. § 121.201, NAICS code 517210.

¹⁵ *Id.*

¹⁶ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, “Establishment and Firm Size Including Legal Form of Organization,” Table 5, superseded NAICS code 517212.

¹⁷ *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with “1000 employees or more.”

¹⁸ U.S. Department of Commerce, Bureau of the Census, 1992 Census of Transportation, Communications, and Utilities, UC 92-S-1, Subject Series, Establishment and Firm Size, Table 2D, Employment Size of Firms.

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

11. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.¹⁹

12. The Commission is considering amending its rules to require telemarketers to honor national do-not-call registrations indefinitely and is seeking comment on this option. The alternative would be to not modify the rules and leave the registration period at 5 years. This would result in millions of national do-not-call registrations being removed from the Registry in 2008 and leaving consumers without protection from unwanted telemarketing calls unless they take action to re-register. Small businesses, which believe the elimination of any date of expiration for registrations would impact their business in a negative way, are requested to file comments and advise the Commission about such an impact.

F. Federal Rules that May Duplicate, Overlap, or Conflict With the Proposed Rule

13. The FCC's TCPA rules and the FTC's Telemarketing Sales Rule are duplicative in part. Should the Commission determine to amend its rules and there is no similar amendment made to the FTC's policies, the two sets of rules may be inconsistent.

¹⁹ See 5 U.S.C. § 603(c).

**STATEMENT OF
CHAIRMAN KEVIN J. MARTIN**

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

Today's action tentatively concludes that telephone numbers registered in the National Do-Not-Call Registry will not expire after 5 years. The Commission continues to move forward to protect consumers who have registered their telephone numbers on the Do-Not-Call list. Consumers expect their telephone numbers to remain protected under the Do-Not-Call list until they have cancelled their registration or their telephone number is disconnected or reassigned.

At the direction of Congress, the National Do-Not-Call Registry was adopted to make it easier and more efficient for consumers to prevent unwanted telemarketing calls. Since the opening of the National Do-Not-Call Registry was announced in June of 2003, over 145 million telephone numbers have been placed on the Registry. However, if the Commission does not take action, millions of telephone numbers may expire leaving millions of consumers without protection from unwanted telemarketing calls. Today's action sets us on a path to minimize consumer confusion for those consumers that have chosen to avoid unwanted telemarketing calls. I expect the Commission to evaluate the record we develop and move forward in a timely manner to ensure that consumers registered on the National Do Not Call Registry continue to maintain the privacy they deserve.

**STATEMENT OF
COMMISSIONER MICHAEL J. COPPS**

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

Nearly five years ago the Commission in coordination with the Federal Trade Commission established the Do-Not-Call Registry that allowed consumers to put limits on the telemarketing calls they received. At the time, we made registrations valid for a finite period of time – five years – in order to allow the FCC to evaluate the program. My how time flies. June 2008 will mark five years and unless the Commission acts, in conjunction with the FTC, to make these registrations permanent, tens of millions of consumers will again be eligible for the constant barrage of unwanted telemarketing calls. This Notice of Proposed Rulemaking is the first step towards ensuring that we are able to make the registrations permanent. It tentatively concludes that the Commission should make registrations with the Do-Not-Call Registry permanent and it seeks comment on how best to implement the proposed change. Upon completion of such a rule change, consumers will not need to re-register nor take any further action in order to remain on the Do-Not-Call Registry. I am pleased the Commission does not ask consumers to take any further action in order to keep unwanted telemarketing calls in abeyance. I am pleased to support this item.

**STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN**

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

I am pleased to support this item which seeks comment on how we can extend the benefits of the National Do-Not-Call Registry for millions of Americans who stand to lose its protection as their registrations expire over the next year. The Do-Not-Call Registry was one of the greatest boons for consumers this agency has ever put forth. It is important that we do everything within our power to maintain its vitality as a tool to protect the privacy of American families.

The Do-Not-Call Registry benefits consumers on a daily basis and in a very personal way. For millions of families, the Registry has restored peace and quiet around the dinner table and has allowed them to once again view their phones as a useful connection to the world rather than a source of nightly harassment. So, it is important that we turn our attention to the fact that the registrations of 10 to 30 million consumers are set to expire next summer. This is a ticking time bomb for consumer privacy. We needed to open this rulemaking to investigate what we can do to extend the benefits of the Registry for these consumers. It is not immediately clear that the FCC alone can prevent the expiration of consumers' registrations, so it is important that we get started with this investigation now. I look forward to working with my colleagues at the Commission, our partners in developing and enforcing the Registry at the Federal Trade Commission, and Congress as we move forward with this effort to make sure that consumers retain control over their phones.

**STATEMENT OF
COMMISSIONER DEBORAH TAYLOR TATE**

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

I have been a strong supporter of the Do-Not-Call program as a state commissioner and certainly as a consumer. Dinner time is a lot quieter and the program has been wildly popular with consumers. In fact, in Tennessee alone, more than 3 million phone numbers have been listed since the establishment of the Tennessee program in 1999. The Tennessee Regulatory Authority (TRA) has been extremely vigilant in responding to complaints and has issued enforcement actions against violators exceeding \$300,000. I am very proud of the work done by the TRA and many other state commissions that oversee state programs.

Likewise, the federal government established a Do-Not-Call program in 2003. As in Tennessee, the Do-Not-Call program has been extremely popular, with over 145 million consumers registering their telephone numbers, and has been very successful in curbing the number of unwanted telemarketing calls.

Unfortunately registered numbers will begin to expire next year and that is why our action today is so important. I am committed to working with Congress and the Federal Trade Commission in taking whatever steps are necessary to ensure that this important protection remains an effective means for consumers to be free of unwanted telephone solicitations.

**STATEMENT OF
COMMISSIONER ROBERT M. MCDOWELL**

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

The Telephone Consumer Protection Act gives us responsibility to protect residential telephone subscribers' privacy rights to avoid receiving objectionable telephone solicitations. In 2003, we established the National Do-Not-Call registry in cooperation with our sister agency, the Federal Trade Commission. Out of an abundance of caution concerning the accuracy of the database, the registrations were to be valid for five years. Over the past four years, the Registry has proven to be an effective vehicle to prevent consumers from receiving unwanted telephone solicitations from telemarketers. In fact, consumers have registered over 145 million telephone numbers, and I am one of them.

Now that we are approaching the five-year mark for the first of the registrations, it is appropriate that we consider whether to make the registrations permanent, unless a subscriber cancels the registration or the number is disconnected or reassigned. I look forward to quickly reviewing the comments so that we can take action well before the five-year expiration of the first registrations, on June 28, 2008, and provide certainty to consumers and continued protection from unwanted solicitations. I also anticipate coordinating with the FTC to achieve our joint statutory responsibilities under the Telephone Consumer Protection Act.