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02-278

August 24, 2004

BY HAND

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
c/o 236 Massachusetts Avenue, N.E., Suite 110
Washington, DC 20002

Re: Petition for Declaratory Ruling

Dear Ms. Dortch:

Transmitted herewith on behalf of American Teleservices Association, Inc. is an original and four copies of its Petition for Declaratory Ruling with respect to certain provisions of the New Jersey Consumer Fraud Act and the New Jersey Administrative Code.

Should any questions arise concerning this matter, please contact Mitchell N. Roth of this firm at (703) 760-5201.

Sincerely,

Mark Blacknell

Enclosures

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AND RETURN**

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of:

American Teleservices Association, Inc.

**Petition for Declaratory Ruling with Respect to
Certain Provisions of the New Jersey Consumer
Fraud Act and the New Jersey Administrative Code**

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File No.

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AUG 24 2004

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

PETITION FOR DECLARATORY RULING

**Mitchell N. Roth, Esq.
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August 17, 2004

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SUMMARY

On July 25, 2003, the Federal Communications Commission ("Commission") published its revised Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991 ("Commission Rules") in the Federal Register, setting forth amended rules pertaining to, *inter alia*, interstate telemarketing. The Commission Rules emphasize the need to balance consumer privacy concerns with the interests of companies engaged in legitimate telemarketing.

In pertinent part, the Commission Rules establish a national do-not-call registry for consumers who wish to avoid unwanted telemarketing calls. They also require telemarketers to make certain mandatory disclosures at the commencement of the telemarketing call. In order to protect telemarketers' legitimate business interests, the Commission Rules contain several exemptions that permit telemarketers to initiate calls to subscribers whose telephone numbers are on the registry.

The Commission's Rules note that although states may impose more stringent restrictions on intrastate telemarketing, any state rules applicable to interstate telemarketing that are inconsistent with and more restrictive than those imposed by the Commission Rules frustrate the federal objective of creating uniform national rules, impose burdensome compliance costs for telemarketers and will likely cause consumer confusion. Furthermore, according to the Commission, any more restrictive state rule almost certainly would be preempted. The Commission invited any party to seek from the Commission a declaratory ruling preempting any state rule pertaining to interstate telemarketing to the extent it is more restrictive than the Commission Rules.

On or about May 17, 2004, the New Jersey Division of Consumer Affairs published rules implementing the New Jersey Consumer Fraud Act ("New Jersey Rules") in the New Jersey Register. As described herein, the New Jersey Rules create significantly more prohibitive restrictions on interstate telemarketing than those contained in the Commission Rules, despite the Commission's clear and unambiguous request that states not embark on such a legislative or regulatory path.

Pursuant to the Commission's invitation and other regulatory authorization, the American Teleservices Association, Inc. files this Petition for Declaratory Ruling seeking federal preemption of those excessive provisions of the New Jersey Consumer Fraud Act and New Jersey Rules applicable to interstate telemarketing to the extent they are more restrictive than the Commission Rules.

**Before the
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Certain Provisions of the New Jersey Consumer)	
Fraud Act and the New Jersey Administrative Code)	

PETITION FOR DECLARATORY RULING

Pursuant to section 252(e)(5) of the Telecommunications Act of 1996,¹ sections 1.1 and 1.2 of the rules and regulations of the Federal Communications Commission ("Commission"),² the Administrative Procedure Act,³ and a specific invitation from the Commission,⁴ the American Teleservices Association, Inc. ("ATA"), by its attorneys and on behalf of its members, hereby respectfully requests that the Commission issue a declaratory ruling preempting certain provisions of the New Jersey Consumer Fraud Act ("New Jersey Act")⁵ and title 13, section 45D of the New Jersey Administrative Code ("New Jersey Rules")⁶ as they relate to interstate telemarketing to the extent they are more restrictive than the regulations established by the

¹ 47 U.S.C. § 252(e)(5) (2000).

² 47 C.F.R. §§ 1.1, 1.2 (2003).

³ 5 U.S.C. § 554(e) (2000).

⁴ Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991, 68 Fed. Reg. 44,144, 44,155 (July 25, 2003) ("Accordingly, any party that believes a state law is inconsistent with section 227 or our rules may seek a declaratory ruling from the Commission.").

⁵ N.J. STAT. ANN. § 56:8-119, *et. seq.* (West 2003).

⁶ N.J. ADMIN. CODE tit. 13, § 45D (2004). The New Jersey Attorney General promulgated the New Jersey Rules, effective May 17, 2004, based upon authority contained in the New Jersey Act ("The division, pursuant to the provisions of the 'Administrative Procedure Act,' shall promulgate rules and regulations necessary to implement this act . . ."). N.J. STAT. ANN. § 56:8-134 (West 2003) (internal citation omitted).

Commission in its Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991 ("Commission Rules").⁷

I. BACKGROUND

A. STATEMENT OF INTEREST

ATA is a national trade organization with an industry-wide membership that collectively produces over \$500 billion in annual sales. Its member organizations represent all facets of the teleservices industry and provide traditional and innovative services to Fortune 500 companies. Many ATA member organizations initiate interstate telephone solicitations to existing and potential subscribers who are New Jersey residents.

Enforcement of certain provisions of the New Jersey Act and the New Jersey Rules to the extent they are more restrictive than the Commission Rules will have a significant and material adverse impact on its member organizations.

B. THE NEW JERSEY ACT AND THE NEW JERSEY RULES

Of particular concern to ATA and its members are the breadth of the New Jersey Act and the New Jersey Rules and the extent to which they directly conflict with, and are more restrictive than, the Commission Rules. Specifically, the New Jersey Rules impose upon out-of-state telemarketers who initiate interstate telephone solicitations to New Jersey subscribers compliance burdens that go substantially above and beyond those imposed by the Commission

⁷ Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991, 68 Fed. Reg. 44,144 (July 25, 2003). ATA does not acknowledge the underlying constitutionality of either the Commission Rules, the New Jersey Act or the New Jersey Rules. ATA has specifically challenged the constitutionality of the Commission Rules and has requested the United States Supreme Court to review same. See *Mainstream Mktg. Servs., Inc. v. FTC*, 283 F.Supp.2d 1151 (D. Colo. 2003), *stay denied*, 284 F.Supp.2d 1266 (D. Colo. 2003), *stay granted*, 345 F.3d 850 (10th Cir. 2003), *and rev'd*, 358 F.3d 1228 (10th Cir. 2004), *pet. for cert. filed*, *American Teleservs. Ass'n v. FTC*, No. 03-1552 (U.S. May 14, 2004). ATA expressly preserves all challenges to the constitutionality of any statute or regulation implementing a government-sponsored do-not-call list.

Rules.⁸ The Commission, itself, recognized the importance of supporting Congress' objective of creating uniform national rules:

Although section 227(e) gives states authority to impose more restrictive intrastate regulations, we believe that it was the clear intent of Congress generally to promote a uniform regulatory scheme under which telemarketers would not be subject to multiple, conflicting regulations. We conclude that inconsistent interstate rules frustrate the federal objective of creating uniform national rules, to avoid burdensome compliance costs for telemarketers and potential consumer confusion. The record in this proceeding supports the finding that application of inconsistent rules for those that telemarket on a nationwide or multi-state basis creates a substantial compliance burden for those entities.

We therefore believe that any state regulation of interstate telemarketing calls that differs from our rules almost certainly would conflict with and frustrate the federal scheme and almost certainly would be preempted. We will consider any alleged conflicts between state and federal requirements and the need for preemption on a case-by-case basis. Accordingly, any party that believes a state law is inconsistent with section 227 or our rules may seek a declaratory ruling from the Commission. We reiterate the interest in uniformity—as recognized by Congress—and encourage states to avoid subjecting telemarketers to inconsistent rules. [Emphasis added].⁹

Three provisions in the New Jersey Act and/or New Jersey Rules are significantly more restrictive than corresponding provisions in the Commission Rules:

- A) The New Jersey Rules provide for only limited incorporation of the “established business relationship” exemption. Specifically, the New Jersey Rules fail to exempt calls to subscribers who: (a) completed transactions with the seller within eighteen (18) months of the date of the telemarketing call, or (b) inquired into, or applied for, the seller's products or services within three (3) months of the date of the telemarketing call. Furthermore, the New Jersey Rules fail to extend to a seller's affiliates any qualifying “established business relationship” that a seller may have with a subscriber;

⁸ The Commission Rules authorize states to promulgate and enforce regulations that are more restrictive than those established by the Commission, but only with respect to intrastate telemarketing. 68 Fed. Reg. at 44,155.

⁹ 68 Fed. Reg. at 44,155.

- B) The New Jersey Rules fail to exempt telephone solicitations to subscribers with whom the telemarketer has a personal relationship; and
- C) The New Jersey Act and the New Jersey Rules require that the telemarketer disclose the name of the telemarketing entity initiating the call, and apply entity-specific do-not-call requests to both sellers and telemarketers.

The New Jersey Rules do not limit the scope of these Rules to intrastate telemarketing; rather the New Jersey Rules apply to all telemarketing calls to New Jersey customers regardless of their point of origin.¹⁰ In fact, the Division of Consumer Affairs expressly confirmed that its rules apply to all telemarketers, regardless of from where the call was initiated, on its Internet web site:

20. What if the telemarketer is based outside of the State of New Jersey?

The New Jersey "Do Not Call" law covers telemarketing sales calls to New Jersey consumers. This means that New Jersey Division of Consumer Affairs has the authority to take enforcement action against telemarketers who call New Jersey consumers whose residential telephone numbers and/or mobile phone numbers are on the federal "Do Not Call" registry regardless of where the telemarketer is based or where the call was placed from.¹¹

II. DISCUSSION

A. THE NEW JERSEY RULES ARE INCONSISTENT WITH THE COMMISSION RULES' ESTABLISHED BUSINESS RELATIONSHIP EXEMPTION

Although the Commission Rules prohibit telemarketers from initiating telephone solicitations to telephone numbers on the national do-not-call registry,¹² calls to subscribers with

¹⁰ N.J. ADMIN. CODE tit. 13, § 45D-1.2.

¹¹ James E. McGreevey, Governor, Peter C. Harvey, Attorney General, Reni Erdos, Director, *FAQ's, New Jersey's Do Not Call Law*, <http://www.nj.gov/donotcall/consumerfaqs.pdf> (Attached at Exhibit 1).

¹² *Id.* § 64.1200(c)(2).

whom the seller has an “established business relationship” are excluded from this restriction.¹³ The established business relationship exemption contained in the Commission Rules has two prongs, *transaction-based* and *inquiry-based*.

1. The New Jersey Rules’ Transaction-Based Established Business Relationship Exemption Is Narrower and More Restrictive than the Commission Rules’ Exemption

The transaction-based prong of the Commission’s established business relationship exemption authorizes a telemarketer to initiate a call to a subscriber whose telephone number is on the national do-not-call registry (“DNCR”), provided the subscriber purchased a product or service from, or entered into a transaction with, the seller within eighteen (18) months immediately preceding the date of the telemarketing call.¹⁴ By adopting this exemption, the Commission recognized that important aspects of sellers’ business plans are based upon contacting subscribers with whom they already have a business relationship.¹⁵ Moreover, according to the Commission, the exemption recognizes that such customers typically expect calls from sellers with whom they have an established business relationship and, in fact, that these customers often receive benefits from these calls.¹⁶

The New Jersey Rules, on the other hand, provide a significantly narrower and more restrictive transaction-based exemption, authorizing telemarketers to initiate calls to subscribers on the “No Telemarketing Call” list only if they are:

¹³ *Id.* § 64.1200(f)(9)(ii).

¹⁴ *Id.* § 64.1200(f)(3).

¹⁵ Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991, 68 Fed. Reg. 44,144, 44,147 (July 25, 2003).

¹⁶ *Id.* at 44,158.

1. Calls to an "existing customer"¹⁷ which the New Jersey Rules define as "[a] person who is obligated to make payments to a seller on merchandise purchased" or "[a] person who has entered into a written contract with a seller where there is an obligation to perform, either by the customer, seller, or both."¹⁸
2. [C]alls made to an "existing customer" to whom a seller's sole obligation is the extension of credit, provided such calls are made within 18 months of the date of the customer's last credit transaction or until the satisfaction of the credit obligation, whichever is later,¹⁹ or
3. Calls to an established customer, provided the call is "limited to the provision of continuing services and does not relate to expanded services, upgrades, products or other services unless directly related to the particular service or services previously provided."²⁰

Under the New Jersey Rules, a telemarketer may initiate telephone solicitations to numbers on the No Telemarketing Call List only if the seller is currently transacting business with the subscriber. Calls to subscribers who have *completed* transactions with the seller within eighteen (18) months of the call are not permitted

Equally confusing and unnecessary, and certainly more restrictive than the Commission Rules, is the New Jersey Rules' creation of an "established customer" exemption, a designation that has no correlation with any component of the Commission Rules.

The New Jersey Rules define "established customer" as "a customer for whom a seller has previously provided continuing services where the relationship has not been affirmatively or

¹⁷ N.J. ADMIN. CODE tit. 13, § 45D-4.2(a)(1) (2004).

¹⁸ *Id.* § 45D-1.3.

¹⁹ *Id.* § 45D-4.2(a)(2).

²⁰ *Id.* § 45D-4.4.

constructively terminated.”²¹ The New Jersey Rules define “continuing services” as “the performance of work, the provision of medical care or other professional services or the affording of access to a utility, typically provided to an established customer on a recurring basis.”²²

The treatment of the sale of services differently than the sale of goods is unprecedented, unwarranted and unexplained by the New Jersey Attorney General. Moreover, the New Jersey Rules restrict the “established customer” exemption to calls to provide continuing services that are within the scope of the services currently offered to the subscribers--telemarketers may not initiate calls to subscribers for the purpose of selling additional services not currently provided.²³

In contrast, the Commission Rules do not restrict the established business relationship by product or service. Sellers are permitted to offer consumers their full range of products and services, even if the offered product or service exceeds the scope of the subscriber’s relationship with the seller.²⁴

2. The New Jersey Rules Do Not Contain an Inquiry-Based Existing Business Relationship Exemption

The inquiry-based prong of the Commission’s established business relationship exemption authorizes a telemarketer to initiate a telephone solicitation to a subscriber whose telephone number is on the national DNCR within three (3) months after the date on which the

²¹ *Id.*

²² *Id.*

²³ *Id.* § 45D-4.4 (“A telemarketer may call an established customer on the no telemarketing call list or telemarketer specific no call list provided that the call is limited to the provision of continuing services and does not relate to expanded services, upgrades, products or other services unless directly related to the particular service or services previously provided.”).

²⁴ Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991, 68 Fed. Reg. 44,144, 44,159 (July 25, 2003).

subscriber inquired into, or applied for, the sellers products or services.²⁵ This permits subscribers to obtain requested information easily, while protecting them from overly aggressive telemarketers, a result that comports with the legislative history and intent of the TCPA.²⁶

The New Jersey Rules, on the other hand, contain no such provision, so telemarketers are unable to call subscribers whose telephone numbers are on the No Telemarketing Call List even if those subscribers specifically inquired into, or applied for, the sellers' products or services. In fact, telemarketers may not even return a subscriber's telephone inquiry if the telephone number is on the No Telemarketing Call List.

3. **The New Jersey Rules Do Not Extend "Existing Customer" and "Established Customer" Exemptions to a Company's Affiliates**

The Commission Rules extend the established business relationship exemption to affiliates of sellers if the subscriber would reasonably expect the affiliate to be included in the exemption.²⁷ The Commission noted that the inclusion of certain affiliates within the exemption offers flexibility to companies whose subsidiaries and affiliates also make telephone solicitations.²⁸

In contrast, the New Jersey Attorney General has ruled specifically that "existing customer" and "established customer" exemptions do not extend to a company's affiliates,²⁹ thereby making them far more restrictive than the Commission Rules.

²⁵ 47 C.F.R. § 64.1200(f)(3) (2003).

²⁶ 68 Fed. Reg. at 44,158.

²⁷ *Id.* at 44,159.

²⁸ *Id.*

²⁹ N.J. ADMIN. CODE tit. 13, § 45D-4.1(c)(1) (2004).

B. THE NEW JERSEY RULES FAIL TO PROVIDE A PERSONAL RELATIONSHIP EXEMPTION

The Commission Rules specifically permit a telemarketer to initiate a telephone solicitation to a subscriber whose telephone number is on the national do-not-call registry provided the telemarketer has a personal relationship with the subscriber.³⁰ The Commission Rules define "personal relationship" as any family member, friend, or acquaintance of the telemarketer making the call.³¹ The Commission's rationale for creating this exemption is logical – calls to family members, friends and acquaintances of the caller are expected by the recipient and do not represent the type of solicitations to which subscribers object.³²

The New Jersey Rules fail to provide this exemption, thereby making them more restrictive than the Commission Rule.

C. THE DISCLOSURE REQUIREMENTS OF THE NEW JERSEY ACT AND THE NEW JERSEY RULES ARE FAR STRICTER THAN THOSE CONTAINED IN THE COMMISSION RULES

The Commission Rules require telemarketers to make certain disclosures upon the commencement of a telephone solicitation. Specifically, telemarketers must provide subscribers with the name of the individual caller, the name of the entity on whose behalf the call is being made, and a telephone number or address at which the person or entity may be contacted.³³

In addition to disclosures required by the Commission Rules, the New Jersey Act³⁴ and the New Jersey Rules³⁵ require telemarketers to disclose the name of the telemarketing entity

³⁰ 47 C.F.R. § 64.1200(c)(2)(iii) (2003).

³¹ *Id.* § 64.1200(f)(11).

³² Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991, 68 Fed. Reg. at 44,149.

³³ 47 C.F.R. § 64.1200(d)(4) (2003).

³⁴ N.J. STAT. ANN. § 56:8-128(b) (West 2003).

making the call and to make all required disclosures within the first thirty (30) seconds of the telephone call.³⁶ The Commission Rules contain no specific time period within which disclosures must be made. The New Jersey Rules force telemarketers to create separate calling scripts and reprogram automated screen prompt systems for telephone solicitations to New Jersey subscribers, thereby incurring greater compliance expenses and risks.

Moreover, when a subscriber requests to be placed on an entity-specific do-not-call list after disclosure of the telemarketing entity making the call, the request applies to both the seller *and* to the telemarketing entity:

COMMENT: Commenters feel that by making telemarketers identify themselves to the consumer any do not call request will apply to the telemarketer as well as to the seller for whom the telemarketer is making the call.

RESPONSE: The commenters are correct in that the rules require any do not call request made by a consumer to apply to the telemarketer itself as well as the seller.³⁷

It is unprecedented that a subscriber's entity-specific do-not-call request would apply to telemarketers acting on behalf of sellers, as well as sellers themselves, and the requirement will have devastating effects on both. A single such request by a consumer will prevent the telemarketer from calling the consumer again on behalf of any seller. It will also reduce greatly the number of telemarketers available to perform telemarketing services for sellers. There is no rational policy basis for such a result, which is far more restrictive than anything contemplated by the Commission Rules.

³⁵ N.J. ADMIN. CODE tit. 13, § 45D-4.3 (2004).

³⁶ *Id.*

³⁷ N.J. Reg. v. 36, n. 10, cmt. 44 (May 17, 2004) (Attached at Exhibit 2).

CONCLUSION

The provisions of the New Jersey Act and New Jersey Rules discussed above impose regulatory requirements on sellers and telemarketers that are far more restrictive than those imposed by the Commission Rules. More restrictive state laws and regulations contravene the clear intent of Congress to create uniform national rules, and to ensure that individual privacy rights and public safety interests are balanced with the legitimate interests of telemarketers to engage in commercial speech and trade. The New Jersey Act and New Jersey Rules disregard the same legitimate interests of telemarketers which the Commission and Congress sought to preserve.

For the reasons cited herein, ATA and its members respectfully request that the Commission preempt those provisions of the New Jersey Act and New Jersey Rules which are more restrictive than the Commission Rules as they relate to interstate telemarketing.

Respectfully submitted,

**AMERICAN TELESERVICES
ASSOCIATION, INC.**

By: 

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TAB 1

FAQ's

New Jersey's "Do Not Call" Law



James E. McGreevey
Governor

Peter C. Harvey
Attorney General

Reni Erdos
Director

1. What is the New Jersey "Do Not Call" law?

The New Jersey "Do Not Call" law was signed by Governor James E. McGreevey on May 21, 2003, to protect consumers from unwanted and unsolicited telemarketing calls. The law took effect May 17, 2004.

2. What does the New Jersey "Do Not Call" law do?

The New Jersey "Do Not Call" law:

- ⊗ Prohibits telemarketers from calling New Jersey residents who have placed their residential and/or mobile phone numbers on the national "Do Not Call" registry.
- ⊗ Prohibits telemarketers who haven't registered with Consumer Affairs from calling any New Jersey resident.
- ⊗ Prohibits all telemarketers from calling New Jersey residents between the hours of 9 p.m. and 8 a.m.
- ⊗ Bars telemarketers from intentionally blocking the customer's use of caller identification.
- ⊗ Requires telemarketers, including sellers that carry out "any plan, program or campaign" to sell merchandise to consumers in New Jersey to register annually and disclose certain information about their business operations and principals.
- ⊗ Imposes stiff penalties against violators of up to \$10,000 for the first offense and up to \$20,000 for each subsequent offense.
- ⊗ Covers most telemarketing sales calls regardless of where the telemarketer is calling from.
- ⊗ Requires telemarketers and sellers to maintain in-house "Do Not Call" lists pertaining to "existing customers" who have said they do not want to receive sales calls from the telemarketers.

3. What is a telemarketer?

Under the New Jersey "Do Not Call" law, a telemarketer is any person or company making residential telemarketing sales calls to a customer in New Jersey, whether on its own behalf or on the behalf of others.

4. What is a seller and can it carry out its own telemarketing campaigns?

A seller is the person or entity actually providing the good or service being sold. A seller may carry out its own telemarketing campaigns in New Jersey. In that case, however, the seller would have to register with Consumer Affairs as a telemarketer. A seller may also contract with a telemarketer to make sales calls to customers in New Jersey on its behalf, in which case the telemarketer, not the seller, would be required to register with Consumer Affairs.

5. How do I stop telemarketers from calling me?

You may stop most telemarketing sales calls by registering your residential and/or mobile phone numbers with the federal "Do Not Call" registry.

6. Are all calls covered?

No. Telemarketers may still contact you if:

- ⊗ they're calling on behalf of charities, political organizations or pollsters (Please note: You may ask third-party professional fund-raisers who call on behalf of charities to stop calling you and to tell the charity to put you on the charity-specific "no-call" list. The fund-raiser must honor your request);
- ⊗ you've given the company written permission to call you;
- ⊗ you're an "existing customer" — defined as 1) A person who is obligated to make payments to a seller on merchandise purchased or 2) A person who has entered into a written contract with a seller where there is an obligation to perform, either by the customer, seller or both; or



Ⓢ you're an "established customer" for whom a seller has previously provided continuing services where the relationship has not been terminated and the telemarketer's call is limited to the service that is being provided. (However, the telemarketer can't "up-sell" or try to offer a new or enhanced service to the customer).

7. How do I sign up for the federal "Do Not Call" Registry?

Signing up for the federal "Do Not Call" registry is simple and can be done by telephone or by Internet. To register by telephone, call 888-382-1222. To register online, log onto <http://www.donotcall.gov>. To register by phone, you must call from the telephone number you want to register. To register online, you will need an active e-mail address. If you have more than one telephone number, be sure to register each one or you may still get calls on the number that's not registered. Registration is free.

8. Can I register my cellular phone?

Yes.

9. I have more than three personal telephone numbers. How can I register all of the numbers?

You may register up to three telephone numbers at one time on the federal "Do Not Call" registry Web site. You will receive separate confirmation e-mail for each number you register online. You must open each e-mail and click on the link in each one within 72 hours to complete the registration process. If you have more than three personal telephone numbers, you will have to go through the registration process more than once to register all of your numbers.

You can register only one phone number each time you call the federal "Do Not Call" registry, and you must call from the phone number you wish to register.

10. What if I get a new phone number. Do I need to register the new number?

Yes.

11. Do I need to take my old phone number off the list when I get a new number?

No. The federal "Do Not Call" registry will automatically remove telephone numbers that are disconnected for any reason.

12. Is there a registration fee to sign up for the federal "Do Not Call" list?

No. Registration is free.

13. How soon after I register my telephone number on the federal list can I expect telemarketers to stop calling me?

Telemarketers will have up to three months from the date you register your telephone number on the federal "Do Not Call" registry to stop calling you.

14. How long will my telephone number remain on the list?

Any telephone number you register will remain on the registry for five years from the date you register (unless you take the number off the list or the phone number is disconnected.).

15. Can I register telephone numbers for family or friends?

No. You may only register your own telephone number.

16. Can I register my business number?

No. The New Jersey "Do Not Call" law and the federal "Do Not Call" registry only cover residential and personal phone numbers. Business-to-business calls are not covered.

17. If I register my telephone number, how will my information be used and disclosed?

The FTC will collect your phone number and store it in the federal "Do Not Call" registry so that telemarketers and sellers can remove your phone number from their call lists. Telemarketers are required to search the registry every three months and delete from their call lists telephone numbers that are in the registry. The list has only phone numbers, not names or addresses.

18. What if I've registered for the federal "Do Not Call" registry, but still want to receive calls from certain telemarketers?

You may give a telemarketer or seller written permission to continue calling you even if you're on the federal "Do Not Call" registry.



19. Is New Jersey's "Do Not Call" law the same as the federal "Do Not Call" law?

No. While amendments adopted in January allows the New Jersey Division of Consumer Affairs to utilize the federal "Do Not Call" registry, New Jersey's "Do Not Call" law is separate from the federal rules. New Jersey's law works with federal rules to offer New Jersey consumers the greatest possible protection from unwanted telemarketing sales calls.

20. What if the telemarketer is based outside of the State of New Jersey?

The New Jersey "Do Not Call" law covers telemarketing sales calls to New Jersey consumers. This means that New Jersey Division of Consumer Affairs has the authority to take enforcement action against telemarketers who call New Jersey consumers whose residential telephone numbers and/or mobile phone numbers are on the federal "Do Not Call" registry regardless of where the telemarketer is based or where the call was placed from.

21. Are telemarketers allowed to block their telephone numbers?

No. The New Jersey "Do Not Call" law prohibits telemarketers from intentionally blocking a customer's use of caller identification.

22. New Jersey's "Do Not Call" law requires telemarketers to register. What are the registration requirements for telemarketers?

Telemarketers doing business in the State of New Jersey must register annually with the New Jersey Division of Consumer Affairs by completing and submitting a registration application; filing a disclosure statement with the Division stating whether or not their officers, directors, principals or owners have been convicted of certain crimes; and paying an annual registration fee ranging from \$150 to \$2,000 depending on the amount of telephone numbers the telemarketer uses to make sales calls.

23. How do I file a complaint?

If you have registered your telephone number on the federal registry for at least three months and are still receiving telemarketing calls, you may contact Consumer Affairs at 888-NJNOCALL(888-656-6225) or log onto <http://www.njconsumeraffairs.com> for a complaint form. You may either file your complaint online or fill out the complaint form, sign it and return it to: New Jersey Division of Consumer Affairs, P.O. Box 45025, Newark, N.J. 07101.

24. What information do I need to know when filing a complaint against a telemarketer?

Complaints should include the date of the call, the name of the telemarketer, the name of the seller, the telemarketer's address and/or the telemarketer's telephone number, if available. Consumer Affairs will investigate and, where appropriate, prosecute the violator.

25. Why do I need to know the name of the telemarketer or the seller when filing a complaint with the Consumer Affairs?

The name helps regulators at Consumer Affairs know who to investigate and, where appropriate, take enforcement action against.

26. What if I don't have the telemarketer's telephone number?

The more information you can provide will better help us investigate your complaint; however, we will attempt to trace the telemarketer by name if that's all the information you have available.

27. If I don't want to sign up for the "Do Not Call" registry, are there other ways to prevent telemarketers from calling me?

Yes. You may ask the telemarketer to put you on a company-specific or telemarketer-specific "Do Not Call" list. You will need to keep a record of the date you made the request.

28. I received a phone call from someone offering to put my name on the federal "Do Not Call" Registry. Should I let them?

No. The FTC will not allow private companies or other such third parties to register consumers for the federal "Do Not Call" registry. Web sites or phone solicitors that claim they can or will register a consumer's name or phone number on the federal registry — especially those that charge a fee — are almost certainly fraudulent.

** Some information contained in this document was obtained from the Federal Trade Commission.*

TAB 2

1. The first part of the document discusses the importance of maintaining accurate records of all transactions and activities. It emphasizes that this is essential for ensuring transparency and accountability in the organization's operations.

2. The second part of the document outlines the various methods and tools used to collect and analyze data. It highlights the need for consistent and reliable data collection processes to support informed decision-making.

3. The third part of the document describes the reporting and communication strategies used to share the findings and insights derived from the data analysis. It stresses the importance of clear and concise communication to ensure that all stakeholders are kept informed.

4. The final part of the document provides a summary of the key findings and conclusions. It identifies the main trends and patterns observed in the data and offers recommendations for future actions based on these findings.

NEW JERSEY REGISTER
VOLUME 36, NUMBER 10
MONDAY, MAY 17, 2004
RULE ADOPTION
LAW AND PUBLIC SAFETY
DIVISION OF CONSUMER AFFAIRS
TELEMARKETING: DO NOT CALL

Adopted New Rules: N.J.A.C. 13:45D

Proposed: February 2, 2004 at 36 N.J.R. 610(a)

Adopted: April 21, 2004 by Reni Erdos, Director, Division of Consumer Affairs.

Filed: April 23, 2004 as R. 2004 d.196, with substantive changes not requiring additional public notice and comment (see N.J.A.C. 1:30-6.3).

Authority: N.J.S.A. 56:8-119 et seq., P.L. 2003, c.76.

Effective Date: May 17, 2004. Expiration Date: May 17, 2009.

Summary of Hearing Officers Recommendations and Agency Response:

A public hearing on the Telemarketing: Do Not Call proposal was held on February 25, 2004, at the Seton Hall Law School, 1 Newark Center, Newark, New Jersey. Eugene L. Brenycz, Esq., presided over the hearing. A copy of the transcript is available by contacting the Division of Consumer Affairs at PO Box 45027, Newark, NJ 07101. Based on the written and oral testimony, the hearing officer did not believe that it was necessary for the Division to amend the proposal.

The Director has considered the recommendations of the hearing officer and all of the public comments and has made changes to the proposal as outlined below.

Summary of Public Comments and Agency Responses:

The public comment ended April 2, 2004 and the Division of Consumer Affairs (Division) received comments from the following individuals:

1. David Swartley, Vice President, MBNA America Bank, N.A.
2. Robert G. Shumay, Vice President, Consumer and Public Relations, IMD and Distribution, Kirby
3. Thomas J. Cafferty, Esq., McGimpsey and Cafferty, for the New Jersey Press Association

4. Beverly J. Lynch, B. Lynch Associates, for the Direct Marketing Association
5. Tracy Burton, Executive Vice President, Sales and Marketing, The Homemaker's Idea Company
6. Misty Falik, Attorney and Manager of Compliance and Ethics, Direct Selling Association
7. Charles B. Chernosky, Advertising Regulatory Compliance, for Craftmatic Organization, Inc. and Craftmatic Scooters, LLC
8. Owen A. O'Neill, Quality Director, TCM Services
9. Arthur H. Saxon, President, Telestar Marketing, L.P.
10. Katherine Scheri
11. Alice Tulecki
12. James M. Demers, President, New England Financial Services Association, New York Consumer Finance Association, New Jersey Financial Services Association
13. Arthur W. Conway, President & CEO, DialAmerica Marketing, Inc.
14. William D. Castleberry, Senior Manager, Government Affairs, MCI
15. Nancy S. Davenport, Senior Counsel & Director-Northeast Region, State Relations, American Council of Life Insurers
16. Bruce D. Cohen, Vice President & General Counsel, Verizon
17. Richard Santoro, President, New Jersey Retail Merchants Association
18. Allen J. DeWalle, Council Chairman, AAA Clubs of New Jersey, President/CEO AAA Mid-Atlantic
19. Magdalena Padilla, Esq., President, Insurance Council of New Jersey
20. Richard M. Stokes, Esq., Regional Manager and Counsel, Property Casual Insurers Association of America
21. Charles D. Vogel, Counsel, State Farm Insurance Companies
22. Charlene Brown, Assistant Vice President, NJ Government Affairs, AT & T
23. Mitchell N. Roth, Esq., Williams Mullen, for the American Teleservices Association

24. Zsuzsanna E. Benedek, Esq., Sprint

25. Nancy Donohoe Lancia, Vice President and Director, State Government Affairs, Securities Industry Association

26. Chris Stam, Managing Director, Direct Marketing, Harte-Hanks

27. Jeanne Heisler, CPCU, CLU, AAI, AIS, Government Affairs Representative, The Independent Insurance Agents & Brokers of New Jersey

28. Michael L. Schack, Esq., General Counsel, National Recreational Properties, Inc.

1. COMMENT: A commenter recommended that proposed new rule N.J.A.C. 13:45D- 1.3 be amended to include the definition of "contractual obligation" which it suggests be defined as "the rights, responsibilities, and obligations voluntarily incurred between persons pursuant to either verbal or written agreement" in order to cover all industries affected by the regulation.

RESPONSE: The Division disagrees with the need to define "contractual obligation," as the obligations under the contract between the seller and customer would be the obligations agreed to in the written contract required in the definition of "existing customer" at N.J.A.C. 13:45D-1.3. The Division limited "contractual obligation" to what is contained in the written contract in order to clearly indicate what calls can be made to an "existing customer," that is, those that relate to the obligations of the written contract. Without a written agreement, there would be no terms to limit the content of calls. Industries providing a "continuing service" are dealing with an "established customer," and a distinction has been drawn between the relationship of an "existing customer" and a seller and an "established customer" and a seller in that a written contract is not necessary for "continuing services" provided to an "established customer." That distinction would be lost if the Division adopts the commenter's suggestion. In addition, extending the agreement to a verbal agreement is inconsistent with the Legislative exception to an unsolicited telemarketing sales call that permits a telemarketing sales call to be made at the express written request of the customer called. The Legislature established that the evidence of a consumer's decision must be in writing and the Division mirrors this requirement when it requires a contract to be written.

2. COMMENT: A commenter requested that the Division amend the definition of "continuing services" to read "those services offered by a person to a customer which are associated with an existing contractual relationship to the person, and may include an expansion or replacement of that existing contractual relationship" in order to extend the regulation to all industries.

RESPONSE: The Division disagrees with the commenter's statement that this revision would simply extend the regulation to all industries, as the commenter's proposed definition would also greatly expand the number of calls that a customer could receive. The definition suggested also eliminates the distinction between an "established customer" and an "existing customer," which the Division believes is essential, as an "established customer" would expect a call related to a continuing service they have received in the past even though a contractual obligation may not

exist and an "existing customer" would only expect a call relating to the contractual obligation or in response to a written request.

3. COMMENT: A commenter believes that the duty to update information in proposed new rule N.J.A.C. 13:45D-3.4 should be amended so that it only requires "Federally regulated corporations or entities with an established physical business presence in New Jersey" to comply with N.J.A.C. 13:45D-3.2 through 3.4 when requested by the Division of Consumer Affairs as the commenter believes that the application and updating requirements are extremely onerous.

RESPONSE: The Division disagrees with the commenter's statement that the application requirements are "extremely onerous" and would like to direct the commenter to the statute at N.J.S.A. 56:8-121(b), which requires every telemarketer making calls into New Jersey to register with the Division, N.J.S.A. 56:8-122, which requires a disclosure statement to be filed by each applicant with any changes to be reported in writing to the Director within 30 calendar days, and N.J.S.A. 56:8-125, which requires any material change in any information filed with the Director to be reported in writing to the Director within 30 business days. Therefore, the requirements of proposed new rules N.J.A.C. 13:45D-3.3 and 3.4 are required by statute. The Division does not believe that the information requested in proposed new rule N.J.A.C. 13:45D-3.2 is excessive, as the information that the Division requires and will collect in the application is that which is necessary for the Division to carry out its enforcement responsibilities under the Act. The Division is amending N.J.A.C. 13:45D-3.4 upon adoption to reflect the statutory distinction in these two sections.

4. COMMENT: Commenters request that the Division delete paragraph (a)2 from proposed new rule N.J.A.C. 13:45D-4.3 which requires the telemarketer to disclose the name of the entity making the call as it "will add a significant amount of confusion to those companies who employ a third party telemarketing company."

RESPONSE: The Division disagrees with the commenter that disclosing the name of the entity making the call will cause confusion. In fact, the Division believes requiring that the caller disclose itself as the telemarketer will clarify for the consumer who is calling. It will also provide the information necessary to determine who in fact called a consumer who is on the no telemarketing call list and identifies the party against whom the Division would be seeking enforcement or those with pertinent knowledge.

5. COMMENT: Commenters believe the Division has too narrowly drafted the definition of "existing customer" to only include those customers who have a contractual obligation or who pay on existing accounts.

RESPONSE: The Division disagrees with the commenter as the definition of "existing customer" is derived from the legislative definition of "unsolicited telemarketing sales call" at N.J.S.A. 56:8-120 and the legislative intent as expressed in the findings at N.J.S.A. 56:8-119(b) which is ". . . to provide the broadest possible protection to protect public privacy and the sanctity of homes and to protect families and individuals from unsolicited interruptions."

6. COMMENT: A commenter requests N.J.A.C. 13:45D-4.2 be amended to create an exemption for newspapers to allow them to consider as "existing customers" customers who have stopped receiving a newspaper within 18 months of the date of the cancellation of the subscription.

RESPONSE: The Division disagrees, as someone who has canceled a newspaper subscription has terminated the contractual relationship and therefore cannot be considered an "existing customer."

7. COMMENT: Numerous commenters state that the proposed recordkeeping requirement in proposed new rule N.J.A.C. 13:45D-3.10 is costly and burdensome and should be amended to require record retention for two years instead of the proposed three years.

RESPONSE: The Division agrees that the retention of records for two years may be sufficient to meet its needs and has upon adoption amended the recordkeeping requirement at N.J.A.C. 13:45D-3.10(d) and reduced the record retention requirement from three years to two years.

8. COMMENT: A commenter believes that the fees set forth in N.J.A.C. 13:45D-1.4(a) are arbitrary as they have no relationship to registration or the costs of enforcement of the law.

RESPONSE: The Division disagrees as the sliding scale of fees are based on the number of telephone numbers used by the telemarketer and therefore a relationship should exist which correlates with the number of telemarketing calls a telemarketer makes. The Division expects to receive a comparable number of complaints as has been experienced by other states who have implemented telemarketing laws. It expects that it will therefore be receiving several thousand complaints in the first year. As a result, the Division will need to increase both its customer service staff and investigative staff to handle the volume of complaints. The Legislature mandated at N.J.S.A. 56:8-121 that fees be imposed to defray the costs of administering and enforcing the Act. If the initial fees do not meet the Legislative requirements, the fees will be adjusted accordingly. The Legislative mandate will be continually reviewed to ensure that the fees meet the statutory framework.

9. COMMENT: A commenter requests that the direct selling community be excluded from the reporting and recordkeeping requirement intended to target the telemarketing community.

RESPONSE: The Division believes that it would not be appropriate to exclude from the reporting and recordkeeping requirements direct sellers who engage in telemarketing to consumers who are not existing customers. When direct sellers make telemarketing sales calls in order to induce purchases, direct sellers are engaging in telemarketing and are therefore telemarketers, required to comply with the requirements of the Act and rules.

10. COMMENT: Several commenters state that the intent of the proposed rules and their underlying legal authority is to regulate deceptive and abusive telemarketing campaigns.

RESPONSE: The Division disagrees with the commenters that the focus of the Act is so limited as it is clear from the legislative findings listed at N.J.S.A. 56:8-119(a) and (b) that the intent of the legislation is to limit unsolicited phone calls and to "provide the broadest possible protection

to protect public privacy and the sanctity of homes and to protect families and individuals from unsolicited interruptions."

11. COMMENT: A commenter requested clarification as to what is intended by the fee schedule.

RESPONSE: The fee schedule provided in N.J.A.C. 13:45D-1.4 sets three levels for the telemarketing registration fee based on the number of telephone numbers used for telemarketing sales calls. The Division believes that the number of telephone numbers in use by a telemarketer to make telemarketing sales calls reflects the number of telemarketing sales calls that the telemarketer will make. A telemarketer who uses one to five telephone numbers to place telemarketing sales calls would pay a registration fee of \$150.00. A telemarketer who uses six to 15 telephone numbers to place telemarketing sales calls would pay a registration fee of \$500.00. A telemarketer who uses 16 or more telephone numbers to place telemarketing sales calls would pay a registration fee of \$2,000. For example, a telemarketer with three telephone numbers in use for telemarketing sales calls would pay \$150.00 as its registration fee, while a telemarketer with 50 telephone numbers in use for telemarketing sales calls would pay \$2,000. The Legislature mandated at N.J.S.A. 56:8-121 that fees be imposed to defray the costs of administrating and enforcing the Act. If the initial fees do not meet the Legislative requirements, the fees will be adjusted accordingly. The Legislative mandate will be continually reviewed to ensure that the fees meet the statutory framework.

12. COMMENT: A commenter believes that the regulations should allow for a prior or existing business relationship that extends to affiliates who are under the same corporate umbrella.

RESPONSE: The ban on telemarketing sales calls from affiliates is consistent with the prohibition against allowing telemarketing sales calls regarding upgrades and additional services to established customers and is further consistent with the intent of the statute expressed at N.J.S.A. 56:8-119(b) which is to ". . . provide the broadest possible protection to protect public privacy and the sanctity of homes and to protect families and individuals from unsolicited interruptions."

13. COMMENT: A commenter suggested that the Division adopt a "safe harbor provision" that specifies that there is no violation of the do not call regulations if the telephone call results from an error and the telephone solicitor has maintained records and other information required by the Federal government and self-regulatory organizations, and has established and implemented clear and written procedures to prevent violations.

RESPONSE: The Legislature has adopted what can be characterized as a "safe harbor" provision at N.J.S.A. 56:8-132 and the Division mirrors the "safe harbor" provision in the rules at N.J.A.C. 13:45D-4.5. Telemarketers are permitted ". . . an isolated call made no more than one time in a 12-month period" provided they have a copy of the no telemarketing call list that is "no older than three months at the time of the telemarketing call in question" in use; "have established and implemented written policies and procedures related to the requirements of the Act and these rules; have trained their personnel in the requirements of the Act and these rules;" and have the records to show compliance with the training and usage requirements.

14. COMMENT: A commenter urges the Division to closely follow the rules set forth in the Federal Telephone Consumer Protection Act (TCPA) as departure from the TCPA would create hardships for national telemarketing entities.

RESPONSE: The Division is adopting these telemarketing rules pursuant to the directives of the enabling statute, N.J.S.A. 56:8-119 et seq. The Division disagrees with the commenter that the rules create a hardship for national telemarketing entities. The goals of the State and Federal schemes are the same, namely to balance the needs of telemarketers with the consumer's desire to be left alone.

15. COMMENT: A commenter believes that the registration requirements and disclosure statements are redundant and unnecessary for established, regulated companies, such as utilities, and proposes that N.J.A.C. 13:45D-3.1 be amended to add "Sellers of companies that are regulated, licensed or otherwise registered of (sic) certificated with a New Jersey state agency, shall not have to register with the Division."

RESPONSE: The Division believes it would be inappropriate to exempt established, regulated companies, such as utilities, from the rules as it is charged by statute, N.J.S.A. 56:8-119 et seq., to regulate telemarketers. When these companies engage in telemarketing, they fall under the scope of the Act and rules and therefore are required to register as telemarketers with the Division.

16. COMMENT: A commenter requests that the Division register telemarketers without charge, as the number of telemarketing companies that do business in New Jersey is probably not that great.

RESPONSE: The Division disagrees that the number of telemarketers doing business in New Jersey is small. The funding derived from the registration fees is necessary to pay for the administration and enforcement of the Act and rules.

17. COMMENT: Commenters state that it is not necessary for the telemarketer to identify itself at the beginning of each call in addition to the name of the entity on whose behalf the call is being made as required in proposed new rule N.J.A.C. 13:45D-4.3 as this imposes an additional burden on telemarketing companies that is not imposed on entities making calls on their own behalf. The commenters state that they take on the face of the brand of that company and ask "Is that not more worthy of protection of consumers for us to use our client's name?"

RESPONSE: The Division disagrees with these commenters and would like to point out that the requirement that the "telemarketer's name" be identified is found in the Act at N.J.S.A. 56:8-128(b). "Telemarketer" is defined in both the statute and regulations as the "entity . . . who makes residential telemarketing sales calls to a customer . . ." The Division does not believe that the identification of the telemarketer is an additional burden beyond that of sellers making telemarketing calls on their own behalf, since in both counts they are identifying the telemarketer as well. The consumer has the right to know who is making the telemarketing call. Consumers will be making complaints to the Division against telemarketers who violate the law, whether

they be an entity hired by the seller or the seller itself, and this is the information the consumer would need to know in order to lodge complaints.

18. COMMENT: A telemarketer states that to ban all calls to cell phones would reduce the number of people who can be called and that people are not bothered getting calls that offer "great deals" for products and services that they want.

RESPONSE: The Division disagrees with the commenter's statement that people are not bothered by getting telemarketing calls on their cell phone when such consumers will have to pay for that call offering products or services in which they have expressed no interest. Supporting the Division's position is the public outpouring of support for the enabling statute. The Division's rules addressing wireless devices/cell phones are adopted pursuant to the Act at N.J.S.A. 56:8-130.

19. COMMENT: A commenter suggests that the Division has not addressed the economic burden that will be placed on businesses who use telemarketing to sell their goods and services as they will lose business and jobs will be lost.

RESPONSE: The Legislature has directed the Division at N.J.S.A. 56:8-134 to adopt regulations to implement the Act, which it has done in this adoption. In its findings at N.J.S.A. 56:8-119(a)(9), the Legislature points out that there are other means, such as mail, email, face to face solicitation and various other forms of advertising, that can be used in lieu of telemarketing to reach prospective customers.

20. COMMENT: A commenter suggests that the Division let the present law stand.

RESPONSE: The Division would like to point out to the commenter that there is no prior law and that these rules implement the new law which was approved May 21, 2003.

21. COMMENT: Commenters suggest that the Division adopt the Federal Trade Commission (FTC) definition of "established business relationship" which is "A relationship between a seller and a consumer based on (1) the consumer's purchase, rental, or lease of the seller's goods or services or a financial transaction between the consumer and seller, within 18 months immediately preceding the date of a telemarketing sales call; or (2) the consumer's inquiry or application regarding a product or service offered by the seller within 3 months immediately preceding the date of a telemarketing call" and do away with "continuing services" and "existing customer."

RESPONSE: In promulgating these regulations addressing "continuing services" and "existing customer," the Division is following the direction of the enabling statute, N.J.S.A. 56:8-119 et seq. The definition of "existing customer" is derived from the definition of "unsolicited telemarketing sales call" at N.J.S.A. 56:8-120. In defining "continuing services," the Division is effectuating the Legislative intent to look at the nature of the relationship between the telemarketer and customer. The intent of the Act and these rules is to provide the broadest protections to New Jersey residents from unwanted and unsolicited telemarketing sales calls.

22. COMMENT: A commenter states that the requirement for "written express consent" in N.J.A.C. 13:45D-1.3 and the need for a customer's signature and express agreement in writing in N.J.A.C. 13:45D-4.2 would prohibit companies engaged in telemarketing from calling consumers who respond to an advertisement by calling the 800 telephone number service or those who consent to be called by checking the appropriate request on a web site and that the FTC and Federal Communications Commission (FCC) permit calls within 90 days of the receipt of an inquiry. The commenter suggests that calls be made with the express agreement of the caller and the onus of proving consent be placed on the caller.

RESPONSE: The definition adopted by the Division mirrors the statutory definition in that "unsolicited telemarketing sales calls" are any telemarketing sales calls other than those made to an existing customer or at the express written request of the customer called. Verbal permission to make telemarketing sales calls was removed from bill A727 by Assembly floor amendments adopted on November 18, 2002 in the Fourth Reprint of the bill. The Legislature established that the evidence of a consumer's decision must be in writing and the Division must comply with the Legislative mandate. The Division realizes that express consent may be obtained from a written document, including permitting consumer to check off a box on a form, or by electronic signature.

23. COMMENT: A commenter believes that the Division is violating the Interstate Commerce Clause of the United States Constitution when it requires a telemarketer who calls New Jersey residents but does not have any employees or physical presence in New Jersey to register.

RESPONSE: The Division disagrees with the commenter as all telemarketers, regardless of whether they have a physical presence or employees in New Jersey, are being regulated in the same manner once they direct their business into the stream of commerce in New Jersey by contacting New Jersey residents via telemarketing sales calls.

24. COMMENT: Commenters urge the Division to exempt Department of Banking and Insurance licensees or licensees registered with the State or Federal government under a different statutory scheme from the requirements of the proposed regulations and have proposed that an exemption to the definition of "unsolicited marketing call" be created for this type of licensee.

RESPONSE: The Division believes it would be inappropriate to exempt Department of Banking and Insurance licensees or licensees registered with the State or Federal government under a different statutory scheme from the proposed rules, as it is charged by statute, N.J.S.A. 56:8-119 et seq., to regulate telemarketers. The Division is not regulating the banking or insurance activities of Department of Banking and Insurance licensees, or the regulated activities of other State or Federal government licensees. The Division is simply regulating their activities as telemarketers once they elect to engage in telemarketing.

25. COMMENT: A commenter believes that the proposal is preempted by the Federal Do Not Call Regulations and requests that the Division clarify the need for this proposal in light of the comprehensive nature of the Federal regulations.

RESPONSE: The New Jersey Legislature enacted and the Governor signed the Do Not Call Act and the Division is charged with the responsibility to promulgate rules, implement the Act and enforce the law. The Division believes the Act and rules will work in concert with the FCC and FTC regulations to afford the greatest protection to New Jersey consumers without undue burden to telemarketers who do business in New Jersey.

26. COMMENT: A commenter states that the Division has significant discretion in promulgating regulations in light of section 2 of S-2776.

RESPONSE: The Division does not see section 2 of S-2776, P.L. 2003, c.208, as the grant of significant discretion and sees it simply as the authority to adopt the Federal Do Not Call list as its own.

27. COMMENT: A commenter states that the language in N.J.A.C. 13:45D-4.4 which precludes discussions about expanded services, upgraded products or other services unless directly related to the particular services already provided would limit a company's ability to call existing customers who want to be notified of upgrades in services and more cost effective plans.

RESPONSE: N.J.A.C. 13:45D-4.4 specifically deals with established (not existing, as the commenter notes) customers. Whether a call directly relates to a continuing service is controlled by the consumer's expectations based on the underlying agreement, contract, or understanding of the nature of the service. Sellers concerned about their ability to make telemarketing sales calls to customers may ask for the customer's express written permission pursuant to the requirements of N.J.A.C. 13:45D-4.2(b) to make telemarketing sales calls at the time the service agreement is reached or the original sale is effectuated.

28. COMMENT: Commenters recommend that the definition of "telemarketer" be modified so it does not include companies that telemarket on their own behalf but rather is limited to someone who makes telemarketing sales calls on behalf of sellers or whose primary business is telemarketing for others and that only these entities be required to register.

RESPONSE: The definition of telemarketer adopted in the proposal is the same as that found in the Act and includes entities who make residential sales call to a customer "... on behalf of itself or others ...". Therefore, companies that telemarket on their own behalf are telemarketers under the statute as well as these regulations and it would be inappropriate for the Division to modify the definition. For the same reason, the registration requirement must be applied to any entity that engages in telemarketing. It should be noted, however, that not every telephone call to a customer is a telemarketing sales call. The telephone calls captured by the Act and rules as telemarketing sales calls are those made for the purpose of inducing a sale as part of a plan, program, or campaign.

29. COMMENT: A commenter is concerned that the requirement to divulge the true name of the telemarketer in N.J.A.C. 13:45D-4.3 could impact the telemarketer's security. Instead the commenter suggests that a system be implemented to track which individual makes the call or a unique identifier be provided at the customer's request and the telemarketer should indicate the client on whose behalf he or she is calling.

RESPONSE: The Division disagrees with the commenter and does not believe that divulging the name of the person making the telemarketing sales call would impact their security. If the telemarketer is concerned with its employees using their true names, the rules allow for the use of a fictitious name at N.J.A.C. 13:45D-3.10(a)4. The telemarketer is already required by N.J.A.C. 13:45D-4.3(a)3 to identify the client on whose behalf he or she is calling.

30. COMMENT: A commenter states that the proposal presents a barrier for new insurers to enter the market as the definition of "telemarketer" is too broad and unduly subjects insurance companies and their agents to the requirements of the proposal.

RESPONSE: The Division disagrees with the commenter. The definition of "telemarketer" used in the proposed rules is the statutory definition from N.J.S.A. 56:8-120. The rules apply to all entities who engage in telemarketing and will be applied to all such entities, including insurance companies and their agents if they engage in telemarketing.

31. COMMENT: A commenter asks whether or not a corporate license covers all employees, such as employee agents, exclusive agents and independent contractors, who make telemarketing sales calls.

RESPONSE: A corporate telemarketing license will cover employees such as employee agents. Exclusive agents and independent contractors will need to register with the Division as telemarketers if they engage in telemarketing and are not employees of the corporation, because they are not under the control of the corporate entity.

32. COMMENT: A commenter asks for clarification on the permissible communication exchanges between representatives of the insurance industry and its existing policyholders.

RESPONSE: The Division cannot delineate the breadth of permissible communication exchanges. In responses to these comments, the Division has addressed specific situations raised but cannot provide an answer to a universal hypothetical.

33. COMMENT: Commenters state that it appears that the definition of "unsolicited telemarketing sales call" prohibits the return of a telephone call to someone who is not an existing customer and has orally inquired about products and services is contrary to common sense and frustrates the purpose of the law.

RESPONSE: The Division agrees with the commenter that the definition of "unsolicited telemarketing sales call" prohibits the return of a telephone call to someone who is not an existing customer and has orally inquired about products and services. The definition adopted by the Division mirrors the statutory definition in that "unsolicited telemarketing sales calls" are any telemarketing sales calls other than those made to an existing customer or at the express written request of the customer called. Verbal permission to make telemarketing sales calls was removed from A727 by Assembly floor amendments adopted on November 18, 2002 in the Fourth Reprint of the bill. The Legislature established that the evidence of a consumer's consent to receive calls must be in writing. Telemarketers can always have its messages remind callers to call back, or to log onto a website to give express permission for a call back.

34. COMMENT: Commenters seeks clarification about whether "ordinary conversations with a customer about products" are not subject to the requirements of this proposal.

RESPONSE: Since the Division does not know what an "ordinary conversation with a customer about products" entails, the Division cannot provide clarification to the commenter. The commenters are directed to the Act and the rules to determine whether any of such conversations fall within their parameters and therefore are subject to the requirements. The telephone calls captured by the Act and regulations as telemarketing sales calls are those made for the purpose of inducing a sale as part of a plan, program, or campaign.

35. COMMENT: A commenter recommends that the definition of "established customer" be modified to "[A] customer for whom a seller has previously provided continuing services within eighteen months immediately preceding the date of the last payment or transaction, as long as the customer has not asked to be on the company's do-not-call list." The commenter believes the proposed modification to the definition empowers the consumer to make a determination consistent with his or her needs.

RESPONSE: The Division disagrees with the commenter as the consumer has already made a determination consistent with his or her needs. By registering for the Do Not Call list, the consumer has decided to take action to limit the number of telemarketing sales calls they receive. The commenter refers to "transaction," but the definition of "established customer" as used in these rules refers to "continuing services" and the commenter's recommendation blurs the distinction that has been drawn between an "established customer" and an "existing customer."

36. COMMENT: While the commenter respects the right of New Jersey to set its own rules for telemarketing, these rules present a huge burden to businesses and creates confusion for consumers as these regulations do not mirror the FTC and FCC regulations.

RESPONSE: The Division is adopting these telemarketing rules pursuant to the directives of the enabling statute, N.J.S.A. 56:8-119 et seq. The Division disagrees with the commenter that the rules impose a huge burden on businesses and confuse consumers. The FTC and FCC left significant latitude to the states to permit registration of telemarketers. The goals of the State and Federal schemes are the same, namely to balance the needs of telemarketers with the consumer's desire to be left alone.

37. COMMENT: Commenters state that the enabling legislation for the proposed rules provides a very broad framework for exempting calls for continuing services and to existing customers and points out that these terms are left undefined in the legislation.

RESPONSE: Guided by the Legislature's framework in N.J.S.A. 56:8-119, the Division has sought to address consumer's reasonable expectations of the types of calls they wish to receive. By defining continuing services and existing customer, the Division has created the parameters for application of the law in practical circumstances.

38. COMMENT: A commenter expressed the opinion that the proposed rules regarding exemptions related to "continuing services," "established customers," and "existing customers" create a more burdensome set of rules than contemplated in the enabling legislation.

RESPONSE: The Division disagrees with the commenter and does not view the definitions as more burdensome, but instead as clarifying and continuing the intent of the legislation, which is to provide the broadest possible protection to New Jersey consumers.

39. COMMENT: A commenter states that the Division's proposed rules involving existing customers would only apply to calls that originate and terminate in New Jersey (intrastate calls) as the FCC already has concluded that such rules regarding interstate calls may be preempted.

RESPONSE: The Federal government clearly provides the opportunity for states to register telemarketers and enforce the laws. States have traditionally enforced telemarketing rules both within and across state lines using long-arm jurisdiction. The Division does not believe that the Act and rules are inconsistent with the goals of the Federal regulations, and any claim of conflict would need to be evaluated on a case-by-case basis.

40. COMMENT: Commenters state that since New Jersey has opted to use the Federal Do Not Call Register as the State Do Not Call List that it makes sense to incorporate the Federal regulations for calls to existing/established customers.

RESPONSE: The Division was granted the authority to use the Federal Do Not Call Register as the State No Telemarketing Call List at N.J.S.A. 56:8-127(a). With regard to existing/established customers, the proposed rules follow the statutory direction contained in the statute at N.J.S.A. 56:8-119 et seq.

41. COMMENT: A commenter asks why the costs savings incurred by using the Federal Do Not Call Registry cannot be passed along to the telemarketing industry and that registration fees reduced.

RESPONSE: The Division based the proposed fees based on what other states were charging for registration and adjusted the fees based on the expected volume of complaints and anticipated enforcement costs. The Division requires funds for enforcement of the law as well as to cover the administrative costs of registration and providing for public education regarding the Do Not Call law.

42. COMMENT: Commenters request that New Jersey adopt the Federal rules on the issue of calls to mobile devices which require only that "automatic/predictive telephone dialing systems" avoid calls to mobile devices as the commenters believe that the FCC Order preempts the proposed rule.

RESPONSE: The Division's regulation is an appropriate extension of the State's interest in ensuring the safety of its citizens through limiting distractions while driving. Moreover, the Legislature has determined that consumers should not have to pay for calls they do not choose to get.

43. COMMENT: A commenter states that the Direct Marketing Association is appealing to the FCC for a "safe harbor" regarding calls to mobile devices as land lines can migrate to mobile lines and asks that New Jersey respect any subsequent FCC decision on this matter.

RESPONSE: Until such time as the FCC determines how it will handle the request, any response by the Division would be both premature and speculative.

44. COMMENT: Commenters feel that by making telemarketers identify themselves to the consumer any do not call request will apply to the telemarketer as well as to the seller for whom the telemarketer is making the call.

RESPONSE: The commenters are correct in that the rules require any do not call request made by a consumer to apply to the telemarketer itself as well as the seller.

45. COMMENT: A commenter interprets the enabling legislation to only require that "a telemarketer making a telemarketing sales call shall, within the first 30 seconds of the call, identify the telemarketer's name, the person on whose behalf the call is being made, and the purpose of the call" and states that there is no requirement that the name of the entity making the call be disclosed.

RESPONSE: The Division believes that the commenter is incorrect and directs the commenter to N.J.S.A. 56:8-128(b) which requires the "telemarketer's name" to be identified. "Telemarketer" is defined in both the statute and regulations as the "entity . . . who makes residential telemarketing sales calls to a customer . . ."

46. COMMENT: A commenter suggests that the regulations be clarified to expressly allow (1) follow-ups on contractual obligations; and (2) communication with the existing customer regarding any product, service or account that forms the basis of, or is ancillary to, the seller's existing relationship with the customer, unless the customer has stated to the telemarketer that he or she no longer desires to receive the telemarketing sales calls of the telemarketer.

RESPONSE: The Division does not believe that any clarifications of the rules are necessary. The rules clearly provide that calls made to an existing customer while a contractual obligation to perform exists are allowed and that any ancillary calls are not permitted unless they are related to the contractual obligation to perform or when an obligation exists on the part of an existing customer to make payments to the seller on merchandise purchased. The customer has already expressed his or her desire not to receive telemarketing sales calls by placing his or her number on the no telemarketing list. If the seller's relationship with the customer does not permit telemarketing sales calls to be made to the customer, the seller has the option to obtain the customer's permission to make telemarketing sales calls to them pursuant to the requirements of N.J.A.C. 13:45D-4.2(b).

47. COMMENT: A commenter recommends that N.J.A.C. 13:45D-3.2 be amended to remove the requirement that each officer, director and principal be listed and only that the party in charge of telemarketing be included.

RESPONSE: The Division disagrees with the commenter as enforcement will be sought against the parties responsible for the actions of the entity, as appropriate.

48. COMMENT: Commenters recommend that the residence address of officers, directors and principals be deleted from the application for privacy purposes as they are intrusive and unnecessary.

RESPONSE: The Division disagrees with the commenter as the information requested on the application is necessary for enforcement purposes if action needs to be taken against the parties responsible for the actions of the telemarketing entity.

49. COMMENT: A commenter recommends that the Division charge a flat registration fee of \$150.00 per company and delete the reference to the number of telemarketing lines utilized because the Division is using the Federal Do Not Call list.

RESPONSE: The Division based its fees on the expected volume of complaints and enforcement costs. The Division requires funds for enforcement of the law as well as the administrative costs of registration. The statute speaks to the number of telemarketing sales calls being made, which is why the Division is basing its fee on the number of telephone numbers being used to make those calls.

50. COMMENT: A commenter asks what are the number of "telephone numbers in use for telemarketing sales calls" when a PBX or similar system has, for example, eight telephone numbers but only four actual telephone lines that are in use. The commenter suggests that the rules be interpreted so that the registration fees are based on the actual number of phone lines and not the number of phone numbers and proposes that N.J.A.C. 13:45D-1.4 add a new subsection (c) which will read "Where a telemarketer has more phone numbers than phone lines, the number of phone lines shall be used to determine the number of telephone numbers in use for telemarketing sales calls."

RESPONSE: The Division does not see the need to amend the rules as the rules refer to "numbers in use for telemarketing" at N.J.A.C. 13:45D-1.4. If the numbers exist purely as incoming lines, they do not need to be registered and therefore will not count towards the registration fee. In this example, the numbers assigned to the four actual telephone lines would need to be registered and the registration fee would be based on four telephone numbers.

51. COMMENT: A commenter expresses the opinion that proposed rule N.J.A.C. 13:45D-1.3 defines "existing customer" so narrowly that retailers may be prohibited from contacting current customers for legitimate customer service functions and states that this narrow and inaccurate interpretation severely limits the ability of the sales community to contact their customers and will have a broad impact on many New Jersey businesses.

RESPONSE: Retailers can continue to contact current customers for customer service functions as long as the contact does not fit within the definition of a "telemarketing sales call" at N.J.A.C. 13:45D-1.3, namely those calls which are part of a plan, program or campaign meant to induce a sale. An example of a permitted call would be one informing the customer of a product recall.

Furthermore, a retailer concerned about its ability to make telemarketing sales calls to customers can ask for the customer's permission in writing pursuant to N.J.A.C. 13:45D-4.2(b) to make telemarketing sales.

52. COMMENT: A commenter is uncertain of the definition of "residential telemarketing sales calls" which appears in the scope of the proposal at N.J.A.C. 13:45D-1.2 and believes the proposal should be amended to read "telemarketing sales calls to New Jersey residential customers." The commenter is concerned that the proposed definition of "customer" would essentially include all customers in New Jersey, whether they are residential customers, commercial customers, or other customers as drafted, unless clarified further, and suggests that the word "residential" be added before customer.

RESPONSE: The Division disagrees with the commenter that the rules need to be amended or clarified as it believes that the rules clearly state that telemarketing sales calls are only being regulated when made to the residences of New Jersey customers or their mobile devices. The intent of the statute is to address calls made to residences and does not apply to customers who are not residential customers.

53. COMMENT: A commenter believes that the proposal may be easier to understand if proposed N.J.A.C. 13:45D-4.2 expands its exemptions to include commercial customers and any other customers that are not residential customers.

RESPONSE: The Division disagrees with the commenter and believes that the fact that the rules apply only to residential customers is understandable as proposed.

54. COMMENT: A commenter states that the Division has misinterpreted the enabling legislation with the second sentence of the Summary which reads "The new law prohibits unsolicited telemarketing sales calls to customers and places responsibility for enforcement of the Act with the Division of Consumer Affairs (Division)." The commenter states that the legislation does not prohibit unsolicited telemarketing sales calls but instead regulates the nature and extent of unsolicited telemarketing calls to those on the no call list.

RESPONSE: The Summary is not dispositive and the commenter is correct that the nature and extent of calls is to be regulated. However, the commenter is incorrect as the presumption of the second sentence of the Summary is that the customer is on the no telemarketing call list. The intent of the statute and rules is to prohibit calls to customers who have registered for the no telemarketing call list. The rules do not place a blanket prohibition on all unsolicited telemarketing sales calls.

55. COMMENT: A commenter requests that the Division clarify that nothing in the proposal is intended to limit the use of electronic documents or electronic recordkeeping and that a paper copy of the required documents is not required.

RESPONSE: The Division does not believe any clarification is necessary. The Division is not specifying the format in which the records must to be maintained. It only requires at N.J.A.C.