BEFORE THE FEDERAL TRADE COMMISSION
WASHINGTON, D.C.

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

COMMENTS OF NEXTEL COMMUNICATIONS, INC.

Leonard J. Kennedy
Senior Vice President & General Counsel
Celeste M. Moy
Vice President & Assistant General Counsel
NEXTEL COMMUNICATIONS, INC.
2002 Edmund Halley Drive
Reston, VA 22091

To-Quyen T. Truong
Scott Dailard
DOW, LOHNES & ALBERTSON, PLLC
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036

Attorneys for Nextel Communications, Inc.

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INTRODUCTION

Nextel Communications, Inc. ("Nextel") hereby submits these comments in response to the Federal Trade Commission's Notice of Proposed Rulemaking[1] relating to amendments of the Telemarketing Sales Rule (the "TSR" or "Rule").[2] Nextel strongly supports the Commission's efforts to eliminate telemarketing fraud, and supports many aspects of the proposed amended TSR. Nextel is concerned, however, that certain proposed amendments to the Rule threaten to interfere unduly with legitimate telemarketing activity that is beneficial to both businesses and consumers. As a common carrier, Nextel's internal telemarketing operations fall beyond the jurisdictional scope of the Federal Trade Commission Act and the TSR.[3] Nonetheless, Nextel,

[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 "Notice" or the "NPRM."

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

[3] The Act exempts common carriers from its coverage, and this jurisdictional limitation is incorporated into theTelemarketing Consumer Fraud and Abuse prevention Act ("Telemarketing Act") and, accordingly, the TSR. *See FTC Act*, 15 U.S.C. § 45(a)(2) (authorizing FTC to regulate "persons, partnerships, or corporations, except [among others. . .] common carriers subject to the Acts to regulate commerce . . . ."); *Telemarketing Act*, 15 U.S.C. § 6105(a); *see also NPRM* at 4497 ("The jurisdictional reach of the Rule is set by statute, and the Commission has

continued…

like many communications carriers, outsources most of its telemarketing operations to third-party contractors[4] who are subject to the Rule.[5] Accordingly, the proposed amendments will have a direct and material effect on Nextel's business and its customers.

Nextel respectfully urges the Commission to adopt the following recommendations, which are designed to minimize the impact of the proposed amendments on legitimate business interests, and tailor the proposed TSR amendments more closely to the Commission's statutory mandate to regulate only those "unscrupulous activities from which no one benefits but the perpetrator."[6]

First, Nextel urges the Commission to create an exemption from the proposed national do-not-call requirements for telemarketing calls to persons with whom the caller has formed an established business relationship. Without such an exemption, the proposed amended Rule threatens to disrupt the continuity of existing business relationships and prevent consumers from receiving information from service providers that they know and trust. An exemption permitting calls to existing customers is fully supported by the legislative history of the Telemarketing Act and would align the Commission's proposed national registry requirements with the FCC's

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no authority to expand the Rule beyond those statutory limits"); *See also*, Caroline Mayer, FTC Chief to Seek Power to Curb Illegal Telecom Practices, Washington Post (March 16, 2002).

[4] Nextel presently contracts with nine telemarketing firms in the United States and Canada that collectively employ more than 1,600 telemarketers. Several of these call centers are the economic mainstay of the rural communities in which they are located.

[5] *See NPRM* at 4497 (". . . although the Commission's jurisdiction is limited with respect to the entities exempted from the FTC Act, the Commission has made clear that the Rule does apply to any third-party telemarketers those entities might use to conduct telemarketing activities on their behalf").

[6] *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.

parallel telemarketing regulations and with virtually every analogous state do-not-call registry law.

Second, the Commission should reconsider its proposal to single-out for selective regulation under the TSR business-to-business calls involving Internet and Web services. The current proposal threatens to retard the growth of the Internet economy and is unduly overbroad because it burdens all sellers of Internet and Web services without regard to whether they are engaging in fraud. If the Commission nonetheless retains some aspect of its proposal to selectively regulate Internet and Web services, it should tailor these regulations more narrowly to restrict only those specific fraudulent practices the Commission has identified through its law enforcement activities.

Third, the Commission should clarify that its proposed prohibition against caller ID blocking does not affirmatively require the use of telecommunications equipment and systems that support the transmission of caller ID. Such clarification is necessary to avoid the imposition of prohibitive costs on less sophisticated telemarketers, who do not seek to block or falsify caller ID information, but simply do not have the technological capability to support these functions.

Fourth, the Commission should revise its proposed national do-not-call registry requirements to minimize the administrative burdens on legitimate telemarketers. Specifically, the Commission should adopt reasonable renewal requirements and authentication procedures to ensure the currency and accuracy of the information maintained in any national do-not-call registry. The Commission also should amend its proposed "safe harbor criteria" to avoid inflicting unnecessary costs on telemarketers that do not execute campaigns on a continuous or monthly basis. Finally, the Commission should preempt conflicting state "do-not-call" requirements to the extent that they purport to apply to interstate telemarketing calls. Limited

preemption would reduce the costs and burdens associated with interstate telemarketing campaigns and would follow Congress' direction that any federal do-not-call registry should supersede state do-not-call lists and related procedural requirements.

Only by these and other steps to tailor the TSR, as required by the FTC Act to avoid restricting legitimate business activities, can the Commission ensure that it will not unwittingly deprive consumers of valuable services and savings provided through telemarketing.

BACKGROUND

Nextel operates a digital mobile network that covers thousands of communities across the United States, and provides consumers and business customers with an array of fully-integrated, all-digital wireless communications services, including digital mobile telephone service, two-way radio service, and mobile messaging. Nextel also offers its customers a bundle of wireless Internet access and related Web services including advanced Java-enabled business applications. Using Nextel's Internet-enabled handsets, customers can search the Internet, access wireless Web sites, send and receive email, and access office email accounts, as well as appointments, events and calendar lists.

Nextel has experienced tremendous growth since the launch of its corporate predecessor in 1987, and today serves more than 8.5 million digital subscribers in the United States. Nextel's responsible use of telemarketing has played an important role in the growth of the company and its deployment of a nationwide network of advanced wireless communications services. Telemarketing also promises to play an important role in Nextel's future, as it has the potential to become the company's most cost-effective means of expanding its service to new subscribers.

Telemarketing offers prospective wireless customers certain advantages that cannot be duplicated efficiently through other marketing channels or media. Most importantly, telemarketing allows sales representatives to tailor Nextel's diverse service and equipment

offerings to the needs of individual customers, answer customers' questions before they commit to a purchase, and resolve all the details of a transaction with a single call.

Telemarketing also plays an important role in Nextel's efforts to maintain its relationships with customers. Nextel representatives call customers to notify them when their contracts are about to expire, alert them to the availability of new services and upgrade options, and inquire about and resolve any technical or other problems they may be experiencing with their service. Unnecessary restrictions on these telemarketing activities could severely impair the quality, pricing and variety of services available to Nextel's current and prospective customers.

DISCUSSION

I. The Commission Should Exempt from Its Proposed National "Do-Not-Call" Registry Requirements Calls to Existing Customers.

As the heart of its NPRM, the Commission proposes to create a centralized national "do-not-call" registry to be maintained by the agency for a two-year trial period. Pursuant to this proposal, consumers would contact the Commission and place their telephone numbers on the national registry, making it illegal for companies within the Commission's jurisdiction to call consumers on the list.[7] Once a consumer has placed her telephone number on the national registry, the only way she can authorize a company to contact her is to transmit her "express verifiable authorization" to be called at that telephone number. This proposal would require companies to obtain either a consumer's signed written authorization or recorded oral consent to be called. The Commission's proposed national "do-not-call" requirements contain no

[7] *NPRM* at 4518.

exemption for calls to existing customers. Instead, they would impose a blanket restriction on all telemarketing calls to people who have registered their telephone numbers with the agency. As a result, this broad proposed rule could have the unintended effect of denying consumers access to many valuable communications from businesses that they know and trust.

For example, in the normal course of business, Nextel customer care representatives call new wireless customers within a few days of their activation to welcome them to the Nextel network, confirm delivery of their handsets, answer questions and provide any needed instruction on the various features of Nextel's service. Approximately 120 days after this initial "welcome" call, Nextel will make a second "check up" call to customers to determine if the service is meeting their needs and performing to their expectations. Nextel also routinely calls customers who have registered complaints, as well as customers who appear to be experiencing an unusual number of "dropped" calls. Of course, the primary purpose of these latter contacts is to diagnose and correct any technical problems that may be interfering with a customer's service. Nonetheless, Nextel's customer care representatives frequently will offer customers a special "retention" incentive or discount during these calls to encourage them to continue their service with Nextel. In fact, all of the foregoing customer service-oriented calls frequently lead to discussions about new services, features and equipment that customers may wish to add to their account. Discussions regarding customer service issues, new services, features and equipment are naturally commingled in these communications, as Nextel's customer care representatives seek to meet subscribers' needs.

There is every reason to expect that even those Nextel customers who otherwise might wish to prevent telemarketing "cold calls" to their homes, nevertheless, would be receptive to occasional calls from Nextel and other service providers with whom they have chosen to do

business. As the Commission acknowledges in the 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." [8] Nonetheless, in many circumstances, the Commission's proposed national do-not-call regime threatens to severely impede, if not foreclose, these types of communications, which benefit the commercial interests of both consumers and the companies with whom they have chosen to establish ongoing relationships.

The Commission's proposal provides that consumers can selectively choose to receive calls from specific companies by providing "express verifiable authorization" to be called or by refraining to take advantage of the national registry. But this approach overlooks 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 Rule would allow customers to restore these communications by granting their "express verifiable authorization" to be called, it may take many businesses a long time before they find the means to contact these customers 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 calls that in most cases could be reliably inferred from their ongoing commercial interests in the products and services of firms with whom they have chosen to do business.

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[8] *NPRM* at 4519.

Virtually 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 established business relationships. In New York, for example, the telemarketing registry law 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."[9] Similarly, Missouri exempts from its "do-not-call" registry law 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."[10] As explained below, the FCC has adopted an even broader "established business relationship exemption" to the do-not-call regulations that it administers. Nextel urges the Commission to create a parallel exemption, which is warranted by each of the four considerations the Commission traditionally uses to justify exemptions under the Rule.[11]

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

[10] Mo. Rev. Stat. § 407.1095 (3)(b) (2001). Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Idaho, Kentucky, Louisiana, Maine, Oregon, Tennessee, Texas, Wisconsin, and Wyoming have all enacted similar established business relationship exemptions in connection with their respective do-not-call registry statutes.

[11] The Commission explained in the NPRM that the existing exemptions 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.

A. The Legislative History of the Telemarketing Act Supports the Creation of an Established Business Relationship Exemption.

The legislative history of both the Commission's authorizing statute, the Telemarketing Act,[12] and the parallel Telephone Consumer Protection Act ("TCPA")[13] administered by the FCC, establish that Congress did not intend for federal telemarketing laws and regulations to disrupt the continuity of preexisting business relationships.

The House Committee Report accompanying the Telemarketing Act explicitly "recognizes that legitimate telemarketing activities are ongoing in everyday business and may provide a useful service to both businesses and their customers. . . ."[14] The Committee emphasized that "[r]egulating legitimate, mutually-beneficial activities is not the purpose of [the Telemarketing Act]."[15] Instead, Congress intended the legislation to focus only "on unscrupulous activities from which no one benefits but the perpetrator."[16]

Congress noted that the purpose of the Telemarketing Act parallels the purpose of the TCPA,[17] which, as the FCC recognized, was designed to avoid undue interference with "ongoing business relationships."[18] Congress expressly instructed the FTC to "take into account the obligations imposed by the TCPA and avoid adding burdens to legitimate telemarketing" when it implemented the Telemarketing Act.[19] Contrary to this legislative intent, the Commission's proposed national do-not-call regime, and especially its proposed applicability to calls that

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[12] 15 U.S.C. §§ 6101-6108 (2001).
[13] 47 U.S.C. § 227 (2001).
[14] *House Report on the Telemarketing Act*, H. Rep. No. 103-20, at 2 (1993).
[15] *Id.*
[16] *Id.*
[17] *House Report on the TCPA*, H.R. Rep. No. 102-317, at 14 (1991).
[18] 7 F.C.C.R. at 8770.
[19] *Id.*

continue established customer relationships, unquestionably adds burdens to legitimate telemarketing – burdens that Congress and the FCC expressly determined should not be imposed under the TCPA.[20]

Unlike the Telemarketing Act, the TCPA expressly authorized the creation of a "single national database" that consumers could use to suppress unsolicited telemarketing solicitations. In authorizing such a database, Congress explicitly prohibited the FCC from using the database to prevent telemarketing calls to persons with whom the caller had formed an "established business relationship."[21] As the House Committee explained:

> 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 . . . .[22]

The House Committee found that consumers who previously have expressed interest in products or services offered by a telemarketer are unlikely to be surprised by calls from such companies or to consider them intrusive.[23]

After conducting a lengthy rulemaking, the FCC likewise "conclude[d], based upon the comments received and the legislative history, that a solicitation to someone with whom a prior

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[20] The FCC found that it was not in the public interest to adopt a national-do-not call registry substantially identical to the registry now proposed by the FTC. Specifically, the FCC concluded that "[u]pon careful consideration of the costs and benefits of creating a national do-not-call database, the disadvantages of such a system outweigh any possible advantages." *TCPA Report and Order*, 7 F.C.C.R. 8752, 8760-61 (1992). The FCC further concluded that "the company-specific alternative represents a careful balancing of the privacy interests of residential telephone subscribers against the commercial speech rights of telemarketers and the continued viability of a valuable business service." *Id.* at 8765-66 (1992).

[21] *Id.* at § 227(a)(3).

[22] *House Report on the TCPA*, H.R. Rep. No. 102-317, at 13 (1991).

business relationship exists does not adversely affect subscriber privacy interests."[24] It further noted that "such a solicitation can be deemed to be invited or permitted by a subscriber in light of the business relationship."[25] 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."[26] These conclusions are equally applicable to the TSR.

Unlike the TCPA, the Telemarketing Act contains no reference to a do-not-call list, let alone to a national registry. The express authorization for such a registry in the TCPA demonstrates that, if Congress had wanted the FTC to consider such a mechanism, it would have said so explicitly in the Commission's authorizing statute. It is highly unlikely that Congress intended, only four years after the passage of the TCPA, to authorize the FTC to adopt a national do-not-call registry without any mention of such a regime in the statutory text or legislative history.[27] Certainly, the legislature could not have contemplated that the Commission would adopt such a registry without incorporating the same established business relationship exemption that Congress wove so deliberately into the fabric of the TCPA.

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[23] *Id*.
[24] *TCPA Report and Order*, 7 F.C.C.R. 8752, 8770 (1992).
[25] *Id*.
[26] *Id*.
[27] *See, e.g., General Electric Co. v. Southern Construction Co., Inc.*, 383 F.2d 135,139 (5th Cir. 1967) ("Where a statute with respect to one subject contains a given provision, the omission of such provision from a similar statute is significant to show a different intention existed."); *see also Richerson v. Jones*, 551 F.2d 918, 928 (3rd Cir. 1977); 82 C.J.S., Statutes § 352, p. 467.

B. Calls to Existing Customers Will Still Be Subject to Extensive Regulation Under the TSR.

The existing company-specific do-not-call provisions of the TSR are more than sufficient to preserve any legitimate expectations of privacy that consumers may have with respect to telephone solicitations from parties with whom they have voluntarily chosen to do business. The existing TSR will continue to prohibit all telemarketers from engaging in harassing or abusive conduct, or interfering with a person's right to be placed on a company's do-not-call list, or failing to honor such a request.[28] Accordingly, if a current customer wishes to prevent calls from an existing service provider, all he or she has to do is ask to be placed on the caller's do-not-call list.

In addition to the existing TSR, the FCC's regulations under the TCPA provide further protections for consumers.[29] As the FCC emphasized in its TCPA Report and Order, even though Congress prohibited the implementation of a national registry that would prevent calls to existing customers, "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."[30] The FCC determined that "[a] customer's request to be placed on the company's do-not-call list terminates the business relationship between the company and that customer for the purpose of any future solicitation."[31] The FCC's implementing regulations for the TCPA strike an appropriate balance between residential privacy interests and the interests of consumers and businesses alike in

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[28] Proposed Rule § 310.4(a)-(b).

[29] *See e.g.*, 47 C.F.R. § 64.1200 (restricting calling hours and requiring written do-not-call procedures, training of telemarketing personnel in rights of consumers, recording of do-not-call requests and the maintenance of related do-not-call lists.)

[30] 7 F.C.C.R. at 8770 n.63.

[31] *Id.*

avoiding undue governmental interference with their ongoing business relationships. Nextel urges the FTC to take the same balanced approach to regulation if it moves forward with its proposal to adopt a national do-not-call registry.

The Commission should respect Congress' judgment that registration on a nationwide telemarketing suppression list should not prevent consumers from receiving calls from parties with whom they have formed preexisting business relationships. This will not undermine the important principle of consumer choice. Consumers' ability to prevent future calls from even those parties with whom they have voluntarily chosen to do business will be protected fully under the existing TSR and the FCC's rules through the continuing right to make a company-specific do-not-call request.

C. Additional Restrictions on Calls Continuing Established Business Relationships Are Unnecessary to Prevent Telemarketing Fraud.

To date, the Commission has declined to adopt an "established business relationship" exemption to the TSR in light of concerns that such an exemption may be "unworkable in the context of telemarketing fraud."[32] The Commission has surmised that such an exemption might "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."[33] This concern dates back to 1995, when the central purpose of the Rule was to prevent telemarketing fraud. However, it has no relevance to the proposed do-not-call registry requirements, which are

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[32] *NPRM*, 67 Fed. Reg. 4492, 4532.
[33] *Id.*

unrelated to fraud, and are designed primarily to prevent a "pattern of unsolicited telephone calls" which are "coercive or abusive of [a] consumer's right to privacy."[34]

An established business relationship exemption limited to these latter privacy-related provisions of the TSR will have no affect on the Commission's ability to prevent fraudulent telemarketing. All of the Rule's current provisions prohibiting misrepresentations and requiring affirmative disclosure of material terms[35] will continue to apply to all outbound telemarketing calls, including outbound calls placed by businesses to their current customers. The Commission has a panoply of tools specifically designed to prevent fraudulent activities. By contrast, the do-not-call registry was never intended to target fraud, and it cannot serve as an effective tool in this endeavor.

D. The Benefits of an Established Business Relationship Exception Outweigh the Risks That It Would Be Exploited for Fraudulent Purposes.

Because an established business relationship exemption will not undermine the Commission's ability to police telemarketing fraud, the fourth and final factor – whether the burdens of the do-not-call requirements on legitimate business outweigh the risk that an established business relationship exemption could be exploited by fraudulent telemarketers – weighs strongly in favor of granting such an exemption. To avoid potential conflicts with parallel telemarketing laws and regulations administered by the FCC, Nextel urges the Commission to adopt an exemption that is coextensive with the established business relationship exception defined under the TCPA:

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[34] *Id.* at 4517.

[35] Proposed Rule § 310.3.

> 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 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.[36]

The adoption of such an exemption is warranted by Congress' conclusion that a broad exemption for established business relationship calls was necessary under the TCPA "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."[37] This exemption also would protect the principle of consumer choice, honor Congress' judgment that nationwide suppression lists should not be used to disrupt the continuity of ongoing business relationships, and adhere, at least in this respect, to Congress' instruction that the Commission not implement regulations under the Telemarketing Act that add burdens to legitimate business activities beyond those imposed by the TCPA.

II. The Commission Should Not Single-Out Internet Access and Web Services for Selective Regulation Under the TSR.

Although the TSR generally excludes from its scope all telemarketing calls from one business to another, the NPRM proposes selectively to eliminate this business-to-business exemption for telemarketing that involves solicitations for "Internet services" and "Web services."[38] According to the NPRM, this proposed amendment is intended to expand the coverage of the TSR to embrace all outbound business-to-business telemarketing activity that

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[36] 47 C.F.R. § 64.1200(e).

[37] *House Report on the TCPA*, H.R. Rep. No. 102-317, at 14 (1991).

involves "any and all services related to the World Wide Web."[39] The proposed exception would have far-reaching economic implications and would impose unprecedented burdens on Nextel and other firms that provide Internet access or other Web related services to businesses.

A. The Proposed Exception Will Retard the Growth of Internet and Advanced Services.

The Commission's proposal to regulate business-to-business marketing of Internet and Web services would affect a huge segment of the Internet economy. The Small Business Administration ("SBA") estimates that 35 percent of all small businesses had established Web sites by 1998, and that 85 percent will conduct business via Web sites in 2002. [40] These figures attest to countless transactions for Web site development, hosting and maintenance services. The demand for commercial Internet access and Internet Service Provider ("ISP") services also has surged. By 2003, the SBA projects the number of ISPs will swell to more than 10,000.[41] SBA also estimates that during this same time frame, business-to-business e-commerce running over the networks of these Internet Service Providers will account for a staggering $3.0 trillion in sales.[42] Web services and Internet access have revolutionized the economy and they generate powerful efficiencies and cost savings for consumers and businesses alike. These services have

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[38] Proposed Rule § 310.6(g).
[39] *NPRM*, 67 Fed. Reg. 4492, 4500.
[40] *See* U.S. Small Business Admin., Small Business Expansions in Electronic Commerce 8 (2000), *at* http://www.sba.gov/advo/stats/e_comm2.pdf.
[41] *Id.* at 5.
[42] *Id.* at 14.

proved especially valuable for small businesses. According to the SBA, "[s]mall businesses that use the Internet have grown 46% faster than those that have not."[43]

Nextel 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 fundamentally unfair and actively undermines the high priority that both Congress and the administration have placed on speeding the deployment of advanced telecommunications services.[44] The Commission's proposal to selectively target Web and Internet access services for special regulations also runs counter to the agency's traditionally cautious approach to adopting regulations that could impede 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."[45]

The proposed exception singling out Internet and Web services for regulation would be particularly damaging to Nextel and other providers of wireless communications services, as

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[43] *Id*. at 8.

[44] *See* 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 deployed expeditiously); *see also* 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 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").

[45] *See* 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.*

well as to consumers. Nextel and other wireless providers are developing and deploying advanced wireless or Third Generation ("3G") services that will offer customers unprecedented mobile data capabilities. Internet access and related functions form the key components of these suites of services. As the FCC has recognized, these advanced services form the frontier of the wireless industry and are expected to increase the growth of the industry significantly over the next several years.[46] Extensive customer outreach efforts will be necessary to develop customer knowledge and acceptance of these new services, and telemarketing activities will play a vital role in the deployment efforts of Nextel and other wireless providers. Nextel, therefore, urges the Commission not to hinder the growth of Internet and Web based services in general, and advanced communications services in particular, by adopting the proposed exception singling out Internet and Web services for regulation.

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[46] *See, e.g.*, In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, *Sixth Report*, FCC 01-192 (rel. July 17, 2001).

B. Selective Regulation of Commercial Speech About Internet and Web Services Is Repugnant to the First Amendment.

The proposal to selectively target commercial speech about Web and Internet services also is repugnant to the First Amendment. Selective regulations of commercial speech are subject to searching review under at least the intermediate level of constitutional scrutiny.[47] Under this intermediate scrutiny test, generally 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.[48]

Even assuming that the Commission could successfully assert a substantial interest in protecting businesses from telemarketing fraud, the selective regulation tentatively proposed in the NPRM 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

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[47] *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, however, recently has acknowledged a movement among several Justices toward applying strict scrutiny to all government restrictions on truthful commercial speech. *Lorillard*, 121 S. Ct. at 2421. Moreover, *selective* commercial speech restrictions that distinguish among otherwise similarly situated speakers also implicate fundamental guarantees of equal protection under the Fifth Amendment and are judged under the standard of strict scrutiny. *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).

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

materially advanc[e] the asserted governmental interest."[49] "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."[50] Moreover, a 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.[51]

The Commission's proposed exception selectively regulating Internet and Web services fails each of these requirements. The NPRM asserts that telemarketing fraud is prevalent in the Internet and Web services fields. However, the NPRM cites no empirical evidence that suggests that providers of Internet and Web services are more prone to engage in fraud than providers of other services to businesses. 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." Measured against the sheer scale of business-to-business e-commerce in these industries, these enforcement statistics do not evidence a uniquely pervasive problem with fraudulent telemarketing in the area of Internet and Web services. Accordingly, there is no justification for imposing burdensome restrictions on providers of Internet access and Web services that will apply to virtually no other actors in the American economy.[52] This paucity of empirical evidence suggests that the unique harms the Commission associates with Web and Internet services are more speculative than real.

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[49] *See id.*
[50] *Greater New Orleans*, 527 U.S. at 188, citing *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993).
[51] *Lorillard*, 121 S. Ct. at 2404 (citations omitted).
[52] Only providers of certain non-durable office and cleaning supplies would be subject to comparable restrictions. *See* Proposed Rule § 310.6(g).

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."[53] To withstand this test, the Commission 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."[54] The Commission's proposal fails this requirement, both because it burdens all providers of Internet and Web services irrespective of whether they are engaging in fraud, and because it subjects sellers of Web and Internet services to provisions of the TSR, such as the national do-not-call requirements, that are unrelated to the Commission's stated goal of reducing fraudulent telemarketing.

Although the commercial speech doctrine does not require a federal agency to use the least restrictive means available to further its interest, the Commission must "carefully calculate the costs and benefits" associated with a proposed restriction.[55] The agency also must demonstrate that an alternative, significantly less restrictive strategy will not sufficiently advance its regulatory interests.[56]

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

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[53] *Id.* at 2421, citing *Greater New Orleans*, 527 U.S. at 188.
[54] *Id*. (citations omitted).
[55] *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 n. 13 (1993).
[56] *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).

telemarketing fraud perpetrated by unscrupulous sellers of Internet and Web services to businesses. In fact, the four cases cited in the NPRM as evidence of the extent of the fraud in this area all involved enforcement actions undertaken by the Commission under its Section 5 powers.

In light of these constitutional flaws, Nextel urges the Commission not to selectively target the Web and Internet services industry for additional regulation under the TSR. If the Commission nonetheless decides to retain some form of its original proposal, any restrictions on business-to-business telemarketing calls involving Web and Internet services should be tailored far more narrowly to address only those specific fraudulent practices giving rise to the Commission's concerns.

C. At a Minimum, the Commission Should Narrow the Scope of the Proposed Exception.

At a minimum, the Commission should tailor the proposed exception of Internet and Web services from the business-to-business exemption 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.[57] According to the Commission, those cases involved calls to businesses offering Web site design and hosting services for

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[57] *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).

> 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 cancelled.[58]

Nothing in this record suggests fraud in the telemarketing of services other than Web site design, development, hosting, and maintenance services. Nor does this enforcement record evidence a pattern of fraud in the sale of Internet access services, let alone the specialized wireless Internet access services offered by Nextel. Accordingly, at a minimum, Internet access services should be excluded from the scope of the amended TSR.

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 . . . ."[59] Accordingly, if the Commission decides to retain any version of its proposal to regulate business-to-business calls involving Web services under the TSR, the Commission should exempt calls 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 prohibitions against misrepresentations. This measure would allow the Commission to target telemarketing fraud without saddling Nextel and

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[58] *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.
[59] Rule Tr. at 256-57.

other legitimate businesses with national do-not-call obligations, calling hour restrictions, and disclosure requirements that the Commission generally has deemed to be unnecessary in the business-to-business context.

While more tailored regulation may address the most egregious problems posed by the proposed exception, Nextel urges the Commission to reject as a whole the proposed exception of Internet and Web services from the business-to-business exemption. As discussed above, there is no evidence of a pattern of fraudulent activities in the telemarketing of Internet and Web services to justify the selective regulation of this commercial speech. Moreover, the selective regulation of Internet and Web services is likely to have far-reaching, adverse affects on the growth of advanced services and on customers, including both small businesses and consumers. Such an adverse regulatory outcome not only would fail to advance the Commission's purpose to prevent fraud, but would be contrary to its central mission to serve consumers' interests.

III. The Commission Should Clarify That Its Proposed Prohibition Against Caller ID Blocking Does Not Affirmatively Require the Use of Telecommunications Equipment That Supports Caller ID.

The Commission proposes to amend the TSR to "prohibit blocking, circumventing, or altering the transmission of, or directing another person to block, circumvent or alter the transmission of, the name and telephone number of the calling party . . . ."[60] Nextel supports this proposal to the extent that it prohibits falsification or deliberate blocking of caller ID information by a telemarketer that is using equipment capable of transmitting such information. However, as the Commission recognized, ". . . it is technically impossible for some telemarketers to transmit

[60] Proposed Rule § 310.4(a)(6).

caller ID information because of the type of telephone system [or equipment] they use."[61] Some of Nextel's telemarketing contractors, for example, use proprietary dialers that do not give them the ability to transmit such information. Nextel's contractors also use large 'trunk side' connections (also known as trunk or T-1 lines), which are cost-effective for making calls, but often cannot transmit caller ID information, or can transmit only a non-callable trunk exchange number that is useless to consumers and has the potential to cause confusion.

In light of these technological limitations, the Commission should clarify that its proposed amendment would not impose an affirmative obligation on telemarketers to transmit caller ID information. While Nextel generally agrees with the Commission that "there is no reason that a legitimate seller or telemarketer would choose to subvert the display of information sent or transmitted to consumers' caller ID equipment"[62] (emphasis added), there certainly are reasons why a legitimate seller or telemarketer would be unable to transmit that information. Nextel, therefore, requests that the Commission clarify that the practices of using telecommunications systems and equipment that lack caller ID capabilities, and of contracting for telemarketing services from contractors that use such technologies, do not violate the proposed Rule.

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[61] *NPRM*, 67 Fed. Reg. 4492, 4515.
[62] *Id.*

IV. The Commission Should Revise Its Proposed National Do-Not-Call Registry Requirements to Minimize Administrative and Management Problems and Burdens on Legitimate Telemarketers.

Nextel respectfully requests that the Commission revise the proposed national do-not-call registry requirements as suggested below to avoid unnecessary burdens on legitimate business activities:

A. Annual Updating of Do-Not-Call Requests.

Given the fact that telephone numbers change for at least sixteen percent of the population every year,[63] names and numbers that are listed in the proposed national do-not-call registry should be retained by the Commission for no longer than twelve months from the date of a consumer's initial registration, or from any subsequent renewal. This would essentially require consumers to renew their national do-not-call requests on an annual basis, which should not prove unduly burdensome if the Commission adopts the automated registry system described by senior Commission officials in recent press reports.[64] The Commission also should bear in mind the potential for abuse of the national registry system, and adopt reasonable authentication procedures to ensure that only line subscribers of record will be able to place their numbers on the proposed national do-not-call list. Finally, the Commission 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.

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[63] *See* Comments of Direct Marketing Association at 11.

[64] Caroline E. Mayer, *FTC Anti-Telemarketer List Would Face Heavy Demand*, Washington Post, March 19, 2002, *at* http://www.washingtonpost.com/wp-dyn/articles/A47200-2002Mar18.html ("To collect names, the agency is not planning to rely, as most states have, on operators or the Internet. Consumers who want to sign up would have to call in from the phone number they want listed on the do-not-call registry. The number would be automatically 'captured' in the database, and the consumer would have to verify it by entering the number again. 'That's all we need,' [J. Howard Beales III, director of the FTC's Bureau of Consumer Protection] said.").

B. "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."[65] 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.

C. Preemption of Conflicting State Regulation of Interstate Calls.

Nextel urges the Commission to preempt conflicting state law "do-not-call" requirements that purport to apply to interstate telemarketing calls. Preemption of state do-not-call laws that affect interstate calling would honor Congress' direction, pursuant to 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 states 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.

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[65] Proposed Rule § 310.4(b)(2).

H.R. Rep. 102-317 at 25. This statement unambiguously indicates that Congress intended for any comprehensive federal do-not-call registry to preempt conflicting state law requirements.

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 both consumers' rights and solicitors' obligations with respect to telemarketing calls and transactions.

D. Six Month Implementation Window.

Several aspects of the Commission's proposed amended Rule would require many telemarketers to make significant technological changes to their operations, including upgrades necessary to record customers' "express verifiable authorization" for transactions using novel payment methods and to support the transmission of caller ID information. To provide for an orderly transition, allow time to complete necessary technology investments and related testing and training, and to avoid disruptions in telemarketing operations, Nextel urges the Commission to allow at least 180 days for the implementation of any new requirements it may impose through the amended TSR.

CONCLUSION

Nextel 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 deprive consumers of valuable services and savings provided through telemarketing.

Respectfully submitted,

NEXTEL COMMUNICATIONS, INC.

Leonard J. Kennedy
Senior Vice President & General Counsel
Celeste M. Moy
Vice President & Assistant General Counsel
NEXTEL COMMUNICATIONS, INC.
2001 Edmund Halley Drive
Reston, VA 20191

To-Quyen T. Truong
Scott Dailard
DOW, LOHNES & ALBERTSON, PLLC
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036

Attorneys for Nextel Communications, Inc.

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