BEFORE THE FEDERAL TRADE COMMISSION
WASHINGTON, D.C.

In the Matter of Telemarketing Rulemaking – Comment	)))))))	FTC File No. R411001

COMMENTS OF COX ENTERPRISES, INC.

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INTRODUCTION AND SUMMARY

Cox Enterprises, Inc. ("CEI" or "Cox") hereby submits these comments in response to the Federal Trade Commission's ("FTC") Notice of Proposed Rulemaking[1] relating to the proposed amendment of the Telemarketing Sales Rule (the "TSR" or "Rule").[2] Cox welcomes this opportunity to comment on the proposed amended Rule, and strongly supports the efforts of the FTC to protect consumers from fraudulent and deceptive telemarketing.

Cox has a 104-year history of leadership in the media and communications industries and today is one of the nation's largest diversified media companies, with significant operations and investments in cable television, telephony, high-speed Internet access, broadcast radio and television stations, newspapers, and local Web content. Cox always has respected the rights of consumers, and recognizes that regulation is necessary to prevent fraudulent and deceptive telemarketing activity that victimizes both consumers and legitimate businesses. While Cox applauds many of the proposed amendments to the Rule, others appear to stray from the Commission's mandate to focus its telemarketing regulations on "unscrupulous activities from which no one benefits but the perpetrator."[3] Several facets of the proposed amended TSR threaten to unduly disrupt the continuity of existing business relationships, create competitive imbalances in vital sectors of the Internet economy, and otherwise unduly burden "legitimate, mutually-beneficial activities" that Congress did not intend the Commission to regulate.[4]

Certain aspects of the Commission's telemarketing proposal also fail to account for the core First Amendment rights possessed by CEI and other media. As other commentators have noted, there are substantial First Amendment issues that have to be considered before the Commission institutes any new telemarketing proposal. Courts have long recognized that government regulations that restrict the ability of newspapers and other speakers to effectively distribute news, opinion, and other content are attacking an essential part of the right of speech itself.[5] This fact is as true for publications and information sold to the public as it is for expression given away on a street corner.[6] This protection of the right to distribute publications and alert the public to the content of those publications is essential, even in the face of seemingly neutral regulations that attempt to advance governmental interests unrelated to the suppression of free speech.[7]

Given this background, any efforts to restrict "telemarketing" must account for the fact that newspaper publishers, cable television system operators, Web providers and other content providers rely heavily on telephone contacts with customers and potential customers to inform them of news and editorial content, and of the availability and modes of distribution of that information. Telemarketing restrictions, both generally and in the particular details of the Commission's proposed Rule, do not serve to limit only ordinary commercial transactions for consumer goods and services. Instead, these rules restrict the constitutionally protected ability of speakers to alert people to the content of publications, and to distribute their content to both new and existing consumers of media services. The Commission should recognize that telemarketing restrictions that limit the ability of CEI and other media companies to distribute core protected speech pose constitutional considerations that differ significantly from the constitutional implications of restrictions on telephone calls peddling home repair services, time-share vacations or health club memberships.[8]

These considerations lie at the heart of the categorical newspaper industry exemption sought by the Newspaper Association of America – a proposal that CEI fully supports. But they also merit careful consideration of every facet of the proposed amended Rule that could limit the public's access to information about and awareness of other media outlets, publications and information services that involve protected core speech.[9]

In light of these considerations, and for all these reasons discussed in greater detail below, Cox respectfully urges the Commission to modify its proposed amendments to the Rule as follows:

1. **The Commission Should Create An Established Business Relationship Exemption.**

The Commission should create an exemption from the proposed national do-not-call requirements for telemarketing calls to persons with whom the seller has formed an established business relationship. By requiring consumers on the proposed national do-not call registry to affirmatively provide "express verifiable authorization" before they can receive information from their existing service providers, the proposed TSR unreasonably interferes with valuable communications between consumers and businesses they know and trust. To the extent these requirements are applied to newspapers, cable operators and other print and electronic media services, they also threaten to disrupt the delivery of vital news and information to the public. The legislative history fully supports, if not mandates, the adoption of an established business relationship exemption from the proposed national do-not-call requirements, and such an exemption would align the TSR with the approach of the Federal Communications Commission ("FCC") and virtually every state legislature that has enacted analogous do-not-call registry laws.

2. **The Commission should not single-out Internet and Web services for selective regulation under the TSR.**

Cox urges the Commission reconsider and eliminate the proposal to single-out for regulation under the TSR business-to-business telemarketing calls involving Internet and Web services. This proposal, if implemented, would unfairly handicap the ability of many high speed Internet access and Internet-based advertising services to compete effectively against stronger, unregulated competitors. It also would slow the growth of vital segments of the Internet economy and undermine the high priority that both Congress and the administration have placed on the deployment of broadband Internet service and advanced communications services.

3. **Pre-acquired billing information restrictions.**

The Commission should clarify that the proposed restrictions on the use of pre-acquired customer billing information do not apply to "up-selling" situations, and do not otherwise prohibit the transfers of customer billing information between sellers and third-party sales agents soliciting on their behalf. Read literally, the proposed Rule would appear to prevent sellers from receiving customer billing information acquired by its own contractors or sales agents through sales of its own products and services, if the seller later intended to use this information for purposes of "up-selling" a customer in a future telemarketing transaction. Whether billing information is obtained through a transaction conducted by a third-party sales agent, or by a seller's own call center employees, a seller's internal use of its own customer information for purposes of up-selling does not pose significant risks to consumers.

4. **The Commission should revise its proposed new definition for an "outbound telephone call."**

The Commission should exclude from the definition of an "outbound telephone call" internal "up-selling" solicitations to an inbound caller and tailor the definition to impose only the disclosure requirements of the Rule on telemarketers who engage in external "up-selling" during an inbound call. The current proposed Rule inappropriately fails to distinguish between calls transferred between telemarketers representing the same seller and calls between telemarketers representing different sellers. Moreover, the current proposal would subject internal "up-selling" solicitations involving different CSRs to calling hour restrictions, do-not-call requirements and other aspects of the proposed Rule that logically should not apply to any call initiated by a consumer.

5. **Caller ID Blocking.**

The Commission also should clarify that the proposed prohibition on Caller ID blocking does not affirmatively require the use of equipment that can display the telephone number of the calling party.

6. **Any national do-not-call requirements the Commission adopts should preempt the application of state laws and regulations to interstate telemarketing calls.**

Finally, the Commission should preempt state laws to the extent they apply to interstate telemarketing calls by sellers within the FTC's jurisdiction to regulate. This limited preemption would dramatically simplify the maze of state telemarketing laws that companies must negotiate when executing interstate calling campaigns and is supported by legislative history surrounding Congress' authorization of a nationwide do-not-call database under the Telephone Consumer Protection Act ("TCPA").

BACKGROUND

CEI's subsidiary, Cox Communications, Inc. ("CCI" or "Cox Communications"), is one of the nation's largest multi-service advanced communications companies. CCI offers an array of services to its customers, including cable television, advanced digital video programming services, local and long distance telephone services, high speed Internet access, and commercial voice and data services. CCI is the fifth largest cable company in the nation, serving approximately 6.2 million customers nationwide, and it provides one of the highest-capacity and most reliable broadband delivery networks in the world.

CCI also provides some of the highest-quality customer service in the cable industry. Cox Communications was the first cable company ever to receive the J.D. Power award for customer service and twice has been named as Cablevision Magazine's Operator of the Year. Much of this success is attributable to CCI's responsible telemarketing operations, which it uses to acquire, maintain and strengthen relationships with its customers. Unlike other media, telephone contacts enable Cox Communications' customer care representatives to explain fully the features and capabilities of CCI's increasingly diverse bundle of services and to tailor service offerings and flexible billing options to the requirements of individual customers. Outbound telephone campaigns also have proven critical to CCI's successful deployment of powerful new broadband services, such as its enhanced video, voice and high speed Internet access services. Telemarketing campaigns can be designed to pinpoint households in the path of rolling technological upgrades and are among the fastest and most efficient means of informing consumers when new services become available in their neighborhoods.

Another CEI subsidiary, Cox Newspapers, Inc. ("CNI"), is one of the nation's largest newspaper publishing enterprises with seventeen daily and thirty weekly newspapers in metropolitan areas such as Atlanta, Georgia, Austin, Texas, Dayton, Ohio and Palm Beach, Florida. Telephone calls play a critical role in CNI's efforts to alert readers to the content and availability of its publications and to distribute its newspapers. Telephone calls allow CNI's newspapers to offer consumers low-cost, convenient access to a vital information resource. Costing just one-third of the costs of direct mail, outbound telephone campaigns are by far the most efficient and cost-effective method of acquiring subscribers for CNI papers. On average, CNI's major daily newspapers acquire over fifty percent of their new subscribers by this means. In addition, telephone based-customer service and sales calls enable Cox's newspapers to reduce churn rates and maintain lasting customer relationships. Cox's newspapers use telephone contacts to sell and renew subscriptions, renew classified advertising from both individuals and businesses, and tailor frequency, delivery, payment and billing options to suit individual customer preferences and needs.

Two other independent Cox affiliates, Cox Business Services (a subsidiary of Cox Communications) and Cox Interactive Media ("CIMedia"), focus primarily on business customers. These companies rely heavily on business-to-business telephone communications for their success, and small and large businesses alike benefit from their calls. Cox Business Services, for example, relies heavily on telephone contacts to offer its single-network voice, data, video, Web hosting and high speed Internet services to businesses of all sizes, to offer new services and upgrades to its 50,000 existing customers nationwide, and to tailor its services and technologies to the individual needs of its customers.

CIMedia, an independent subsidiary of Cox Enterprises, operates the highest-rated network of local content Web sites in the nation, as well as a dynamic Web hosting and Web site development business. CIMedia's telemarketing is integral to its ability to offer advertising on its Web sites and to market its Web site hosting and related development services to businesses. Telephone sales calls also provide CIMedia's current customers the opportunity to take advantage of new products and services as they become available and to receive the kind of individualized customer service that they have come to expect from Cox.

DISCUSSION

VII. THE PROPOSED NATIONAL DO-NOT-CALL REGISTRY WILL UNREASONABLY RESTRICT COMMUNICATIONS WITH EXISTING CUSTOMERS AND INTERFERE WITH LEGITIMATE RELATIONSHIPS BENEFICIAL TO CONSUMERS.

The FTC proposes to create a centralized national "do-not-call" registry to be maintained for a trial period of two years.[10] Pursuant to this proposal, consumers would contact the FTC and place their telephone number on the national registry, making it illegal for companies within the FTC's jurisdiction to call them for telemarketing purposes. Once consumers have placed their telephone numbers on the national registry, the only way they can authorize a company to contact them is to transmit their "express verifiable authorization" to be called. This proposal would require companies to obtain either a consumer's signed written authorization or recorded oral consent to be called.

Unlike virtually every state that has enacted analogous do-not-call registry laws,[11] the FTC has not proposed an "established business relationship" exemption that would permit telemarketers to call parties with whom they have a preexisting business relationship, regardless of whether those parties' numbers are on the national registry. Accordingly, by preventing companies from contacting existing customers without first undertaking a cumbersome process of obtaining each customer's "verifiable authorization" to be called, the proposed amended Rule threatens to disrupt the continuity of legitimate business relationships and deny consumers access to valuable communications from businesses that they know and trust.

For example, Cox newspapers routinely contact their subscribers to remind them when subscriptions are due for renewal to avoid a disruption in delivery. Similarly, the newspapers contact their subscribers when they fall behind in their payments to inquire as to whether those customers still wish to receive a paper and determine if a more flexible billing option or a different delivery schedule or frequency would better suit the customers' needs. Sales and customer service discussions are commingled in these retention calls, which plainly benefit consumers and are vital to Cox newspapers' ability to operate in an industry with an annual churn rate of almost 60 percent.

Similarly, Cox cable television systems use telemarketing campaigns to contact their customers when new services have become available in their neighborhoods and to apprise them of free programming previews or special promotional offers and discounts. These call generally are welcomed by Cox's customers and very rarely result in do-not-call requests. For example, Cox's cable television system in Omaha, Nebraska, contacts an average of 2,000 customer households each month through outbound telemarketing calls. On average, fewer than five of these customers ask to be placed on Cox's do-not-call list – just one quarter of one percent of all customers called. Cox's Hampton Roads system contacts approximately 75,000 customer households on a monthly basis. On average, these contacts elicit only between 75 to 100 do-not-call requests, scarcely more than one-tenth of one percent of the households called.

These statistics suggest that even those Cox customers who might otherwise wish to prevent telemarketing "cold calls" to their homes are, nevertheless, receptive to occasional calls from Cox and other service providers with whom they have chosen to do business.[12] Nonetheless, the FTC's proposed national do-not-call regime threatens to foreclose many of these communications, which benefit the commercial interests of both consumers and the firms with whom they have formed ongoing relationships.

The Commission's proposal would allow consumers to selectively choose to receive calls from specific companies by providing their "express verifiable authorization" to be called or by simply refraining from taking advantage of the national registry. However, this rationale ignores the obvious probability that many customers who place their telephone numbers on the national registry will not appreciate the breadth of the Rule and will realize too late that they have lost access to valuable information from their existing service providers. Although the proposed amended Rule technically would allow these customers to restore these communications by granting their "express verifiable authorization" to be called, it will be cumbersome, expensive and impractical for many businesses to obtain this necessary authorization. Quite apart from the burdens and expenses this requirement will inflict on businesses, customers also will be inconvenienced by the need to formally record their consent to be called, which in most cases could be inferred accurately from their continuing relationships with particular businesses.

Almost every state legislature that has enacted a "do-not-call registry" statute has recognized the importance of preserving legitimate, mutually beneficial commercial activities by exempting calls that further established business relationships. Missouri, for example, exempts from its registry law telemarketing calls placed by "any person or entity with whom a residential subscriber has had a business contact within the past one hundred eighty days or has a current business or personal relationship."[13] New York's telemarketing registry law similarly exempts "telephone calls pertaining to a renewal or continuation of an existing or prior contractual relationship or the continuation of an established business relationship between a customer and any telemarketer, provided that the telemarketer discloses any material changes in the terms and conditions of the prior contract."[14] As explained below, the FCC has adopted an even broader "established business relationship exemption" to the telemarketing regulations that it administers. Cox urges the FTC to create a parallel exemption, which is warranted by each of the four considerations the FTC traditionally uses to justify exemptions under the Rule.[15]

A. An Established Business Relationship Exemption from the Proposed Do-Not-Call Requirements is Warranted by Each of the Four Factors the FTC Uses to Determine Whether to Exempt Certain Telemarketing Conduct from Coverage of the TSR.

The Commission proposes to retain exemptions from the Rule for several types of telemarketing activities, including exemptions for calls subject to the FTC's Pay-Per-Call and Franchise Rules,[16] calls soliciting transactions that would be completed only after face-to-face meetings,[17] and inbound calls that do not result from any solicitation or that are initiated in response to general media advertising or most direct mail notices.[18] The Commission explains that these exemptions are designed to ensure that legitimate businesses are not unduly burdened by the Rule, and notes that each exemption is justified by one of four factors: (1) whether Congress intended a particular activity to be exempt from the Rule; (2) whether the conduct or business in question is already the subject of extensive federal or state regulation; (3) whether the conduct at issue lends itself easily to the forms of abuse or deception the Telemarketing Consumer Fraud and Abuse Prevention Act ("Telemarketing Act")[19] was intended to address; and (4) whether the risk that fraudulent sellers or telemarketers would avail themselves of the exemption outweigh the burden to legitimate industry of compliance with the Rule.[20] As explained below, the creation of an exemption from the proposed do-not-call requirements for calls furthering an existing business relationship is warranted by each of the foregoing factors.

1. The Legislative History of the Telemarketing Act and TCPA Support the Creation of an Established Business Relationship Exemption.

The legislative history of the Telemarketing Act specifically states that "[the] regulat[ion] of legitimate, mutually-beneficial activities is not the purpose of [the statute]."[21] Instead, the Act was intended to "strike an equitable balance between the interest of stopping deceptive (including fraudulent) and abusive telemarketing activities and not unduly burdening legitimate businesses."[22]

Congress attempted to strike the same balance in the TCPA.[23] As the FCC explained, the TCPA was not meant to impede legitimate telemarketing practices, but rather was designed to balance consumer privacy interests against the "continued viability of beneficial and useful business services."[24] Unlike the Telemarketing Act, the TCPA expressly authorized the adoption of a "single national database to compile a list of telephone numbers of residential subscribers" who wished to suppress the receipt of unsolicited telemarketing solicitations.[25] A nationwide do-not-call registry was only one of several mechanisms Congress directed the FCC to consider as a means of enabling residential telephone subscribers to prevent objectionable telemarketing solicitations.[26] Notwithstanding this authorization, Congress expressly prohibited the FCC from adopting a national do-not-call database that would prevent telemarketing calls to any person with whom the caller has formed an "established business relationship."[27] The House Committee explained this decision as follows:

> The [TCPA] reflects a balance the Committee reached between barring all calls to those subscribers who objected to unsolicited calls and a desire to not unduly interfere with ongoing business relationships. To provide as much protection as possible to the former interest while respecting the latter, the Committee adopted an exception to the general rule – that objecting subscribers should not be called – which enables businesses to continue established business relationships with customers . . .The Committee found that subscribers' objections to telemarketing initiatives were twofold. The first element pertains to the volume of unwanted

> calls. The second involves the unwanted nature of the calls. That is, the absence of any current or prior dealings with the caller was the source of many objections.[28]

The House Committee found that consumers who have previously expressed interest in products or services offered by a telemarketer generally are less likely to be surprised by calls from such sellers or consider them intrusive. The Committee also explained that the exemption Congress created for calls furthering "established business relationships" was *expressly designed to cover calls by cable television systems and newspapers to their existing subscribers:*

> Under the exception adopted by the Committee, an established business relationship would include a business entity's existing customers, for which an established business relationship is clearly present. Therefore, magazines*, cable television franchises, and newspapers all could call their current subscribers to continue their subscriptions even if such subscribers objected to 'unsolicited' commercial calls*. . . . In the Committee's view, an established business relationship also could be based upon any prior transaction, negotiation, or inquiry between the called party and the business entity.[29]

When Congress enacted the Telemarketing Act, it noted that the purpose of this statute paralleled the purpose of the TCPA,[30] which, as the FCC recognized, was designed to avoid undue interference with "ongoing business relationships."[31] The House Committee Report accompanying the Telemarketing Act also recognized "that legitimate telemarketing activities are ongoing in everyday business and may provide a useful service to both businesses and their customers . . . ."[32] The House Committee emphasized that "[r]egulating legitimate, mutually-beneficial activities is not the purpose of [the Telemarketing Act]."[33] Instead, the House Committee intended the legislation to focus only "on unscrupulous activities from which no one benefits but the perpetrator."[34]

Moreover, for purposes of implementing the Telemarketing Act, Congress specifically instructed the FTC to "take into account the obligations imposed by the TCPA and avoid adding burdens to legitimate telemarketing."[35] The lack of an established business relationship exemption in the FTC's proposed national do-not-call regime clearly adds a burden to legitimate telemarketing – a burden that Congress and the FCC *expressly determined should not be imposed under the TCPA.*

2. <u>Calls to Current Customers Already Are Subject to Extensive Regulation Under the Existing TSR.</u>

An established business relationship exemption from the national do-not-call requirements would not affect other aspects of the existing TSR, including calling hour restrictions,[36] prohibitions against abusive and harassing conduct,[37] and the requirement that all telemarketers must honor company-specific do-not-call requests.[38] These provisions of the existing TSR effectively protect consumers from unwarranted intrusions on their privacy by telemarketers with whom they have formed existing relationships. If a current customer wishes to prevent calls from a particular merchant or service provider with whom the customer does business, he or she can do so simply by asking to be placed on the company's own do-not-call list.

The TCPA's company-specific do-not-call provisions provide substantially identical protections. As the FCC explained, notwithstanding the existence of an established business relationship exemption to the rules governing unsolicited telephone solicitations, "a business may not make telephone solicitations to an existing or former customer who has asked to be placed on that company's do-not-call list."[39] The FCC determined that "[a] customer's request to be placed on a company's do-not-call list terminates the business relationship between the company and that customer for the purpose of any future solicitation."[40]

The FTC should respect Congress' judgment that registration on a nationwide telemarketing suppression list should not prevent consumers from receiving calls from companies with whom they formed ongoing business relationships. Such action will not undermine the principle of consumer choice or the Commission's privacy objectives, because, pursuant to both the existing TSR and the TCPA, consumers will continue to be able to prevent calls from even those parties with whom they have voluntarily chosen to do business by making a company specific do-not-call request.

3. Calls to Existing Customers Do Not Threaten Privacy Interests that the Telemarketing Act Was Intended to Protect.

According to the Commission, the proposed national do-not-call requirements are designed to fulfill its mandate under the Telemarketing Act to "prohibit telemarketers from undertaking a 'pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy.'"[41] Phone calls from businesses to their existing customers are not inherently "coercive or abusive of a consumer's right of privacy" and, therefore, they are beyond the scope of the Telemarketing Act's privacy mandate.

After conducting a lengthy rulemaking proceeding pursuant to the TCPA, the FCC "conclude[d], based upon the comments received and the legislative history, that a solicitation to someone with whom a prior business relationship exists does not adversely affect subscriber privacy interests."[42] It further noted that "such a solicitation can be deemed to be invited or permitted by a subscriber in light of the business relationship."[43] Indeed, the FCC expressly concluded that "any telephone subscriber who releases his or her telephone number has, in effect, given express prior consent to be called by the entity to which the number was released."[44] These conclusions are equally applicable to the TSR. Calls to existing customers do not adversely affect privacy interests and, therefore, do not lend themselves easily to the forms of the abuse the proposed national registry requirements are intended to protect. This consideration provides a third, independent justification for creating an established business relationship exemption to the proposed national do-not-call requirements.

4. The Burdens on Legitimate Industry Outweigh the Risk that a Narrow Established Business Relationship Exemption Could be Exploited for Fraudulent Purposes.

The only potential justification articulated by the FTC for declining to adopt an "established business relationship" exemption to the TSR is that such an exemption may be "unworkable in the context of telemarketing fraud."[45] Specifically, the NPRM surmises that such an exemption may "enable fraudulent telemarketers who were able to fraudulently make an initial sale to a customer to continue to exploit that customer without being subject to the Rule."[46] This concern dates back to 1995,[47] when the central purpose of the Rule was to prevent fraudulent telemarketing activity, but it has little or no relevance to the proposed do-not-call registry requirements, which primarily are aimed at protecting consumer privacy.[48]

Because the do-not-call requirements primarily are concerned with privacy as opposed to fraud, an established business relationship exemption limited to the do-not-call provisions should have little or no effect on the Commission's ability to prosecute fraudulent telemarketing. Calls to existing customers would remain fully subject to the TSR's current provisions prohibiting misrepresentations[49] and requiring affirmative disclosure of the material terms of telemarketing transactions.[50]

The proposed do-not-call requirements would do little or nothing to advance the FTC's interest in reducing telemarketing fraud, but would significantly burden ongoing business relationships by requiring sellers to obtain "express verifiable authorization" before communicating with customers whose telephone numbers appeared in the national registry. Therefore, the fourth and final factor – whether the burdens on legitimate businesses outweigh the risk that an established business relationship exemption could be exploited by fraudulent telemarketers – strongly supports granting such an exemption.

B. The FTC Should Adopt The FCC's Definition of an "Established Business Relationship" for Purposes of Implementing Any National Do-Not-Call Requirements.

To avoid potential conflicts with parallel telemarketing laws and regulations administered by the FCC, Cox urges the Commission to adopt an exemption that is coextensive with the established business relationship exception defined under the TCPA:

> The term established business relationship means a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a [telephone] subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.[51]

The adoption of such an exemption will honor Congress' judgments that an established business relationship exemption from a national do-not-call registry is "necessary" to protect current customer relationships and should be worded broadly "so as not to foreclose the capacity of businesses to place calls that build upon, follow-up, or renew, within a reasonable period of time, what had once been an existing customer relationship."[52] The adoption of such exemption will also enable the FTC to preserve the principle of consumer choice while adhering, at least in this respect, to Congress' instruction that the Commission refrain from implementing telemarketing regulations that add burdens to legitimate business activities beyond those imposed by the TCPA.

VIII. THE PROPOSED AMENDED TSR WOULD UNFAIRLY AND UNCONSTITUTIONALLY DISCRIMINATE AGAINST COMPANIES THAT USE TELEMARKETING TO MARKET INTERNET ACCESS AND WEB SERVICES TO BUSINESS CUSTOMERS.

The FTC generally exempts from the scope of the Rule telemarketing calls that are made from one business to another.[53] The proposed TSR, however, would eliminate the business-to-business exemption for telemarketing calls involving the sale of "Internet services" and "Web services."[54] This exception is startling in its reach. According to the NPRM, this proposed amendment would expand the TSR's coverage to embrace all outbound business-to-business telemarketing involving "any and all services related to the World Wide Web."[55]

In support of this proposal, the Commission asserts that the "sale of Internet and Web services[56] to small businesses has emerged as one of the leading sources of complaints about fraud by small businesses."[57] This assertion hardly is surprising, however, given the explosive growth of the Internet economy. The Department of Commerce reported in February that U.S. retail e-commerce sales increased 19.3 percent between 2000 and 2001,[58] despite the fact that total retail sales increased by only 3.3 percent during the same period of time.[59] According to the University of Texas, electronic commerce transactions, including both retail and business-to-business sales, generated a total of $830 billion in 2000.[60]

As of 1993, few among even the largest companies in the United States had established a presence on the World Wide Web. By 1998, however, at least 35 percent of all small businesses had established a Web site and one-third of those sites supported e-commerce transactions.[61] Since that time, Web sites for small businesses have continued to proliferate. The Small Business Administration ("SBA") estimated that 85 percent of all small businesses would transact business via Web sites by the end of 2002, a figure that attests to countless transactions for Web site development, hosting and maintenance services.[62]

The demand for Internet access and Internet Service Provider ("ISP") services also has surged since the advent of the first commercial Web browser in 1993. As of 2000, there were no fewer than 7,100 ISPs in the United States.[63] The SBA projects that by 2003, this number will swell to more than 10,000 ISPs.[64] The SBA also estimates that during this same time frame, business-to-business e-commerce running over the networks of these ISPs will account for $3 trillion in sales, a very significant figure for a sector of the economy that hardly existed a decade ago.[65]

Unlike credit repair services, fraud loss recovery schemes and other inherently bogus enterprises singled-out for special restrictions under the TSR, the FTC does not, and could not plausibly, contend that Web services and Internet access services are inherently fraudulent. These services have revolutionized the economy and generate powerful efficiencies and cost savings for consumers and businesses alike.[66] Web services have proved especially valuable for small businesses. According to the SBA, "[s]mall businesses that use the Internet have grown 46 percent faster than those that have not."[67]

The NPRM cites no empirical evidence supporting an inference that providers of Internet and Web services are more prone to engage in fraud than providers of other services to businesses. Indeed, despite the enormous scale of the Internet economy, the NPRM cites only four cases in which the Commission has alleged fraud in the sale of "Web services," and identifies no cases whatsoever involving fraud in the sale of "Internet services."[68] Measured against the sheer scale of business-to-business e-commerce on the World Wide Web, these enforcement statistics do not reflect a uniquely pernicious problem with fraudulent telemarketing in the area of Internet and Web services. Accordingly, this data does not justify the selective expansion of the TSR to encompass these industries.

The FTC's proposed disparate treatment of Web and Internet service providers under the TSR will result in significant competitive harm. For example, commercial cable modem service providers like Cox Business Services compete directly with telephone companies offering DSL services. Although the proposed amended Rule would stultify the marketing communications of Cox Business Services, it would leave unfettered the telemarketing efforts of its principal competitors, the DSL companies that would continue to be insulated from the jurisdiction of the FTC by their status as common carriers.

If the Commission truly intends to sweep into the TSR "any and all service relating to the World Wide Web," then the proposed amended Rule also would embrace all forms of Internet advertising. Commenting on the recent "explosion in online advertising," former FTC Chairman Robert Pitofsky noted that online ad revenues in the United States had grown from less than $300 million in 1996, to more than $1.6 billion in only the first half of 1999.[69] This figure has continued to skyrocket since the former Chairman's departure from the Commission. Early estimates of total U.S. online advertising expenditures in 2001 range between $6 and $8 billion.[70] Although a vibrant sector in the media marketplace, online advertising still is dwarfed by print, broadcast and other traditional advertising media, and its continued growth would be jeopardized by the selective regulations proposed by the FTC. Cox urges the Commission not to single-out firms engaged in the sale of Internet and Web services to businesses for coverage under the TSR. This proposal is grossly unfair, constitutionally unsound and it undermines the support both Congress and the administration have pledged for the rapid deployment of broadband Internet services.

A. **The Internet and Web Services Exception Violates the Equal Protection Clause.**

The equal protection clause of the Fifth Amendment requires "that all persons similarly situated should be treated alike,"[71] and requires that laws must equally impose liabilities on parties, including corporations, in like circumstances.[72] Moreover, the guarantee of equal protection requires strict scrutiny of a legislative classification when, as with the case of the proposed Internet and Web services exception, "it interferes with the exercise of a fundamental right" like First Amendment rights.[73]

"Of course, it is a rare case . . . in which a law survives strict scrutiny."[74] As one prominent authority noted, "[w]hen some form of heightened scrutiny is applied, the law may properly be regarded as presumptively invalid, and likely to be struck down."[75]

This case presents no exception to the general rule of constitutional infirmity. The FTC has not proffered any "compelling" interest that is served by singling-out the commercial speech of Internet and Web services firms for restrictions imposed on virtually no other businesses. To the contrary, inasmuch as the proposed amendments to the TSR create unique obstacles to the marketing of commercial Internet access service, the Commission's proposal actively undermines the high priority that both Congress and the administration have placed on speeding the deployment of high-speed Internet service.[76] The FTC's proposal to target Web and Internet access services for special selective regulations also runs counter to the Commission's traditionally cautious approach to adopting rules and policies that could retard the growth of the Internet economy. As Commissioner Swindle observed, considering the size and importance of this economic sector, "[t]he economic consequences of government actions in e-commerce will be profound and serious. Any missteps will injure our country gravely and diminish our position as the leading world economy."[77]

Nor has the Commission shown, as it must, that Internet advertising transactions, or transactions involving Internet and Web services, are uniquely susceptible to fraud. Accordingly, the selective regulation of Internet advertising services would plainly violate fundamental guarantees of equal protection under the Fifth Amendment.[78]

B. The Internet and Web Services Exception Violates The First Amendment.

The FTC's proposal to selectively target commercial speech about Web and Internet services also is repugnant to the First Amendment. Even when strict scrutiny is not applied to such regulations under an equal protection analysis, disparate regulations of commercial speech and speakers still are subject to searching review under at least the intermediate level of constitutional scrutiny under the First Amendment.[79] Under this commercial speech test, known as the "*Central Hudson* test," a governmental restriction on truthful commercial speech about lawful activity will be upheld only if: (1) the asserted government interest is substantial; (2) the regulation directly advances the governmental interest asserted; and (3) the regulation is not more extensive than is necessary to serve that interest.[80]

The threshold inquiry under *Central Hudson* is whether the commercial speech at issue concerns lawful activity and is not misleading.[81] Although the proposed Internet and Web Services exception is ostensibly designed to suppress fraudulent telemarketing, it burdens all telemarketing speech concerning these services, and would subject legitimate Web and Internet services to many restrictions under the TSR that are unrelated to fraud. "[W]here . . . truthful and non-misleading expression will be snared along with fraudulent or deceptive speech, the [government] must satisfy the remainder of the [three prongs of the] *Central Hudson* test . . . ."[82] Therefore, the FTC's proposed restriction on business-to-business solicitations involving Web and Internet services will be sustained only if they withstand scrutiny under all three of the *Central Hudson* factors.

Even assuming that the FTC could successfully assert an important interest in protecting businesses from telemarketing fraud, the selective regulation chosen as the means of advancing this interest fails the second and third prongs of the *Central Hudson* test. To pass the second prong of this test, a regulation must "directly and materially advanc[e] the asserted governmental interest."[83] This burden is "not satisfied by mere speculation or conjecture; rather, a governmental body must demonstrate that the harms it recites are real and that its restrictions will, in fact, alleviate them to a material degree."[84] The regulation cannot be saved if it "provides only ineffectual or remote support for the government's purpose" or if there is "little chance" that the restriction will advance the state's goal.[85]

The FTC's proposed exception selectively regulating Internet and Web services fails each of these requirements. The Commission asserts that telemarketing fraud is prevalent in the Internet and Web services industries. Nonetheless, the NPRM cites only four cases in which the FTC detected fraud in the field of Web services and cites no cases at all involving telemarketing fraud in the sale of Internet services.[86] Viewed in light of the tremendous volume of commerce involving the sale of Internet and Web services, this small handful of cases suggests that the unique harms the FTC associates with Web and Internet services are more speculative than real.

Likewise, the Internet and Web services exception fails the final prong of the *Central Hudson* analysis, which asks whether the speech restriction is "more extensive than necessary to serve the interests that support it."[87] To withstand this test, the FTC must demonstrate that its selective restriction on Web and Internet services represents "a reasonable fit between the [regulatory] ends and the means chosen to accomplish those ends . . . a means narrowly tailored to achieve the desired objective."[88] The Commission's proposal fails this requirement because it burdens all providers of Internet and Web services without regard to whether they are engaging in fraud. It also is overinclusive because it subjects sellers of Web and Internet services to the privacy provisions of the TSR, such as the national do-not-call requirements, that largely are unrelated to the FTC's stated goal of reducing fraud. At the same time, the FTC's proposal is fatally underinclusive because it would fail to prevent telemarketing fraud perpetrated through telemarketing transactions involving the myriad other products and services that are sold to businesses.

Although the commercial speech doctrine does not require that the government use the least restrictive means available to further its interest, an administrative agencies must "carefully calculate the costs and benefits" associated with proposed restrictions.[89] Moreover, the Commission must demonstrate that a significantly less restrictive alternative strategy will not sufficiently advance its regulatory interests.[90]

The NPRM contains no discussion of the costs and burdens that its proposed disparate regulation of Web and Internet services would inflict on the thousands of legitimate businesses operating in these industries. Moreover, the Commission makes no attempt to show why its broad enforcement powers under Section 5 of the FTC Act are insufficient to address any telemarketing fraud perpetrated by unscrupulous sellers of Internet and Web services to businesses.[91]

C. At a Minimum, The Commission Should Narrow The Scope of The Proposed Internet and Web Services Exception.

In light of its constitutional flaws, Cox urges the FTC to reject as a whole the proposed exception of Web and Internet services from the exemption for business-to-business calls. If the Commission nonetheless retains some form of its original proposal, any restrictions on business-to-business telemarketing calls involving Web and Internet services should, at the very least, be tailored more narrowly to address only the specific fraudulent practices giving rise to the Commission's concerns, and to minimize undue interference with the legitimate marketing practices of firms that are vital to the continued growth of the Internet economy.

At a minimum, the Commission should narrow the proposed Internet and Web services exception to exclude from regulation those activities for which the Commission lacks evidence of any fraudulent telemarketing. All of the cases cited by the NPRM in support of a proposed business-to-business exception for Web and Internet services telemarketing involved the fraudulent sale of Web site hosting and design services and, more specifically, the "cramming" of charges for those services on businesses' telephone bills.[92] According to the FTC, those cases involved calls to businesses offering Web site design and hosting services for

> a 'free' 30-day trial period . . . Some small businesses were told they were under 'no obligation' after the trial period; but that they'd be billed at the end of trial period unless they cancelled . . . Others were told that no charges would be incurred unless the business ordered the web site on a permanent basis and approved future charges . . . Other businesses refused to accept the free offer, but agreed to receive an information package . . . But small businesses were still charged for the 'free' trial . . . Many were billed repeatedly, month after month, even those who had not agreed to accept the trial offer and those who had canceled.[93]

Nothing in this record suggests a pattern of fraudulent telemarketing for offers to supply Internet access service, or any other services relating to the World Wide Web other than Web site design and development, hosting and maintenance. Accordingly, any extension of the Rule should be limited, at most, to these latter Web site development, hosting and maintenance services, as opposed to Internet access services, advertising services and the hundreds of other services implicated by the Commission's sweeping proposal to regulate "any and all services related to the World Wide Web."[94]

Moreover, as Susan Grant of the National Consumers League noted during the July forum, "[o]ne of the distinguishing characteristics of [the internet and Web services] scam is that there is no preexisting relationship between the vendor and the business."[95] Accordingly, because there is no evidence of fraud in the context of ongoing business relationships, any selective regulation of Internet and web services should exempt telephone communications to existing customers.

Finally, as several participants in the July forum suggested, any exception for Internet and Web services should be limited strictly to the TSR's prohibitions against deceptive telemarketing misrepresentations. This measure would enable the Commission to target the types of telemarketing fraud described in the NPRM without burdening Cox's affiliates and other legitimate ISPs and Internet technology and Web services firms with national do-not-call obligations, calling hour restrictions, or disclosure requirements that the Commission has generally deemed unnecessary in the business-to-business context.[96]

IX. THE FTC'S PROPOSED RESTRICTION ON THE DISCLOSURE OF CUSTOMER BILLING INFORMATION IS OVERBROAD AND UNDULY BURDENSOME.

The proposed amended Rule would prohibit telemarketers from receiving a customer's billing information from anyone other than the customer, or from disclosing or sharing any such information with third-parties for use in telemarketing.[97] Cox's cable television systems and newspapers regularly use third-party service bureaus or other third-party telemarketing contractors to conduct outbound telemarketing campaigns on their behalf. When telemarketing agents acquire a new customer, they necessarily transfer the customer's billing information back to Cox for purposes of establishing a new account, and, in the ordinary course of business, a Cox customer sales representative may someday refer to that account information again, including the customer's billing information, for purposes of processing another telemarketing transaction with the same customer. Various Cox divisions also have entered into relationships with firms like AllConnect and ConnectUtilities that enable consumers who are planning to relocate to a new community to establish accounts for all of their necessary utility services and related services, such as newspaper and cable television subscriptions, with a single online or telephone transaction. The very efficiency that these firms offer is the ability to establish, on a "one stop shopping" basis, multiple billing relationships with a single submission of billing information. Cox cable systems also have entered into cross-sales agency relationships with individual newspaper publishers and power companies in their communities designed to achieve similar efficiencies. All of these relationships offer obvious benefits to consumers and most of them involve some exchange of customer billing information with the knowledge and consent of the affected customers.

Read literally, the proposed amended TSR could be construed to prevent Cox from receiving customer billing information acquired by its own contractors or third-party sales agents through a sale of Cox's own services, if Cox later intended to use this billing information to "up-sell" customers in a subsequent telemarketing campaign. The FTC should clarify that this is not the intention of the proposed customer billing restrictions contemplated by the amended Rule. Whether the information in question is obtained through a transaction conducted by a third-party sales agent or by a seller's own call center employees, a seller's internal use of its own customer billing information for purposes of "up-selling," or otherwise completing a telemarketing transaction, does not pose significant risks to consumers. Consumers who already have purchased goods or services through a telemarketing transaction with a particular seller are on notice that the seller possesses their credit card number (or other account information) at the time they are solicited. Such customers, accordingly, will not be surprised when the seller uses the billing information that they voluntarily have provided to process a second transaction.

Moreover, the ability of a seller (or a seller's sales agent) to access a customer's historical account information during an "up-selling" call generally benefits the consumer because it speeds the completion of the call, promotes convenience and efficiency, and reduces transaction costs. Of course, Cox would not object to a rule requiring telemarketers to disclose that they are in possession of a customer's billing information before they use such information to process a payment. However, a rule that categorically prohibits the disclosure or receipt of customer billing information, even among sellers and their third-party telemarketing contractor, is far broader than necessary to prevent the abuses associated with the "pre-acquired account telemarketing" scenarios and negative option scams discussed in the NPRM.[98]

Cox accordingly urges the Commission to revise the proposed amended TSR to clarify that it is not intended to prevent transfers of customer billing information from a seller to its own sales agents (and vice versa) for use in telemarketing calls involving the seller's own products and services. Specifically, the FTC should permit the disclosure and receipt of customer billing information to and from sellers and their third-party telemarketing agents where: (1) the information was originally acquired during the sale of the seller's own goods or services; and (2) the subsequent use of the customer's billing information is limited to transactions involving the same seller's goods and services. The Commission also should clarify that nothing in the proposed amended Rule is intended to prevent a seller's transfer of comprehensive customer records, including customer billing information, to its successor-in-interest after an ordinary-course transfer of control event, such as a merger or sale of a seller's business as a going concern.

X. THE PROPOSED DEFINITION OF AN "OUTBOUND TELEPHONE CALL" IS OVERBROAD.

The Commission's proposed definition of an "outbound telephone call" would extend the applicability of the TSR to *inbound* calls in two situations: "(1) when, in the course of a single call, a consumer or donor is transferred from one telemarketer soliciting one purchase or charitable contribution to a different telemarketer soliciting a different purchase or contribution; and (2) when a single telemarketer solicits purchases or contributions on behalf of two separate sellers or charitable organizations (or some combination of the two)."[99] In these circumstances, the transferred call or second solicitation would be treated as an "outbound telephone call" subject to all of the requirements of the proposed amended TSR.

Cox submits that this proposal is flawed in two important respects. First, the proposed definition inappropriately fails to distinguish between calls transferred between telemarketers representing the same seller and calls transferred between telemarketers representing different sellers. Second, the proposal, on its face, would subject "up-selling" solicitations to calling hour requirements, national do-not-call obligations and other aspects of the TSR that logically should not apply to any call that is initiated by a consumer.

The Commission's proposed definition of an "outbound telephone call" includes "any telephone call to induce the purchase of goods or services . . . when such telephone call . . . is transferred to a telemarketer other than the original telemarketer."[100] Under the proposed Rule, the term "telemarketer" means any "person" who initiates or receives a call.[101] Read literally, this provision would trigger the applicability of the proposed amended TSR whenever one Cox customer care representative transfers an inbound caller to a different Cox customer care representative for purposes of completing a transaction for the sale of Cox services. Surely, this is not the result intended by the Commission. Cox accordingly requests that the Commission revise the applicable definition of an "outbound telephone call" to clarify that an outbound call does not include inbound calls transferred between telemarketers representing the same seller, where the purpose of the call is to induce the purchase of that seller's products or services.

Moreover, as drafted, the FTC's proposed definition of an "outbound telephone call" would essentially transform the "up-selling" portion of inbound calls into separate, outbound telemarketing calls that are fully subject to the calling hour restrictions, and national do-not-call registry obligations of the proposed amended TSR. Read literally, this change would lead to preposterous results. Before inquiring about a caller's interest in another seller's products or service, a telemarketer who receives an inbound call would have to make a "real time" determination as to whether the caller's name or number is on the proposed national do-not-call registry and consider whether the second solicitation is taking place before 8 a.m. or after 9 p.m. Cox does not believe that such an impractical and burdensome result was contemplated or intended by the FTC. In fact, the NPRM evidences that the Commission proposed this definitional change with only the disclosure requirements of the Rule in mind.[102] Discussing the intent underlying the proposed "outbound telephone call" definition, the Commission states:

> [I]n external up-selling, when calls are transferred from one seller or telemarketer to another, or when a single telemarketer solicits on behalf of two distinct sellers, it is crucial that customers or donors clearly understand that they are dealing with separate entities . . . [I]t is also important that consumers understand that the purpose of the second transaction is to solicit sales of goods or services . . . .[103]

Thus, it appears that the Commission's goal in proposing the "outbound telephone call" definition was limited to ensuring that consumers are not deceived or misled about the nature and purpose of "up-sell" transactions, or about the identity of the seller of the products or services offered in those transactions. Accordingly, Cox encourages the Commission to tailor the proposed definition of "outbound telephone call" to its intended purpose of imposing only the Rule's disclosure obligations on telemarketers who engage in "up-selling" during inbound telephone calls.

XI. <u>OTHER RECOMMENDATIONS.</u>

Cox respectfully requests that the Commission consider the following additional recommendations regarding its proposal to amend the TSR.

A. Caller ID Blocking.

Cox generally supports the FTC's proposal to prohibit the falsification of caller ID information or to block the transmission of caller ID information when a telemarketer is employing equipment capable of transmitting the name of the calling party and/or a telephone number at which consumers can reach the calling party. However, Cox, like many telemarketers, often uses large "trunk side" connections (also known as T1 lines) because they are a cost-effective means of making many calls. Often these connections are incapable of transmitting caller identification information, or are capable only of transmitting the telephone number for the trunk exchange. In these latter situations, telemarketers should be allowed to suppress the transmission of the phone number associated with the trunk exchange because these numbers cannot be used by consumers to contact the telemarketer. The receipt of such numbers as caller identification information serves no useful purpose and tends only to confuse consumers. Accordingly, Cox requests that the Commission clarify that the use of equipment and telecommunications services that are incapable of transmitting the name of the calling party and/or a telephone number at which the calling party can be reached will not in and of itself, constitute "blocking, circumventing, or altering the transmission of, or directing another to block, circumvent or alter the transmission of" caller identification information within the meaning of the TSR.[104] Similarly, Cox requests that the Commission clarify that the failure to transmit a trunk exchange number that cannot be used by consumers to contact the calling party will not constitute an abusive telemarketing act or practice.

B. Authentication of Do-Not-Call Requests.

To avoid abuses of any do-not-call registry requirements that the Commission may adopt, and to ensure that the registry accurately reflects consumer preferences, the FTC should adopt reasonable authentication procedures to ensure that only listings from the line subscriber of record will be incorporated into the national suppression database. Moreover, the FTC should allow telemarketers that obtain actual knowledge that a number included in the national registry has been reassigned to remove that number from their suppression lists.

C. "Do-Not-Call Safe Harbor" Requirements.

The "safe harbor" requirements contemplated by the NPRM provide that "sellers and telemarketers must obtain and reconcile on not less than a monthly basis the names and/or telephone numbers of persons who have been placed on the Commission's national registry."[105] This requirement would inflict unnecessary costs and burdens on sellers and telemarketers that do not execute campaigns or otherwise engage in telemarketing activity on a continuous or monthly basis. Accordingly, the proposed safe harbor criteria should be amended to provide that sellers and telemarketers will not be liable for inadvertently calling a suppressed number if, within thirty days of making the call in question, they had obtained and reconciled their lists against the names and/or numbers in the Commission's national registry.

D. Preemption of Conflicting State Regulation of Interstate Calls.

If the FTC determines that it has preemption authority, Cox urges the Commission to preempt conflicting state law do-not-call requirements that purport to apply to interstate telemarketing calls. This limited preemption would drastically simplify the patchwork of disparate and sometimes conflicting state laws that apply to telemarketing today. Preemption also would reduce the complexity, legal costs and administrative burdens associated with planning and executing interstate telemarketing campaigns, conserve judicial and law enforcement resources at the state level, and promote a better understanding of consumers' rights and solicitors' obligations with respect to telemarketing calls and transactions.

Preemption of state do-not-call laws that affect interstate calling also would honor Congress' judgment in connection with the TCPA that any federal do-not-call registry should supersede state do-not-call lists and related procedural requirements. The House Report on the TCPA recites that:

> if the FCC requires establishment of the [national do-not-call] database permitted in subsection c(3), State or local authorities' regulation of telephone solicitations must be based upon the requirements imposed by the FCC. State and local authorities may enforce compliance with the database, or functionally equivalent system, or a segment thereof.[106]

CONCLUSION

Cox respectfully urges the Commission to modify its proposal to amend the Telemarketing Sales Rule as recommended above in order to ensure that the Commission will not impose unnecessary restrictions on legitimate business activities and the distribution of vital news, information and other protected content to consumers through telemarketing.

Respectfully submitted,

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Appendix A

"Do Not Call" Registry Statutory Exemptions for Existing Business Relationships

1.) **Alabama**: ALA. CODE § 8-19A-4(21) (2001) (exempting calls to "prospective customers who have an existing business relationship with or who have previously purchased from the business enterprise").

2.) **Alaska**: ALASKA STAT. § 45.50.475(g)(3)(B)(v) (Michie 2001) (exempting calls to "prospective purchasers who have, within the last 24 months, purchased from the person making the solicitation or from the business enterprise for which the person is calling").

3.) **Arkansas**: ARK. CODE ANN. § 4-99-403(2)(A) (Michie 2001) (exempting "a call or message to any consumer with whom the telephone solicitor has a prior or existing business relationship").

4.) **California**: CAL. BUS. & PROF. CODE § 17592(e)(4) (Deering 2001) (exempting "[t]elephone calls made to a subscriber if the telephone solicitor has an established business relationship with the subscriber").

5.) **Colorado**: COLO. REV. STAT. § 6-1-903(10)(b)(ii) (2001) (exempting calls "[b]y or on behalf of any person or entity with whom a residential subscriber has an established business relationship").

6.) **Connecticut**: CONN. GEN. STAT. § 42-288a(a)(9)(C) (2001) (exempting calls "to an existing customer").

7.) **Florida**: FLA. STAT. CH. 501.059(1)(c)(3) (2001) (exempting calls to "any person with whom the telephone solicitor has a prior or existing business relationship").

8.) **Georgia**: GA. CODE ANN. § 46-5-27(b)(3)(B) (2001) (exempting calls "[b]y or on behalf of any person or entity with whom a residential subscriber has a prior or current business or personal relationship").

9.) **Idaho**: IDAHO CODE § 48-1003A(4)(b)(i) (Michie 2001) (exempting calls made when "an established business relationship exists between the telephone solicitor and the telephone subscriber").

10.) **Kentucky**: KY. REV. STAT. ANN. § 367.46951(2)(c) (Michie 2001) (exempting a "telephone call to any person with whom the telemarketer or merchant has a prior or existing business relationship").

11.) **Louisiana**: LA. REV. STAT. ANN. tit. 45, § 844.12(4)(c) (West 2001) (exempting calls to "any person with whom the telephonic solicitor has an existing business relationship, or a prior business relationship that was terminated or lapsed within six months of such call").

12.) **Maine**: ME. REV. STAT. ANN. tit. 32, § 14716(3)(B) (West 2001) (exempting calls made if "the seller has an established business relationship with the consumer at the time the call is made").

13.) **Missouri**: MO. REV. STAT. § 407.1095(3)(b) (2001) (exempting calls by "any person or entity with whom a residential subscriber has had a business contact within the past one hundred eighty days or a current business or personal relationship").

14.) **New York**: N.Y. GEN. BUS. LAW § 399-z(1)(J)(ii) (Consol. 2001) (exempting calls "[i]n connection with an established business relationship").

15.) **Oregon**: OR. REV. STAT. § 646.569(2)(b) (2001) (exempting calls made by "a person soliciting business from prospective purchasers who have previously purchased from" the person or a business entity that the person represents).

16.) **Tennessee**: TENN. CODE ANN. § 65-4-401(6)(B)(iii) (2001) (exempting calls to "any residential subscriber . . . who is an existing customer," defined to include a telephone subscriber with whom the person making the call "has had a prior relationship within the prior twelve months").

17.) **Texas**: TEX. BUS. & COMM. CODE ANN. § 43.003(b)(2)(A) (Vernon 2002) (exempting calls made "in connection with . . . an established business relationship").

18.) **Wisconsin**: WIS. STAT. § 100.52(6)(b) (2002) (exempting telephone solicitations "made to a recipient who is a current client of the person selling the property, goods, or services that is the reason for the telephone solicitation").

19.) **Wyoming**: WYO. STAT. ANN. § 40-12-301(a)(xi)(C) (Michie 2001) (exempting calls to "any person with whom the telephone solicitor had an established business relationship").

[*] The *Richmond Journal of Law & Technology* has neither verified the accuracy of these remarks or the accuracy of the author's footnotes.

[1] 67 Fed. Reg. 4492 (proposed Jan. 30, 2002) (to be codified at 16 C.F.R. pt. 310). Hereafter, the Notice of Proposed Rulemaking is referred to as the "NPRM."

[2] 16 C.F.R. pt. 310 (2001).

[3] *House Report on the Telemarketing Act*, H.R. Rep. No. 103-20, at 2 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1626, 1627.

[4] *Id.* at 2.

[5] *E.g., Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938) (distribution as well as publication is subject to First Amendment protection); *Ex Parte Jackson*, 96 U.S. 727, 733 (1878) ("Liberty of circulating is as essential to [freedom of expression] as liberty of publishing; indeed, without the circulation, the publication would be of little value.")

[6] *Murdock v. Pennsylvania*, 319 U.S. 105, 111 ("The right to use the press for expressing one's views is not to be measured by the protection afforded commercial handbills. It should be remembered that the pamphlets of Thomas Paine were not distributed free of charge.").

[7] This basic proposition is true of a government permitting scheme that uses supposed cost-based fees to restrict speech, *Cox v. New Hampshire*, 312 U.S. 569, 577 (1941) (striking down excessive fee imposed on expression of speech); it is true of seemingly neutral rules that have the effect of unreasonably restricting expression or distribution of protected expression, *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983) (holding that even neutral time, place and manner restrictions must meet a heightened reasonableness standard when implicating protected speech); and it is particularly true when the government seeks to limit only one method of press distribution or one type of commercial speech about the availability of media publications, *City of Lakewood v. Plain Dealer Pub. Co.,* 486 U.S. 750, 751 (1988) (striking down newsrack licensing plan).

[8] *See, e.g., Lakewood*, 486 U.S. at 761 ("Newspapers are in the business of expression, while soda vendors are in the business of selling soft drinks."); *see also*, *Bery v. City of New York*, 97 F.3d 689 (2nd Cir. 1996) (striking down enforcement of general peddling ordinance against sale of protected speech on public streets and sidewalks.)

[9] Of course the First Amendment shields more than the distribution of news content and political speech. Its protections extend to all forms of entertainment media. *See, e.g., Turner Broadcasting Sys., Inc. v. FCC,* 114 S.Ct. 2445, 2464 (1994) (television programming); *Winters v. New York*, 333 U.S. 507, 510 (1948) (film); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-502 (1952); (theatre); *Southwestern Promotions Ltd. v. Conrad*, 420 U.S. 546 (1975); (music without regard to lyrics).

[10] Proposed Rule § 310.4(b)(1)(iii).

[11] Citations to the established business relationship exemptions that exist under every state "do-not-call" registry law known to Cox are compiled in a list attached hereto as Appendix A.

[12] As the FTC acknowledges in its NPRM, "the same customers who say they would like to stop receiving telemarketing calls may actually welcome certain types of telemarketing calls – for example, special sale price offers from companies with which they have previously transacted business." *NPRM*, 67 Fed. Reg. 4492, 4519.

[13] Mo. Rev. Stat. § 407.1095(3)(b).

[14] New York General Business Law § 399, McKinney's Consolidated Laws of New York Annotated, Chapter 20, Article 26.

[15] The Commission explained in the NPRM that the existing exemptions it has created under the TSR are supported by one or more of the following considerations: (1) whether Congress intended a particular activity to be exempt from the Rule; (2) whether the conduct or business in question is already the subject of extensive federal or State regulation; (3) whether the conduct at issue lends itself easily to the forms of abuse or deception the Telemarketing Act was intended to address; and (4) whether the risk that fraudulent sellers or telemarketers would avail themselves of the exemption outweigh the burden to legitimate industry of compliance with the Rule. *NPRM* at 4528.

[16] Proposed Rule §§ 310.6(a) and (b).

[17] *Id.* at § 310.6(c).

[18] *Id.* at §§ 310.6(d)-(f).

[19] 15 U.S.C. §§ 6101-6108.

[20] *NPRM*, 67 Fed. Reg. 4492, 4528.

[21] *House Report on the Telemarketing Act*, H.R. Rep. No. 103-20, at 2 (1993).

[22] *Id.*

[23] 47 U.S.C. § 227 (2001).

[24] *TCPA Report and Order*, 7 F.C.C.R. 8752, 8754 (1992).

[25] 47 U.S.C. § 227(c)(3).

[26] *Id.* at § 227(c)(1).

[27] *Id.* at § 227(a)(3).

[28] *House Report on the TCPA*, H.R. Rep. No. 102-317, at 13 (1991).
[29] *Id.* at 14 (emphasis added).
[30] *Id.*
[31] *TCPA Report and Order*, 7 F.C.C.R. 8752, 8770 (1992).
[32] *House Report on the Telemarketing Act*, H.R. Rep. No. 103-20, at 2 (1993).
[33] *Id.*
[34] *Id.*
[35] *Id.* at 8.
[36] Proposed Rule § 310.4(c).
[37] *Id.* at § 310.4(a), (b)(1)(i), (d) and (e).
[38] *Id.* at § 310.4(b)(1)(iii)(A).
[39] *TCPA Report and Order*, 7 F.C.C.R. 8752, 8770 n.63 (1992).
[40] *Id.*
[41] *NPRM*, 67 Fed. Reg. 4492, 4518.
[42] *TCPA Report and Order*, 7 F.C.C.R. at 8770.
[43] *Id.*
[44] *Id.*
[45] *NPRM* at 4532.
[46] *Id.*
[47] *See NPRM Proposing the Original TSR*, 60 Fed. Reg. 30406, 30423 (proposed June 8, 1995) (codified at 16 C.F.R. pt. 310).
[48] *Id.* at 4517.
[49] Proposed Rule § 310.3(a)(2).
[50] *Id.* at § 310.3(a)(1).
[51] 47 C.F.R. § 64.1200(e). California has enacted a similarly broad exemption from its registry law for calls placed by telemarketers on behalf of persons or firms with whom the residential subscriber has formed an "established business relationship" defined as "a relationship formed by a voluntary, two-way communication between a telephone solicitor and a subscriber with or without an exchange of consideration, on the basis of an application, purchase, rental, lease, or transaction if the relationship has not been terminated by the subscriber or the solicitor." Cal. Bus. & Prof. Code § 17592(e)(4).

[52] *House Report on the TCPA*, H.R. Rep. No. 102-317, at 14 (1991).
[53] 16 C.F.R. § 310.6(g).
[54] The current version of the Rule already includes an exception to the business-to-business exemption for calls involving sales of non-durable office or cleaning supplies.
[55] *NPRM,* 67 Fed. Reg 4492*,* 4500.
[56] "Internet services" are defined as "the provision, by an Internet Service Provider, or another, of access to the Internet," and "Web services" are defined as "designing, building, creating, publishing, maintaining, providing or hosting a website on the Internet." Proposed Rule, §§ 310.2(o) and (bb).
[57] *NPRM* at 4531.
[58] *See* Press Release, U.S. Census Bureau, U.S. Dep't of Commerce, *Retail E-Commerce Sales in Fourth Quarter 2001* (Feb. 20, 2002), at http://www.census.gov/mrts/www/current.html.
[59] *See id.*
[60] *See* University of Texas Center for Research in Electronic Commerce*, The Internet Economy Indicators*, *at* http://www.internetindicators.com/execsummry.html.

[61] *See* U.S. Small Business Admin., Small Business Expansions in Electronic Commerce 8 (2000), *at* http://www.sba.gov/advo/stats/e_comm2.pdf.
[62] *See id.*
[63] *See id.* at 5.
[64] *See id.*
[65] *See id.* at 14.
[66] *See generally*, *Benefits of Electronic Commerce Applications of the National Information Infrastructure*, *at* http://nii.nist.gov/nii/applic/eleccom/elcben.html (last visited Mar. 22, 2002).
[67] *See* Small Business Expansions in Electronic Commerce, *supra* note 55, at 8.
[68] *See NPRM*, 67 Fed. Reg. 4492, 4531.
[69] Chairman Robert Pitofsky, *Electronic Commerce and Beyond: Challenges of the New Digital Age*, Address at the Woodrow Wilson Center Sovereignty in the Digital Age Series (Feb. 10, 2000), *at* http://www.ftc.gov/speeches/pitofsky/rpwilson2.htm.
[70] *E-Advertising Will Grow Despite General Ad Flatline*, eStatNews (Jan. 22, 2002), *at* http://www.emarketer.com/estatnews/estats/eadvertising/20020122_gart.html.

[71] *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985).
[72] *Williams v. Vermont*, 472 U.S. 14 (1985); *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 881 n. 9 (1985); *Police Dep't v. Mosley*, 408 U.S. 92 (1972).
[73] *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976).
[74] *Burson v. Freeman*, 504 U.S. 191, 211 (1992).
[75] 1 Rodney A. Smolla & Melville B. Nimmer, *Freedom of Speech*, § 4:3 (1999).
[76] *See* Remarks by Secretary of Commerce Donald L. Evans to the Precursor Group, February 6, 2002, *available at* http://osecnt.doc.gov/public.nsf/docs/Evans-Precursor-Group ("We're working on ways to help accelerate broadband deployment and usage . . . . NTIA will work closely with the FCC to craft the right regulatory policies to facilitate broadband deployment and the creation of a competitive broadband marketplace . . . ."); Remarks of Commerce Assistant Secretary and NTIA chief Nancy Victory, January 23, 2002, *available at* http://www.ntia.doc.gov/ntiahome/speeches/2002/ outlook_012302.htm ("broadband issues are a top priority for President Bush and his administration"); *see also* S. Rep. No. 104-230, at 50 (1995) ("deployment of advanced telecommunications services" is one of the "primary objectives" of the Telecommunications Act of 1996); Telecommunications Act of 1996, § 706, Pub. L. 104-104, Title VII, Feb. 8, 1996, 110 Stat. 153, reproduced in the notes to 47 U.S.C. § 157 (directing the FCC to conduct yearly review of deployment and make any regulatory changes necessary to ensure that high-speed internet access, among other capabilities, is being expeditiously deployed).
[77] Commissioner Orson Swindle, *Should Policymakers Apply a Depression-Era Tax System to the Economy of the 21st Century?*, Address at the Policy Perspectives on the Taxation of Cyberspace Conference on E-Commerce (May 12, 2000), *at* http://www.ftc.gov/speeches/swindle/ denver000512.htm. Commissioner Swindle also noted that "[u]nwarranted taxes and regulation at a time when the technology is still rapidly evolving threaten to lock in or limit the Internet to specific technologies and modes of service that fall far short of its likely potential." *Id.*

[78] *See*, *e.g.*, *Burkhart Advertising Inc. v. City of Auburn*, 786 F. Supp. 721, 732 (N.D. Ind 1991) (invalidating statute on equal protection grounds where the defendants could not show how billboards advertising commercial goods and services were any more distracting or unattractive than billboards promoting noncommercial services and messages).
[79] *See*, *e.g.*, *Lorillard Tobacco Co. v. Reilly*, 121 S. Ct. 2404, 2421 (2001*); Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173, 184 (1999); *Central Hudson*, 447 U.S. at

562-63 (1980). The Supreme Court recently has acknowledged a movement among several Justices toward applying strict scrutiny to all government restrictions on commercial speech, but the Court has yet to "break [such] new ground." *Lorillard*, 121 S. Ct. at 2421.

[80] *Central Hudson,* 447 U.S. at 566.

[81] *See id.*

[82] *Edenfield v. Fane*, 507 U.S. 761 (1993) (holding that blanket ban on all solicitations by CPAs was unconstitutional).

[83] *Id.*

[84] *Greater New Orleans*, 527 U.S. at 188, citing *Edenfield,* 507 U.S. at 770-71 (1993).

[85] *Lorillard*, 121 S. Ct. at 2404 (citations omitted).

[86] *See NPRM*, 67 Fed. Reg. 4492, 4531.

[87] *Id.* at 2421, citing *Greater New Orleans*, 527 U.S. at 188.

[88] *Id*. (citations omitted).

[89] *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 n. 13 (1993).

[90] *U.S. West v. FCC*, 182 F.3d 1224, 1235 (10th Cir. 1999), *cert denied*, 120 S.Ct 2215 (2000); *Rubin v. Coors Brewing Co.*, 514 US 476, 490-91 (1995).

[91] In fact, the four cases cited by the FTC in the NPRM as evidence of the extent of the fraud in this area all involved enforcement actions undertaken by the FTC under its Section 5 powers.

[92] *See FTC v. Shared Network Svcs, LLC*, Case No. S-99-1087-WBS JFM (E.D. Cal. filed June 12, 2000); *FTC v. U.S. Republic Communications, Inc.*, Case No. H-99-3657 (S.D. Tex. Oct. 21, 1999); *FTC v. WebViper LLC d/b/a_Yellow Web Services*, Case No. 99-T-589-N (M.D. Ala. June 9, 1999); *FTC v. Wazzu Corp.*, Case No. SA CV-99-762 AHS (ANx) (C.D. Cal. filed June 7, 1999).

[93] *See FTC Cracks Down on Small Business Scams: Internet Cramming is Costing Companies Millions*, FTC news release, June 17, 1999, *at* http://www.ftc.gov/opa/1999/9906/small9.htm; *see also Small Business Owners Who Got "Crammed" to Get Refunds*, FTC news release, Oct. 25, 1999, *at* http://www.ftc.gov/opa/1999/9910/republic2.htm. In the current NPRM, the FTC also cites to the comments of the National Association of Attorneys General ("NAAG") and comments made by participants at the July TSR forum, where the same "cramming" schemes are mentioned. *NPRM* at 4531; NAAG at 16-17.

[94] *NPRM*, 67 Fed. Reg. 4492, 4500.

[95] Rule Tr. at 256-57.

[96] As Jerry Cerasale of the Direct Marketing Association noted, the affirmative disclosure requirements of the Rule would be impractical and unnecessary because "unlike business-to-consumer calls where there is only a brand relationship, in business-to-business calls, it's both a brand and individual relationship." Rule Tr. at 263. Elaborating on this reasoning, Char Pagar of the Promotion Marketing Association stated:

> you're going to have a situation in B-to-B calls where you have repeat dealings . . . [a sales representative is going to] make a number of calls per day to people who [the sales rep] has spoken to many, many times in the past who know what the terms are . . . and [the sales rep] is calling them again to say, do you want to get X at . . . Y price . . .

Id. at 269. Keith Anderson of the FTC also suggested that it may be enough to subject businesses to the Rule's prohibitions on misrepresentations and not subject them to the disclosure and other requirements of the TSR. *Id.* at 270-71.

[97] Proposed Rule § 310.3(a)(3).

[98] *NPRM*, 67 Fed. Reg. 4492, 4512-14.

[99] *NPRM* at 4500.

[100] Proposed Rule § 310.2(t)(2).
[101] Proposed Rule § 310.2(z).
[102] *NPRM* at 4500.
[103] *Id.* at 4500 n.70.
[104] Proposed Rule § 310.4(a)(6).
[105] Proposed Rule § 310.4(b)(2).
[106] House Report on the TCPA, H.R. Rep. No. 102-317, at 25 (1991).