FEDERAL TRADE COMMISSION
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BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of:
Proposed Rulemaking Amending the Telemarketing Sales Rule
FTC File No. R411001

Comments and Recommendations of the Consumer Choice Coalition, ACI Telecentrics Inc., Coverdell & Company, Inc., Discount Development Services, LLC, HSN LP d/b/a HSN and Home Shopping Network, Household Credit Services, Inc., MBNA America Bank, N.A., MemberWorks Incorporated, Mortgage Investors Corporation, Inc., Optima Direct, TCIM, Inc., Trilegiant Corporation and West Corporation

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I.

INTRODUCTION

. We, the members of the Consumer Choice Coalition, ACI Telecentrics Inc., Coverdell & Company, Inc., Discount Development Services, LLC, HSN LP d/b/a HSN and Home Shopping Network, Household Credit Services, Inc., MBNA America Bank, N.A., MemberWorks Incorporated, Mortgage Investors Corporation, Inc., Optima Direct, TCIM Teleservices, Inc., Trilegiant Corporation and West Corporation (the "Consumer Coalition"), submit these Comments in connection with the Federal Trade Commission's notice of proposed rulemaking (the "Proposed Rule") amending the Telemarketing Sales Rule, 16 C.F.R. Part 310 (the "Rule"), enacted pursuant to the Telemarketing and Consumer Fraud and Abuse Protection Act of 1994, 15 U.S.C. Section 6101-6108 (the "Act"). We thank you for the opportunity to comment as part of the Commission's proposed rulemaking process. The members of the Consumer Coalition are each recognized leaders in their respective industries and each markets products and/or services through a variety of methods including those currently regulated by the Rule and/or the Proposed Rule. Industries represented by the members of the Consumer Coalition include financial services, insurance, healthcare, retail merchandising, teleservices, direct marketing and service providers.

A. The Rule and its Purpose

The Act, signed into law by President Clinton in 1994, was intended to provide consumers with additional protections from "unscrupulous activities from which no one benefits but the perpetrator" and to "strike an equitable balance between the interests of stopping deceptive (including fraudulent) and abusive telemarketing activities and not unduly burdening legitimate business."[1] The Act directed the Commission to issue a rule prohibiting "deceptive" and/or

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[1] H.R. Rep. No. 20, 103rd Cong., 2nd Sess. 2 (1994). Part of the definition of burden the Commission is required to be mindful of is the record keeping burden imposed on companies by a proposed amendment See 15 U.S.C. § 6102(a)(3).

"abusive" telemarketing acts or practices. 15 U.S.C. Section 6102 (a)(1),(2).[2] In response to that requirement, the Commission issued the Rule in 1995.

The Act further directed the Commission to undertake a review proceeding to evaluate the operation and effectiveness of the Rule. Based on that proceeding (begun in November of 1999 and concluded in or about May of 2000), the Commission has now proposed several major amendments to the Rule, including those that the Commission has deemed necessary to protect consumers from "practices that may be coercive or abusive to the consumer's interest in protecting his or her privacy" and/or are, in the Commission's view, "unfair."[3]

B. Telemarketing and Related Marketing

As Congress has previously recognized, telemarketing provides numerous benefits to consumers and the economy. Telemarketing provides consumers with lower cost goods and services, increased availability and a wider variety of choices of goods and services, as well as increased convenience in effecting their purchases. See H.R. Rep. No. 20 103rd Cong. 1st Sess. 2; 139 Cong. Rec. H 934 (daily ed. March 2, 1993). Consumers are able to complete their transactions quickly and conveniently from the comfort of their home, thereby saving the time, effort, cost and inconvenience of traveling to retail stores, which, in some rural areas, may be located fifty or more miles away. In fact, many Americans, including those in rural areas and those with lower incomes, are eager to receive the offers of goods and services telemarketing calls bring to them. Telemarketing also provides a cost-effective and efficient way for legitimate businesses to reach consumers.

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2 Although "deception" is not defined in the Act, it has been generally held to occur "if, first, there is a representation, omission, or practice that, second, is likely to mislead consumers acting reasonably under the circumstances, and third, the presentation, omission, or practice is material." See 67 Fed. Reg. 4503, citing Cliffdale Associates, 103 F.T.C. 110, 165. Similarly, "abusive," is not defined in the Act, but is commonly held to mean "wrongly used,'' "perverted" and/or "misapplied." See 67 Fed. Reg. 45 10, n. 176.

3 67 Fed. Reg. 4518, citing;, 15 U.S.C. § 6102(a)(3)(A) and 67 Fed. Reg. 4546. Significantly, the term "right of privacy" or "right to be left alone," first enunciated by Samuel Warren and Louis Brandeis in 1890, has uniformly been applied to cases of unwanted governmental intrusion into extremely personal matters and not to commercial matters. See, e.g., Olmstead v. U.S., 277 U.S., 438, 478 (1928) (Brandeis, J. dissenting); George W. M. Thomas, Privacy: Right or Privilege: An Examination of Privacy after Bowers v. Hardwick, 39 Syracuse Law Review 875 (1988).

The telemarketing industry is among the fastest growing industries in the country. Indeed, according to a study prepared for the Direct Marketing Association, outbound telemarketing[4] is now the single largest direct marketing system in the country, employing over 5.4 million people nationwide in 1999. See Economic Impact, U.S. Direct and Interactive Marketing Today, 1999 Forecast (the "WEFA Group") at **p.** 14. This work force, "roughly as numerous as the nation's truck drivers assembly line workers or public school teachers," represents a major percentage of those employed in rural cities such as Albuquerque where it represents **3.3%** of the city's employed population. See Louis Uchitelle, Answering '800' Calls Offers Extra Income but No Security, N.Y. Times, March 27,2002 at A19. In a time of stagnant or negative job growth in many sectors of the American economy, job growth in the telemarketing industry exceeds the overall national job growth average. See id.; WEFA Group at p. 36.

Further, outbound telephone marketing is the largest category of media spending for direct marketers. WEFA Group at p. 11. For example, a full forty percent (40%) of all new newspaper subscriptions are the result of telemarketing. See Comment of the Newspaper Association of America, FTC File No. P994414, at p. 2 (May 30, 2000). Moreover, according to the American Telemarketing Association, outbound telemarketing generated $661 billion in 2001 and is currently expected to grow approximately 8.4% per year to an expected $990 billion by 2006. As evidenced by the above statistics, American consumers make frequent use of the telephone to purchase goods and services; enjoy having freedom of choice to do so; and will continue to demand it.

Based upon the importance of telemarketing to consumers, marketers and the U.S. economy at large, it is critical that the costs of the Proposed Rule - to consumers as well as the telemarketing industry - be carefully weighed against the asserted consumer protection benefits thereof. Certain hidden costs to consumers, including but not limited to direct and indirect economic, opportunity

[4] Outbound telemarketing encompasses only calls made to a consumer from a marketer as opposed to an inbound call – a call made by a consumer to a marketer. When inbound calls are considered "telemarketing" the above-referenced statistics become much larger as should be fully quantified prior to the Commission's currently scheduled public forum on this matter in June.

and freedom of choice, are often overlooked by proponents of "privacy-based" regulations. We believe that this is the case with certain sections of the Proposed Rule as detailed below.[5]

C. Position Summary

The members of the Consumer Coalition are strong believers in consumer choice. American consumers can and should be free to determine, on an individual basis, which marketing solicitations they choose to entertain and accept and how they will be charged for their purchases. We also firmly support the standards of ethical business conduct established by the Rule and the scope and intent of the Act. Accordingly, the members of the Consumer Coalition would support amendments to the Rule that are within the scope of the Act, are narrowly tailored to achieving a material benefit to consumers and do not impose unnecessary burdens or artificial restraints on consumers, commerce and/or commercial speech. As detailed below, we believe that certain provisions of the Proposed Rule, in their current form, exceed the scope of the Act[6] and/or will, at the expense of consumer choice, provide illusory consumer protection benefits and impose undue additional economic and administrative burdens on consumers, legitimate businesses and commercial speech.'

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5 In a thoughtful analysis of financial privacy protection "experiments" that resulted in such high costs to consumers that consumers themselves demanded that the legislature "act quickly to relieve them of the burden of greater privacy protection," Peter McCorkell, Senior Counsel at Wells Fargo & Company, posits that the reason mortgage rates in the U.S. are a full two percentage points lower than those in Europe (or $125,000 less on a 30-year, $250,000 mortgage) is, "in major part, traced to easier access to [consumer financial] information [in the U.S.]." See P. McCorkell, Twenty-six Words for Snow, Privacy and Information Law Report, Volume 1 Issue 9, May, 2001, p. 3. See also, generally, P. Johnson, The Hidden Costs of Privacy: The Potential Economic Impact of Opt-In Data Privacy Laws in California, prepared for the Direct Marketing Association, January, 2002.

6 An amendment to a federal agency's rules must be set aside where the agency has acted "in excess of statutory jurisdiction, authority, or limitations, or short of statutory rights." 5 U.S.C. § 706 (2)(C).

7 The U.S. Supreme Court has long protected commercial speech under the First Amendment to the U.S. Constitution requiring that the government show that a challenged regulation restricting such speech directly advances a substantial regulatory interest and that the restriction is narrowly tailored towards and uses the least restrictive means in achieving that interest, See, e.g., In Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976); Sable Communications, Inc. v. FCC, 492 U.S. 115, 126 (1989).

II.

COMMENTS AND RECOMMENDATIONS REGARDING THE PROPOSED RULE

A. Proposed Rule Sections 310.4(a)(5), 310.2(c) and 310.2(aa) (Abusive Telemarketing Acts or Practices; Prohibition on Transfer of Billing Information)

1. The Prohibition On The Transfer Of Billing Information Exceeds The Scope Of The Authority Granted To The Commission By Congress

The proposed amendment attempts to expand the list of "abusive telemarketing acts or practices" enumerated in the Act[8] to prohibit all forms of telemarketing pursuant to which consumer billing information is received by a marketer from any source (including, apparently, a subsidiary or affiliate) other than directly from the consumer -- even where the receipt and transfer of such information is specifically authorized by the consumer. See Proposed Rule Section 310.4(a)(5). The term "billing information" is defined in the proposed amendment as "any data that provides access to a consumer's or donor's account, such as a credit card...or debit card." See Proposed Rule Section 310.2(c). In essence, the Commission argues that "pre-acquired account telemarketing" (a term that is not defined in the Proposed Rule) must be prohibited because such practice is per se "unfair" and "may be coercive or abusive of a consumer's interest in protecting his or her privacy."[9]

The Commission's elimination of a legitimate method of effectuating a consumer authorized transaction – one that has existed for more than twenty-five years; is widely used by reputable businesses (including banks, credit card issuers, insurers, health clubs, oil companies, service providers, telecommunication providers and retailers) and which benefits both consumers and commerce, including through increased consumer convenience and savings (due to reduced marketing costs), as well as increased consumer protection against account information theft - is outside the scope of the rule-making authority granted to the Commission by Congress pursuant to the Act. Indeed, as Commissioner Swindle has pointed out in his concurring statement regarding

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[8] Acts or practices enumerated in the Act as potentially abusive and, therefore, within the purview of the Commission's rulemaking authority are: (1) a pattern of unsolicited telephone calls, (2) restrictions on when during the day and night calls may be made and (3) disclosures made during calls. See 15 U.S.C. § 6102(a)(3).

[9] 67 Fed. Reg. 4511 and **4494;** see also, concurring comment of Commissioner Swindle, 67 Fed. Reg. **4546.**

this proposed amendment, "[n]othing in the language of the Telemarketing Act or its legislative history indicates that Congress intended the Commission to use unfairness provisions to determine which practices are abusive."[10] Similarly, Congress was clear that "[i]n directing the FTC to prescribe rules prohibiting abusive telemarketing practices, it is not the intent of the Committee that telemarketing practices be considered per se abusive." H.R. Rep., No. 20, 103rd Cong. 1st Sess. 4 (1993).

Further, Congress did not intend the Act to address privacy concerns. In fact, the sole reference to "privacy" in the Act is found in 15 U.S.C. Section 6102(a)(3) which states that "telemarketers may not undertake a pattern of unsolicited telephone calls which the reasonable consumer would consider abusive of such consumer's right of privacy." Obviously, Congress' intent to regulate an "abusive pattern" of telemarketing calls made to a consumer in his or her home lends no legitimacy to the Commission's attempt to prohibit the transfer of billing information used with consumer consent based on espoused financial privacy concerns.[11] Indeed, "financial privacy" was first generally considered by Congress in connection with the Gramm-Leach-Bliley Act, 15 U.S.C. Section 6801-6810 ("GLB"), approximately five years after the passage of the Act. The proposed amendment would also conflict with certain provisions of GLB (which was enacted after the Commission's review of the Rule was concluded) and its enabling regulations, including those issued by the Commission (16 C.F.R. § 313.3(a)), the OCC and the FDIC as well as distinct regulations issued by the FCC under the Telephone Consumer Protection Act of 1991. For example, "banks" are governed by GLB and not the Rule/Proposed Rule, while subsidiaries and affiliates of banks are governed by both GLB and the Rule/Proposed Rule.

2. The Prohibition On The Transfer Of Billing Information Conflicts With Consumer Choice And Is Not The Least Restrictive Means Available To Achieve The Commission's Expressed Purpose

The proposed ban on a legitimate and broadly used method of effectuating consumer-authorized transactions also conflicts with common sense. Consumers understand, and routinely exercise their freedom of choice to consent to the transfer of their account information to effectuate

10 See *67* Fed. Reg. 4546.

11 See supra notes 3-5.

their purchase of goods and services pursuant to both outbound and inbound telemarketing as well as in many other marketing mediums. Indeed, in summarizing the results of a nationwide consumer survey encompassing 2000 consumer interviews conducted to determine whether consumers understand how and when they would be billed when read an actual "pre-acquired account telemarketing" script, the well-respected Luntz Research Companies ("Luntz") found that "[a]n incredible 85 percent of those polled said the billing methods are understandable." (emphasis original). Further Luntz found that "[f]ully 88 percent of respondents said the company was acting fairly, and that this was sufficient disclosure." (emphasis original). A copy of the Luntz survey summary has previously been provided to the Commission. In short, with adequate disclosures such pre-acquired account telemarketing "is not likely to mislead consumers acting reasonably" and therefore is neither "abusive" nor "deceptive." See 103 F.T.C. 110; 67 Fed. Reg. 4510, n. 176. Further, a majority of the states attorneys general, as exemplified by a number of recent voluntary agreements entered into between them and various national financial institutions and national marketing companies, have recognized that, when conducted with adequate disclosure, "pre-acquired account telemarketing" is not abusive or deceptive and is entirely consistent with all applicable federal and state laws and regulations.[12] Similarly, the Commission itself, in assisting in the establishment of the Electronic Retail Association's Advance Consent Guidelines on this topic, has implicitly agreed that proper disclosure can cure any perceived financial privacy concerns with this well-established billing practice, In fact, these self-regulatory guidelines are now followed or exceeded by many organizations.[13]

3. Existing Self-Regulatory Consumer Protections Are Effective And Additional Regulation Would Provide No Material Benefit To Consumers, But Would Unduly Burden Both Consumers And Legitimate Businesses

In addition to the self-regulatory practices of individual companies and trade organizations such as the Electronic Retailing Association and Direct Marketing Association, the self-regulatory

[12] See, e.g., Voluntary Assurance Agreement between Citibank, **N.A.** and the Attorneys General of Arizona, California, Colorado, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maryland, Michigan, Mississippi, Missouri, Montana, Nevada, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania and Hawaii and those voluntary agreements referenced by the Commission at 67 Fed. Reg. 4501, n. 30.

[13] The Rule explicitly recognizes and relies upon the self-regulation of the telemarketing industry. See 16 C.F.R. § 310.4 (b).

practices imposed by payment system providers/merchant processors effectively eliminate fraudulent use of pre-acquired account telemarketing. Indeed, such credit/debit card companies will terminate a marketer's merchant account (thereby preventing the marketer from charging credit/debit cards for its goods and services) if the marketer incurs excessive consumer chargebacks.

Not only would this proposed amendment fail to provide a material benefit to consumers, as described above, but it is more likely to facilitate fraud than to prevent it. For example, an individual telemarketing sales representative calling a consumer (an "outbound call") would, pursuant to the Proposed Rule, be required to obtain billing information such as credit card number, etc. directly from the consumer to effect a sale and would therefore be prohibited from simply obtaining the consumer's express permission to "charge your card on file with us," "your ABC Bank Visa card" or your "credit card on file with ABC retailer." Thus, the individual sales representative would now gain access to the billing information (from the consumer) where currently he or she has no access to the consumer's billing information at any time. Similarly, unscrupulous individuals could easily impersonate marketers (falsely claiming, for example, that they represent a charity) and thereby easily obtain the billing information from the consumer and use same for fraudulent purposes. Further, consumers will be harmed by increased costs of goods and services that would directly result from the dramatically increased marketing costs associated with complying with the Proposed Amendment.

4. Recommendations

Because the proposed prohibition on the transfer of billing information exceeds the scope of the Commission's rulemaking authority, that prohibition must be deleted in its entirety. In concept, however, we believe that billing information should not be obtained and used by a marketer to effect a charge to a consumer for goods or services unless and until the consumer expressly authorizes the marketer to charge his or her billing source. Accordingly, the Commission should "strike an equitable balance" between the interests of reducing potential misuse of this billing method and not unduly burdening legitimate businesses as it is required to do under the Act. See H.R. Rep. No. 20, 103rd Cong., 2nd Sess. 2 (1994). We believe it would be 'equitable for the

Commission to require marketers using "pre-acquired account telemarketing" to obtain the consumer's "Express Verifiable Consent" to the transaction. The marketer should, however, be deemed to have satisfied this requirement if it meets any of the following "safe harbor" methods of obtaining Express Verifiable Consent:[14]

1. Express written authorization by the consumer; or
2. Express oral authorization which is recorded and made available to the customer's credit or debit card issuer/bank and which evidences both (i) the consumer's authorization to charge a specified amount for the goods and/or service that are the subject of the sales offer and (ii) identification of the billing source to be charged that is reasonably specific, based upon the telemarketing method used (e.g., on inbound calls: "the card you just provided," and, on outbound calls: "your card on file with ABC retailer," "your ABC Bank Visa card" or "your card on file with us"); or
3. Written confirmation of the transaction that includes the information included in 2 above.

Relatedly, the overly broad and ambiguous definition of "billing information" under Section 310.2(c) of the Proposed Rule should be clarified to better specify what "any data that provides access to a consumer's or donor's account" means. In its discussion of this definition, the Commission better explains that it means credit, debit, bank, utility, mortgage "numbers" and "other information used to effect a charge against a person's account." See 67 Fed. Reg. 4498. In essence, only aggregate data that "unlocks a consumer's account" should be encompassed within the definition. Therefore, "aggregate data that can effect a charge against a consumer's or donor's account such as account number and expiration date" is a more precise and appropriate definitional language that would clarify that information that does not unlock a consumer's account, such as a consumer's name, address and telephone number, is not encompassed within Proposed Rule Section 310.2(c). Similarly, Proposed Rule Section 310.2(aa) should be clarified to explicitly state that

[14] These safe harbor methods are virtually identical to those enumerated in the Rule, 16 C.F.R. §§ 310.2(a)(3)(i) through (iii) requiring the verification of "novel" billing methods.

transfers of "Billing information" after Express Verifiable Consent has been obtained (under 1 through 3 above) is not a transfer "for telemarketing purposes" within the meaning of that Section.

Finally, any rulemaking by the Commission concerning the transfer of billing information/ "pre-acquired account telemarketing" must pre-empt state law to prevent an undue burden on legitimate businesses. The transfer of billing information is already governed by GLB (15 U.S.C. Section 6801-6810) and the myriad of federal regulations implementing same, including a regulation already issued by the Commission itself. See supra discussion at pp. *5-6*. Inconsistent state legislation would present a complex minefield for national marketers to navigate with regard to the transfer of billing information. Even in the absence of state legislation in this area, pre-emption is still necessary to protect legitimate companies from exposure to the inherently inconsistent regulatory and/or de facto legislative efforts of state authorities on this issue, which efforts have been identified by the Commission. See supra note 12.

B. Proposed Rule Section 310.3(a)(3)(ii)(E) (Express Verifiable Authorization; Billing Information)

1. The Duplicative Disclosures Required By The Proposed Amendment Would Not Provide **A** Material Benefit To Consumers, But Would Unduly Burden Both Consumers And Legitimate Businesses

The proposed amendment expands the definition of "express verifiable authorization" required when using certain "novel" payment methods to include, among other new information to be conveyed to the consumer during a telephone call, the consumer's specific "billing information" (defined in Section 310.2(c) of the Proposed Rule), including the name of the account and account number that will be used to collect payment for the goods or services that are the subject of each sales offer. Under the Proposed Rule, for each upsell sale transacted on an inbound call the marketer would be required to separately obtain/restate the consumer's specific billing information. The Commission essentially argues that this amendment is necessary to ensure that consumers "know which of their accounts will be billed." See 67 Fed. Reg. 4506.

For example, if a consumer calls a debit card issuer ("Issuer") to activate a new debit card (considered a "novel payment method" under the Proposed Rule), the consumer may be offered a subscription to a magazine and/or other third-party goods and services during the same call. Under the proposed amendment, the Issuer could not simply inform the consumer that the charge for the magazine subscription, etc. would be placed on the "debit card just activated." Instead the proposed amendment would require that (i) the Issuer's service representative be given access to the specific credit card account number (thereby unnecessarily facilitating the theft of that consumer's account information) and (ii) provide the specific account number to the consumer for each separate transaction on that single call. Similarly, the Proposed Rule mandates that, if the Issuer sends a written confirmation of the magazine subscription enrollment to the consumer, the account number charged be included thereby unnecessarily facilitating the theft of that information through the mail. See Proposed Rule 310.3(a)(3)(iii)(A) and 67 Fed. Reg. 4506.

Requiring the multiple repetition of a consumer's account number as a required element of Express Verifiable Authorization, particularly during multiple sales on an inbound call, unnecessarily increases call length up to 50%, imposes a substantial inconvenience on the consumer, adds burdensome administrative/technological requirements (and thereby increases marketing cost and, in turn, increases costs of goods and services paid by the consumer) with no apparent benefit to the consumer. For example, under the Proposed Rule, if a consumer calls a travel agency (in possession of his or her debit card information as a result of prior bookings) and the travel agency offers to book additional reservations such as hotel and car (an upsell), it would be required to separately obtain the consumer's debit card account information for the hotel and car portions of the travel reservations. Obviously, this runs contrary to the consumer's purpose in employing a travel agency – to make travel arrangements conveniently.

2. Recommendations

For each distinct transaction, the marketer should be required to identify the billing source to be charged with reasonable specificity based upon the telemarketing method used (e.g., inbound or outbound calling). See supra discussion at pp. 8-9. In short, consumers fully understand the meaning of billing disclosures such as the annual subscription fee of $29.00 "will be billed to the account you just provided" or "to your ABC Bank Visa account" or to your "credit card on file with

ABC retailer." For this and the other reasons set forth above, Section 310.3 (a)(3)(ii) (e) of the Proposed Rule should be deleted in its entirety.

C. Proposed Rule Section 310.2(t) and Proposed Deletion of Section 310.6(d) of the Rule (Definition of "Outbound Call")

1. The Expanded Definition Of "Outbound Call" To Include An "Inbound Call" Is Not The Least Restrictive Means Available To Achieve The Commission's Expressed Purpose

The proposed amendment expands the definition of "outbound telemarketing call" (a call initiated by a telemarketer) to include an "inbound upsell telemarketing call", significantly expanding the scope of the Rule. Essentially, the Commission argues that the practice of "inbound upselling" or offering a consumer another product or service, including those sold by an affiliate or third-party, after the consumer has purchased an initial product or service (during a call originated by a consumer) is a recently-created marketing method and that treating all inbound calls like an outbound call is necessary to ensure that consumers receive adequate disclosure of the identity of the offeror of the upsold product or service and the purpose of the upsell. See 67 Fed. Reg. 4500.

The Rule currently exempts inbound telemarketing from its purview for logical reasons. What makes an inbound call different from an outbound call is that it is initiated by a consumer to a marketer. When the consumer calls to purchase goods or services, he or she directly provides (during the call) his or her billing information for that purpose thereby employing what the Commission has characterized as "the most fundamental tool consumers have for controlling commercial transactions, i.e., withholding the information necessary to effect payment unless and until they have consented to buy." 67 Fed. Reg. 4513.

"Inbound upselling" has been in general use for approximately twenty-five years and, exclusive of outbound telemarketing, represents a significant marketing method used by many companies not today considered to be "telemarketers" under the Rule. "Inbound upselling" preserves the highest level of consumer protection because the consumer is specifically asked and consents to the additional goods or services being charged to the same billing source the consumer provided and/or accessed just moments before. Expanding the current definition of an outbound call to include all inbound calls, is not required to achieve the Commission's stated objective of ensuring that consumers understand that they are dealing with multiple sales offers and multiple sellers. Further, the proposed amendment has many unintended but serious consequences on legitimate businesses. For example, under the existing Rule an "outbound" call may not be made to any person who is listed on a federal, state or company specific do-not-call list and, under the Proposed Rule, this prohibition would now apply to "inbound" calls. Unfortunately, there is no practical way for a marketer to determine, in the middle of an inbound call, whether the consumer is on any do-not-call list.

Further, contrary to the Commission's assumptions,[15] the impact of the proposed change would be to unnecessarily increase inbound call length by 50% or more and thereby increase the costs of goods and services to consumers. Similarly, the new record keeping, public disclosure and collection of information burden under the Rule will be exponentially greater as a result of this major amendment. For example, many inbound call centers (facilities that receive only consumer initiated calls such as mail order catalog companies) do not currently have the technological capacity to record inbound calls (for consumer authorization verification purposes) which recording would, in effect and practice, be required under the proposed amendment as it is for outbound calls. Such technology can cost up to several million dollars for each affected company to install and is simply out of reach for all but the largest businesses. Moreover, the record keeping requirements of Section 310.5(a) will require five separate categories of records of all inbound calls to be kept, including recorded consumer sales verifications for two years, all of which represents a new and significant "paperwork" and financial burden on inbound marketers, including credit card issuers, insurance companies, direct marketers, utility companies and catalog companies.

2. Recommendations

For all the reasons identified above, Proposed Rule Section 310.2(t) should be deleted and existing Section 310.6(d) should not be modified. Further, the Commission should submit this portion, as well as all other portions, of the Proposed Rule to the Office of Management and Budget ("OMB") for detailed review and comment. See supra note 1.

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[15] See 67 Fed. Reg. 4534.

Notwithstanding the foregoing, we believe that an equitable balance can be struck between the expressed purpose of providing consumers with the identity of each upsell offeror and not unduly burdening legitimate business. Specifically, for each upsell offer made during an inbound call made on behalf of a third-party (whether an affiliate or an unrelated party) of the entity offering the primary product or service that is the subject of the inbound call, the marketer should clearly advise the consumer of (i) the identity of the offeror of the upsold product or service and (ii) the purpose of the upsell. However, these requirements can and should be made without expanding the scope of the Rule.

D. Proposed Deletion of Section 310.3(a)(3)(iii) of the Rule (Express Verifiable Authorization; Written Confirmation)

1. The Proposed Amendment Would Not Provide A Material Benefit To Consumers, But Would Unduly Burden Both Consumers And Legitimate Businesses

The proposed amendment deletes the existing provision permitting a marketer to obtain a consumer's "Express Verifiable Authorization" in sales involving payment by negotiable paper and other methods where the payment method does not have the protections provided by or comparable to those available under the Fair Credit Billing Act and/or the Truth in Lending Act (collectively, the "Acts") by confirming the transaction in writing prior to submitting the consumer's billing information for payment. The effect of the deletion is that written authorization (consumer signature as defined by Proposed Rule Section 310.3(i)) and taped oral authorization (as defined by Proposed Rule Section 310.3(a)(3)(ii)) would be the sole permissible methods of obtaining "express verifiable" authorization to such transactions. The Commission essentially argues, without evidentiary citation, that the written authorization confirmation method is "rarely used" and "subject to abuse" and should, therefore, be eliminated. See 67 Fed. Reg. 4508.

The existing written authorization confirmation method is readily available, straightforward, reliable and is currently used by many marketers. It is also a far less cumbersome and costly confirmation method than the recording or signature alternatives provided under the Proposed Rule. Every authorization confirmation method is, of course, subject to abuse by unscrupulous marketers, but that unsupported concern alone is insufficient reason for deleting one of only three "safe harbor" methods of verification authorization. See, e.g., Edenfield v. Fane, 507 U.S. 766, 768 (1993); Katharine Gibbs School v. Federal Trade Commission, 612 F. 2d 658 (2nd Cir. 1979) (Commission must demonstrate that issued regulations are based upon "substantial evidence.")

2. Recommendations

As set forth above, Section 310.3(a)(3)(iii) of the Rule should not be deleted. If the Proposed Rule is retained in any form, it should be clarified to state that debit cards, which are voluntarily afforded protections comparable to those provided under the Acts by debit card issuers, are excluded from the Proposed Rule. This is particularly important because marketers simply have no way of distinguishing between a debit card and a credit card on sales calls.

E. Proposed Rule Section 310.4(b)(1)(iii)(B) (National Do-Not-Call List)

1. The Imposition Of **A** National Do-Not-Call List Exceeds The Scope Of The Authority Granted To The Commission By Congress

The Commission proposes to implement a national do-not-call list and, in support thereof, quotes its Congressional instruction to prohibit "'pattern of unsolicited calls which the reasonable consumer would consider coercive of such consumer's right to privacy."' 67 Fed. Reg. 4518, citing, 15 U.S.C. Section 6102(a)(3)(A). As previously addressed herein, this provision lends no support whatsoever to the proposition that Congress intended the Act or the Commission to address "privacy concerns."[16] In short, legitimate (i.e., non-deceptive non-abusive) calls are simply outside of the scope of the Commission's regulatory authority. See supra notes 2-4. Moreover, the Commission has no authority to declare legitimate telemarketing practices per se abusive. See H.R. Rep., No. 20, 103rd Cong. 1st Sess. 4 (1993).

2. If The Commission Had The Requisite Authority To Impose A National Do-Not-Call List, Pre-Emption Of State Do-Not-Call Lists Would Reduce The Undue Burden On Businesses

The Proposed Rule does not pre-empt state law. Accordingly, each state is free to enact its own legislation which may be more restrictive, less restrictive or the same as the Proposed Rule. National marketing campaigns are not, however, conducted on a state-by-state basis. Rather, marketers call from multiple locations into multiple states simultaneously. Compliance with the

16 See supra discussion at p. 5.

every increasing number of state do-not-call lists'[17] is complex and burdensome. State do-not-call statutes vary from each other as well as from that of the Proposed Rule. The problems that arise from multiple and conflicting lists are obvious. If a company marketing in all 50 states, is forced to purchase 50 different state lists plus the District of Columbia as well as a national list every quarter, it will incur a significant direct economic burden as well as many indirect burdens. In short, it is beyond doubt that the creation of **a** national do-not-call list will cause enormous revenue losses to legitimate marketers and that such impact is required to be weighed by the Commission. See supra note 1. Additionally, the aggregate effect of purchasing 52 different do-not-call lists, in various computer formats, will cause companies to expend substantial resources to integrate the different computer formats into one database compatible with the company's calling database. This is the same type of problem Congress faced regarding the Telephone Consumer Protection'Act (TCPA) in 1992. In that regard, Congress instructed the FCC, in determining whether to require a national do-not-call database, to "consider the different needs of telemarketers conducting business on a national, regional, state or local level." 7 FCC Rcd. 8752 (1992). After an exhaustive study, the FCC concluded that a company specific do-not-call list was an equitably balanced way to protect consumers without placing an undue burden on legitimate marketers. *Id.* at p. 14. That conclusion is just as valid today.

3. Existing Company Specific Do-Not-Call Lists And Self Help Remedies Currently Available To Consumers Are The Least Restrictive Means Of Achieving The Commission's Expressed Purpose And Maintaining Consumer Choice

A company specific "do-not-call" list is an equitable way to empower consumers to make informed purchasing decisions and to preserve consumer choice. Indeed, the FCC determined company specific do-not-call lists are preferable to a national do-not-call list because the former more effectively preserved consumer choice. See 67 Fed. Reg. 8752 ¶ 14, n. 24. Those consumers who do not wish to receive calls from particular companies can simply inform the caller at anytime during the call. For those consumers who want to receive certain types of calls, the Rule allows them the freedom to determine which calls they want to receive and prohibit those they do not.

[17] There are currently twenty-one state do-not-call statutes, eight pending state legislative do-not-call list proposals and two pending federal do-not-call list legislative proposals.

Consumers can also place themselves on the Direct Marketing Association's well-established Telephone Preference Service List without cost. In addition to the foregoing existing "self-help" remedies available to consumers without charge, products and services available to consumers, such as "caller id," can be used to screen calls of every nature at their discretion. Significantly, the availability of self-help remedies reduces or eliminates the need for regulation and makes it increasingly excessive and unnecessary and, therefore, subject to serious constitutional challenge. See, e.g., Thomas W. Bell, Internet Privacy and Self-Regulation: Lessons from the Porn Wars, CATO Briefing Paper No. 65, August, 2001 at p. 4.[18]

4. How Will The Proposed Do-Not-Call List Be Funded, Maintained And Administered And How Much Will It Cost Consumers?

The Commission has not provided any substantive details on how the proposed national do-not-call list will be initially funded, maintained or administered. Therefore, we can only assume that consumers, through higher federal taxes, will bear all the costs thereof regardless of whether they choose to put their name on it or not.[19]

5. Recommendations

We strongly urge the Commission to reconsider the propriety of its proposal in light of the above. Further, the Commission should submit this portion as well as all other portions of the Proposed Rule to the OMB for detailed review and comment. See supra note 1.

111.

CONCLUSION

As detailed above, the members of the Consumer Choice Coalition strongly support the intent and purpose of the Rule and the Act. We also strongly believe that, as drafted, Sections 310.4(a)(5) and 310.4(b)(iii)(B) of the Proposed Rule are not within the scope of the Commission's

[18] Professor Bell discusses the successful constitutional challenges to legislation restricting Internet speech classified as indecent or harmful to minors by arguing the availability of self-help alternatives.

[19] The FCC, in connection with its review of the TCPA, estimated the costs of a national do-not-call database to be between $20 to $80 million in the first year and $20 million each year thereafter. See 7 FCC Rcd. 8752 ¶ 14 (1992). Although not included for notice and comment as part of the Proposed Rule, the Commission has, in connection with its budget request for fiscal year 2003, estimated, without support or explanation, that it would collect $3,000,000 "from a do-not-call fee" to be charged unidentified persons/entities. See Prepared Statement of Chairman Muris Before the Subcommittee on Commerce, Justice, State, and the Judiciary dated March 19,2002 at p. 9.

authority under the Act and that those Sections **as** well **as** Sections 310.3(a)(3)(ii)(E) and 310.2(t) are not carefully balanced to avoid undue burdens on consumer choice, legitimate businesses or commercial speech. Accordingly, we strongly urge you to reconsider these Sections of the Proposed Rule and modify each of them as recommended above.