UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of Notice of Proposed Rulemaking
To Amend the Telemarketing Sales Rule
FTC File No. R411001

COMMENTS OF THE MAGAZINE PUBLISHERS OF AMERICA ON THE COMMISSION'S NOTICE OF PROPOSED RULEMAKING TO AMEND THE TELEMARKETING SALES RULE

I. Introduction

On behalf of the membership of the Magazine Publishers of America, Inc. (the "MPA"), we are pleased to submit our comments in response to the Federal Trade Commission's proposed amendments to the Telemarketing Sales Rule.[1] As the Commission is aware, MPA has been an active participant in the TSR rulemaking proceedings since the original rulemaking began in 1995. We welcome the opportunity to continue the ongoing dialogue we have maintained with the Commission, and to provide comments on the proposed amendments to the TSR.

A. Description and Overview of MPA Membership

The MPA is the national trade association for consumer magazine publishers. Our membership includes approximately 240 domestic magazine publishing companies that publish more than 1,500 individual magazine titles, along with more than 100

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[1] Notice of Proposed Rulemaking (the "NPRM"), 67 F.R. 4492 (January 30, 2002). Hereinafter, the existing Telemarketing Sales Rule, 16 C.F.R. 310, is cited as the "TSR" or

international magazine publishers and more than 120 associate members who act as suppliers to the magazine industry. MPA members' magazines include nationally distributed publications such as *Time*, *Reader's Digest*, and *Good Housekeeping* as well as smaller circulation publications.

The MPA has a long-standing commitment to promoting business practices that are respectful of our subscribers and readers. We have worked closely with the Commission to identify areas of concern in the magazine marketing industry, and to develop industry self-regulatory models that address such issues. The MPA has promulgated guidelines for telemarketing to assist our members in complying with the Telemarketing Sales Rule. Most recently, in an effort to address some of the concerns expressed by the Commission in this NPRM, particularly with respect to upselling and the use of pre-acquired account information, we developed an educational packet for our membership on advance consent marketing techniques. The packet contained the Electronic Retailing Association's Guidelines for Advance Consent Marketing and a companion publication designed to assist our members in applying those guidelines to their specific marketing practices. The MPA understands the important link between advancing self-regulation and ensuring responsible business practices.

B. The Size and Scope of the Telemarketing Industry and its Importance to Magazine Marketing

The long-term viability of the telemarketing industry is essential to the economic health and stability of many segments of the economy. In 2001, telemarketing to consumers generated approximately $274.2 billion in sales, accounting for 27.2 percent of all consumer direct marketing sales and almost 4 percent of all consumer sales.[2] It is

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the "Existing Rule," and the Commission's proposed revised Rule as contained in the NPRM is cited as the "Proposed Rule."

[2] Economic Impact: U.S. Direct Marketing Today 2002 (forthcoming), commissioned by the Direct Marketing Association, conducted by DRI/WEFA (hereinafter, the

estimated that consumer telemarketing will grow by 8 percent per year to an expected $402.8 billion in sales by 2006.[3] The expenditures of direct marketers' telemarketing to consumers were an estimated $27.2 billion.[4] Over 415 thousand people are employed in the segment of the telemarketing industry that markets to consumers in the United States,[5] and more than 4.1 million additional jobs are impacted by the industry.[6] As these figures demonstrate, telemarketing is a vital part of the national economy, one that generates substantial sales of products and services, and creates significant job opportunities for individuals at all levels. In particular, telemarketing affords unique job opportunities for entry-level individuals and persons with disabilities who might otherwise not be gainfully employed.

Telemarketing is also a crucial part of the magazine publishing industry. In our industry, independent contractors generate the majority of initial subscriptions. Many of these contractors use telemarketing as an essential component of their marketing efforts. These independent contractors also rely heavily on inbound upsells as a means of generating initial subscriptions. One contractor, for example, generated approximately 7,000,000 subscriptions in 2000 through telemarketing, representing revenues of approximately $175 million.[7] Independent contractors and magazine publishers directly also rely heavily on outbound telemarketing to existing customers for renewal of existing subscriptions.

"DRI/WEFA Report"). Moreover, the economic impact figures discussed in this section are based only on the outbound consumer segment of the industry, so overall inbound and outbound figures are likely to be significantly higher.

[3] Id.

[4] Id. Moreover, the $27.2 billion figure represents only outbound telemarketing expenditures so overall inbound and outbound expenditures are likely to be significantly higher.

[5] Id.

[6] Id.

Within the magazine industry, the use of inbound upsells to generate magazine subscriptions is becoming increasingly prevalent. Our members conduct such programs with full disclosure of the terms of the offer, full disclosure of the identity of the seller, and full consent of the consumer to the transfer of any billing information.

If legitimate, established telemarketing sales practices were to be substantially restricted or curtailed by the current TSR review, the economic impact on the telemarketing industry in general, and on MPA members in particular, would be severe. At a time when government is actively seeking ways to stimulate our economy, it seems counterintuitive to promulgate regulations which are guaranteed to result in a substantial loss of sales and loss of jobs without any countervailing consumer benefit. We believe that such a result is avoidable if the Commission works with industry to craft regulatory standards which draw the bright-line distinctions that allow responsible marketers to continue legitimate marketing activities while prohibiting the fraudulent practices that injure consumers and reputable businesses alike.

C. General Summary of the MPA's Position

The MPA fully supports the Commission's continued efforts to ensure that telemarketing activities are conducted in an honest, legitimate, and truthful manner. Deceptive and abusive telemarketing practices hurt not only consumers, but also hurt legitimate marketers who utilize telemarketing as an efficient and convenient way to allow consumers to purchase goods and services.

In our industry, a premium is placed on retaining subscribers through multiple subscription periods because such subscribers become profitable customers. For our members, therefore, it is important to take steps to ensure that subscribers understand

[7] We note that these figures represent the economic activity generated by one

their purchases and enjoy their magazines. Otherwise subscribers' refusal to pay for existing orders or failure to renew those orders will ultimately prove to be extremely costly to the publisher's bottom line. For that reason, it is in our members' interest for magazines to be sold to subscribers who understand what they are purchasing and how they will pay for it. Subscribers who understand the nature of their purchases will be more likely to renew and thus to become long-term profitable customers for our members.

In concept, the MPA agrees with many of the Commission's attempts to close avenues of potential abuse by proposing changes to the TSR. However, the MPA is concerned that many of the specific proposals contained in the Commission's proposed Rule are far more onerous and restrictive than is necessary to achieve the intended purpose. Such proposals will have a severe, devastating impact on the magazine publishing industry, and will very likely result in the loss of sales, damage to business, loss of employment, and, ultimately, higher costs to consumers. Moreover, to the extent that such proposals seek to impose more onerous restrictions than necessary on lawful commercial speech, they raise serious First Amendment concerns.

More particularly, the MPA is aware of the fact that telemarketing practices have evolved and that certain marketing practices that have developed since the Rule's inception, such as upsells and the use of pre-acquired account information may need to be examined. The MPA would urge the Commission, however, as it did in 1995, not to let the unscrupulous business practices of a few bad actors color the Commission's view of otherwise legitimate business practices. Today, the Commission faces the same challenges it did in 1995 — namely, finding a way to draw a bright-line distinction between the abusive and deceptive practices of a small group of marketers and the legitimate business practices of the vast majority of marketers who conduct their telemarketing activities in a truthful and non-deceptive manner. The success of the

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contractor, and thus obviously constitute only one small portion of the overall industry.

1995 Rule lies in the Commission's ability to strike that balance. Indeed, the ability of the telemarketing industry to grow and flourish following the promulgation of the Rule in 1995 is a testament to the Commission's skill in crafting regulations that were properly tailored to address the abuses without crippling the legitimate segments of the industry. We urge the Commission to exercise the same restraint and strike an equally proper balance in this rulemaking proceeding.

To assist the Commission in that process, we are commenting upon five specific aspects of the Proposed Rule that will have the most significant impact upon our members. In our comments, we have tried to be constructive by not only explaining our concerns with the specific proposals at issue, but by offering alternative solutions which we believe would be equally effective in addressing the Commission's concerns and avoid potential First Amendment issues.

First, we are deeply concerned about the Commission's proposed expansion of the definition of outbound calls to include inbound upsell calls. The manner in which upsells are treated under the TSR is a significant issue for MPA because of the increasingly large volume of magazine subscriptions that are being generated through inbound upsells. While the MPA understands and supports the Commission's stated goals of ensuring that consumers properly understand when they are dealing with a separate seller and are fully informed about the nature of the upsell offer, we believe that these goals can be more effectively achieved through specific disclosure requirements properly tailored to achieve the intended purpose. We are concerned that the Commission's proposal to subject inbound upsells to all of the Rule's requirements for outbound calls will not only fall short of accomplishing the Commission's stated objectives, but will have unintended and potentially illogical consequences.

MPA proposes that the Commission treat upsell calls as a separate category of calls and require that certain key disclosures be made during that call to address the disclosure related concerns cited by the Commission. Specifically, MPA is proposing

that the following disclosures be required on all upsell calls: (1) the fact that the consumer is dealing with a separate seller; (2) the identity of the seller; (3) that the purpose of the call is to solicit the sale of additional goods or services; and (4) the material terms of the offer such as the nature of the goods or services and the cost. MPA also recommends that the Commission define the term "separate seller" as an unaffiliated entity in a manner consistent with the Commission's definition of the term "affiliate" under the Commission's trade regulation rule on the Privacy of Consumer Financial Information (16 C.F.R. Part 313).

Second, the Commission's proposed ban on any transfer of consumer billing information is a draconian measure which we believe is far more extreme than necessary to achieve its intended purpose. The Commission's approach groups together two very different business practices and is premised on the mistaken view that any transfer of consumer billing information among marketers is inherently abusive to consumers, irrespective of the relationship between the marketers sharing that data and/or the consumer's consent to the transfer. The Commission's approach appears to be based on its limited enforcement experience with an isolated group of marketers who may have engaged in unscrupulous marketing practices, rather than on knowledge of and experience with the manner in which the vast majority of legitimate marketers engage in the transfer of such information in order to facilitate transactions authorized by the consumer. In our comments, we hope to enlighten the Commission as to the manner in which legitimate businesses engage in the transfer of such information.

While we understand and sympathize with the Commission's concerns in this area, we believe that the Commission's stated goals can be achieved through far less drastic means, by requiring that material billing information be disclosed to the consumer and that verifiable consumer consent be obtained prior to the transfer of any consumer billing information. **Accordingly, MPA proposes that the Commission**

prohibit only the transfer or use of consumer billing information when such transfer or use is made without express verifiable authorization from the consumer. In order to obtain express verifiable authorization from the consumer, the following material billing information would have to be disclosed before the consumer provides their consent: the identity of the seller; when or how frequently the consumer will be charged; the amount of the charge; and sufficient information to enable the consumer to reasonably identify the account that will be charged. In terms of the methodology for obtaining consent, MPA proposes that the Commission retain the following three methods of verifiable consent contained in the current Rule: a written signature; a tape recording; or a written acknowledgment sent prior to billing. MPA also recommends that the Commission define consumer billing information to mean the complete account number information that will provide access to the consumer's account.

Third, the Commission requested comments regarding the use of predictive dialers and the potential imposition of a zero percent abandonment rate. In our view, the imposition of such a standard would severely and negatively impact our industry in a manner that would not be outweighed by any countervailing public benefit. **Our members would, however, support the imposition of a reasonably low abandonment rate standard, such as five percent. We believe such an approach would more appropriately meet the needs of both consumers and businesses**.

Fourth, we are deeply concerned about the Commission's proposed national do-not-call registry. In our view, the proposal appears to exceed the Commission's jurisdiction under the Telemarketing and Consumer Fraud Abuse Prevention Act (the "TCFPA"), 15 U.S.C. §6102. Moreover, the Commission's proposal on this issue provides very little detail on the manner in which the proposed registry will be operated, the true costs of operating the registry, or how those costs will be funded. Nevertheless, the operational information that is contained in the Commission's

proposal contains significant flaws that we believe must also be re-evaluated in light of practical considerations. The Commission's goal of providing a nationwide mechanism through which consumers can easily have their names removed from all lists is already being served through the DMA's Telephone Preference Service. **The MPA proposes that the Commission strongly consider certifying the DMA's Telephone Preference Service and require that telemarketers subscribe to the TPS or such other industry maintained lists as may subsequently be certified by the Commission. Alternatively, if the Commission intends to move forward with the establishment of a national registry, MPA urges the Commission to address the various structural flaws inherent in its current proposal such as the lack of pre-emption, the verification problems associated with reliance on ANI data alone, the absence of a pre-existing business relationship exemption, the absence of any renewal terms, the absence of the ability of consumers to selectively block telephone solicitations for certain categories of products or services, and the absence of safeguards to ensure that requests are made only by an authorized account holder.**

Fifth, we suggest that the Commission's proposal to ban the blocking of caller identification services be modified. **In particular, we recommend that the Commission allow marketers, where technologically and economically feasible, to substitute a customer service number or another similar valid callback number that belongs to the seller or its customer service representative.** As telemarketing call centers often operate on systems that provide a non-accessible callback number to caller identification services, we believe that our proposal would help to reduce consumer confusion and frustration with non-functional callback numbers.

II. Expanding the Definition of Outbound Calls

In the Proposed § 310.2(t), the Commission proposes to amend the definition of an "outbound telephone call" to include: "any telephone call to induce the purchase of

goods or services or to solicit a charitable contribution, when such telephone call (i) is initiated by a telemarketer; (ii) is transferred to a telemarketer other than the original telemarketer; or (iii) involves a single telemarketer soliciting on behalf of more than one seller or charitable organization."

The Commission's proposal to expand the definition of outbound telemarketing calls to include either calls transferred to a second telemarketer or calls in which a single telemarketer solicits on behalf of more than one seller or charitable organization is clearly aimed directly at upsells. As the Commission observed in the NPRM, the practice of upselling is becoming increasingly common.[8]

In proposing this alteration, the Commission's stated purpose is to "ensure that, when consumers are transferred from one telemarketer to another or when a single telemarketer makes offers on behalf of two distinct sellers during a single call, consumers understand (a) that they are dealing with two separate entities; (b) the second seller's identity; and (c) that the purpose of the second solicitation is to offer a second product or service."[9] The Commission has proposed expanding the definition of outbound calls to include upsells because it believes such an approach will ensure that consumers receive the disclosures proposed by Sections 310.3 and 310.4.

As an initial matter, MPA assumes that the Commission's intent is to apply the Proposed Rule only to upsells on behalf of a separate seller. Where the subsequent sale is being conducted on behalf of the same seller, the concerns expressed by the Commission regarding disclosure of the existence and identity of the separate seller clearly do not apply. MPA would suggest that the Commission clarify this position in its final rulemaking.

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[8] NPRM, 67 F.R. at 4495.

While the MPA agrees with the Commission that certain disclosures need to be made in the upsell environment in order to ensure that consumers fully understand that they are dealing with a separate seller and a separate sales transaction, the MPA does not believe that it is necessary or prudent to treat upsell calls as outbound calls in order to achieve the Commission's disclosure-related objectives. The MPA is concerned that the Commission's proposed approach will have the unintended consequence of subjecting what are essentially inbound calls to other provisions of the Rule, such as calling time restrictions and do-not-call registry requirements, which cannot logically be implemented in the inbound environment. The MPA firmly believes that the Commission's objectives can be more easily and effectively accomplished by defining upsells as a distinct category of calls and requiring that certain key disclosures be made. Such an approach is more consistent with the Commission's rulemaking authority because it will be sufficient to accomplish the Commission's disclosure-related objectives, while not unduly burdening the industry with additional requirements that would serve no regulatory purpose.

A. Upselling is a Legitimate Marketing Technique.

Upselling is a legitimate, convenient and efficient marketing technique that should not be subject to more restrictive requirements then necessary to achieve the Commission's intended purposes. As the Commission itself has noted, the practice of upselling has become increasingly prevalent since the Rule was originally promulgated in 1995. In fact, it is estimated that approximately $1.5 billion dollars in sales of products and services are generated through upsells.[10] Moreover, the economic impact of upsells extends well beyond the actual sales generated by the upsell offer. By

[9] NPRM, 67 F.R. at 4500.
[10] This figure is based on Commission staff assumptions contained in the NPRM, the DRI/WEFA Report's estimates of direct mail sales, and statistics from The Household

allowing marketers to share the high costs of telemarketing and customer acquisition, upselling also provides economic benefits and efficiencies to the primary marketer, which in turn helps support higher net revenue for the primary marketer and lower prices to consumers. In fact, because of the economic efficiencies inherent in upsells, marketers are often able to offer products and services via upsells on more favorable terms than may be possible in other media.

Upsells are also beneficial to both marketers and consumers alike because they allow product and service offers to be efficiently targeted to consumers who are most likely to be interested in them. In an upsell, the consumer has already demonstrated through a purchase that he or she is interested in the particular product or service category that is the subject of the offer and is inclined to make purchases by phone. Indeed, we would suggest that upselling may be one of the most efficient forms of marketing available because it is naturally targeted and focused to an appropriate audience and dramatically reduces advertising and telemarketing costs for both marketers.

The magazine publishing industry is a natural candidate for the types of affinity marketing programs that the upsell channel supports. Magazines by their very nature are designed to appeal to specific consumer interests. Accordingly, magazine titles can be easily and effectively paired with other product and service offers in order to enhance the primary marketer's relationship with the customer and provide added value to the consumer. For example, a consumer who calls to purchase a piece of exercise equipment may be interested in purchasing a subscription to a fitness magazine. A consumer who calls to purchase women's clothing may be interested in purchasing a subscription to a fashion magazine. Because of these natural affinities, publishers either directly or through their sales agents are relying increasingly upon

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Diary Study, USPS, Fiscal Year 2000. This figure is also based on an estimated 12

"upsells" to generate magazine subscriptions. As noted earlier, one sales agent generated approximately 7,000,000 subscriptions in 2000, representing revenues of approximately $175 million.[11] Much of the upsell revenue is generated through affinity programs with catalog companies. One sales agent estimates paying $31 million to its retail catalog partners, making the arrangement beneficial to both parties. Accordingly, MPA has a strong interest in ensuring that this marketing technique is not subject to undue or unnecessary restrictions which would impair its continued viability.

B. The Proposed Expansion of the Definition of Outbound Calls to Inbound Upsells is Broader than Necessary to Achieve the Intended Purpose and Will Result in Unintended Consequences.

Given the fact that upselling is an inherently legitimate and lawful marketing technique, and given the enormous efficiencies inherent in this form of marketing, the Commission should take care to ensure that any regulations it proposes are no more restrictive than necessary to achieve the Commission's intended purpose.[12] Moreover, "where an obvious alternative exists that restricts substantially less speech, choice of a more stringent rule is far less likely to withstand First Amendment scrutiny." U.S. West, 182 F. 3d at 1238. The MPA believes that the Commission's proposal to apply all of the requirements applicable to outbound calls to inbound upsells is not only much more restrictive than necessary to achieve the Commission's disclosure related objectives, but will lead to results that are at best illogical.

By expanding the definition of outbound calls to include inbound upsells, the Commission will subject such calls to provisions which cannot logically be applied to

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percent upsell sales success rate.

[11] Again, these figures represent the economic activity generated by one contractor, and thus obviously constitute only one small portion of the overall industry.

such calls. For example, both the Proposed Rule Section 310.4(c) and the existing TSR Section 310.4(c) prohibit calls to the consumer's residence at any time other than between 8:00 a.m. and 9:00 p.m. local time at the consumer's location. Accordingly, the Commission's proposal as written, would amount to a tantamount ban on upsells outside the window of 8:00 a.m. to 9:00 p.m. These calling time restrictions were included in the Rule in order to protect consumers from the intrusion of outbound calls during certain time periods. The imposition of these calling time restrictions onto inbound upsells would not make sense. An inbound call is placed by the consumer at his or her own convenience. Such a call clearly does not raise the same potential intrusion concerns, as would an outbound call.

Similarly, if the definition of outbound calls is expanded to encompass upsells, such calls would become subject to the company-specific do-not-call list requirements of Section 310.4(b)(1)(iii) of the Existing Rule and the do-not-call registry (the "DNC List") requirements in Section 310.4(b)(1)(iii) of the Proposed Rule. Subjecting upsell calls, particularly inbound upsells, to do-not-call requirements would impose an insurmountable burden on telemarketers as it would require the telemarketer to determine in the middle of a call whether the particular consumer is on either a company-specific do-not-call list or the national DNC List prior to making a second offer to that consumer. It is doubtful that current technology would even permit the telemarketer to perform that function during the call. Accordingly, the Commission's proposal may amount to a functional ban on upselling. Again, since the intrusion issues presented by an outbound call are simply not present in the context of an inbound upsell call, which is made voluntarily by the consumer at his or her convenience, the resulting devastating impact on industry is not balanced by any countervailing consumer benefit.

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[12] See Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557 (1980) and U.S. West v. Federal Communications Commission, 182 F. 3d 1224 (10th Circuit 1999), cert. denied, 120 S. Ct. 2215 (2000).

C. The Commission Should Establish Specific Disclosure Requirements for Upsells

The MPA believes there is a far less restrictive alternative which will be equally if not more effective in advancing the Commission's stated objectives. Rather than treating upsell calls as "outbound calls," MPA recommends that the Commission treat "upsells" as a distinct category of calls and subject such calls to specific disclosure requirements uniquely designed to communicate the kind of information which the Commission has identified as being important to consumers. Specifically, MPA agrees with the Commission that consumers should be told on an upsell call (1) that they are dealing with a separate seller, (2) the identity of the seller and (3) that the purpose of the upsell is to solicit the sale of additional goods or services (or charitable contributions), and (4) the material terms and conditions of the sales offer such as the nature of the goods or services and the cost.[13] Accordingly, MPA would fully support a revision to the rule which would require the disclosure of such information on all upsell calls. Such an approach will directly advance the Commission's disclosure related objectives without imposing other restrictions which will do nothing to advance the Commission's goals and may indeed amount to a *de facto* ban on this efficient and legitimate marketing technique.

[13] To the extent that the goods or services are being sold on a free trial basis, MPA acknowledges that additional disclosures may be appropriate. See, for example, the ERA Advance Consent Guidelines as they apply to free-to-pay conversions.

D. The Commission Should Clarify the Meaning of a "Separate Seller."

Given the fact that the disclosures being recommended for upsells deal primarily with the fact that the consumer is dealing with a "separate seller," the MPA believes it is important for the Commission to clarify what a "separate seller" means. Under both the Existing Rule Section 310.2(r) and the Proposed Rule Section 310.2(x), a Seller is defined to mean any person who, in connection with a telemarketing transaction provides, offers to provide, or arranges for others to provide goods or services to the customer in exchange for consideration. In many telemarketing transactions, however, there are multiple entities that would literally fall within this definition of a seller. For example, in the magazine publishing industry, magazine sales are often generated by independent sales agents. Both the sales agent and the magazine publisher receive consideration in exchange for providing the magazine. Thus both entities are arguably sellers. However, only one of these entities will actually bill the consumer. The MPA believes that in the context of defining what constitutes a "separate seller" the Commission should clarify that the seller is the entity that will be billing or charging the consumer. In making this proposal, MPA is not intending to narrow the scope of entities or persons who may be subject to the Telemarketing Sales Rule but rather to ensure that in the case of upsells and pre-acquired account information, where the definition of a "separate seller" may be critical, it is clear that the entity who must be properly identified to the consumer is the entity who will in fact be billing or charging the consumer's account.

Moreover, many organizations are comprised of multiple related entities and may offer the products or services of these various affiliates during a single call. For example, a large magazine conglomerate may offer a magazine subscriber videotapes from one of its subsidiary or affiliated companies. In such a situation, the Commission's concerns about the need to disclose the identity of the second seller would not exist. Accordingly, MPA would propose that an affiliated entity not be

deemed to be a separate seller. In this regard, MPA proposes that the Commission adopt the same definition contained in the Commission's Privacy of Consumer Financial Information Rule, 16 C.F.R. §313.3(a), wherein an affiliate is defined as "any company that controls, is controlled by or is under common control with another company."

III. Pre-Acquired Account Information

In the Proposed Section 310.4(a)(5), the Commission seeks to ban all use of pre-acquired account information in connection with telemarketing. Specifically, the Proposed Rule would prohibit receiving "from any person other than the consumer or donor for use in telemarketing, any consumer's or donor's billing information, or disclosing any consumer's or donor's billing information to any person for use in telemarketing." The MPA is deeply troubled by this proposal. While the MPA appreciates the nature of the Commission's concerns regarding the transfer or receipt of consumer billing information from any source other than the consumer, the MPA believes that the Commission's stated objective of ensuring that consumers are not billed for purchases that they have not authorized can be accomplished through far less restrictive measures.

In proposing to ban all sharing of consumer billing information among marketers, irrespective of the relationship between the marketers or the consumers' stated preferences, the Commission has stated that it considers all such uses to be inherently "unfair." Apart from the legal deficiencies inherent in the Commission's position, we respectfully submit that the Commission's proposal is unsupported by the record, more restrictive and extreme than necessary to achieve the Commission's stated purpose, and likely to have a devastating impact on the vast majority of legitimate marketers who follow responsible business practices when sharing consumer billing information, which includes, always obtaining the consumer's prior consent to the

transfer. The MPA believes that a far more reasonable position would be to permit marketers to share consumer billing information during or after a call with proper notice to and consent of the consumer. Such an approach will preserve the consumer's ability to make personal and individual choices regarding how and when their account information will be shared.

A. The Commission's Proposed Ban is Not Consistent with its Stated Concerns or Objectives.

As a threshold matter, we note that the Commission's proposal to ban all transfers and use of consumer billing information among marketers appears on its face to extend beyond the abuses it seeks to address. Repeatedly, throughout the NPRM, the Commission refers to the use of pre-acquired account information and to the abuses that have occurred in connection therewith.[14] The Commission does not, however, define what it means by the term "pre-acquired account information" either in the proposed NPRM or in the Rule itself. This lack of definitional clarity is critical particularly when viewed in light of the extreme remedy the Commission has proposed.

The MPA interprets "pre-acquired account information" to mean complete billing information that is acquired by the seller (defined as the billing entity) prior to the time that the telemarketing solicitation occurs and without the consent of the consumer. This interpretation seems consistent with the Commission's comments and concerns expressed regarding pre-acquired account information. For example, in the NPRM, the Commission cites as its main concern with pre-acquired account information the fact that the consumer does not know that the seller is already in possession of the consumer's account information when the telemarketing solicitation

[14] E.g., NPRM at 4495, 4512-4514.

occurs.[15] This concern by its nature presupposes lack of consumer knowledge and consent.

This approach to the meaning of pre-acquired account information is likewise consistent with the cases cited by the Commission in the NPRM.[16] Specifically, many of the cases alluded to and cited by the Commission involved outbound telemarketing calls in which the consumer's complete account information was transferred to a marketer for telemarketing purposes prior to the consumer being contacted by that marketer and clearly without consumer consent.

If this is the situation the Commission seeks to prohibit, MPA has no issue with the Commission's proposal. MPA believes that its members neither engage in nor support such marketing practices and that to the extent that MPA members do share consumer billing information they do so only with the consumer's knowledge and consent.

As the Commission may be aware, one of the most common ways in which the transfer of consumer billing information occurs is in the inbound upsell situation. For example, in the case of a consumer who calls to purchase exercise equipment and is subsequently upsold a subscription for a fitness magazine, the consumer's billing information will be provided to the magazine publisher. However, the transfer of that information to the seller (defined as the billing entity) occurs only if and <u>after</u> the consumer has consented to the offer. It is true, in such a situation, that at the time of the upsell the telemarketing agent is technically in possession of the consumer's information from the prior sale. In this situation, however, the consumer is clearly aware of this fact because the consumer him/herself has just provided that information to that telemarketing agent only seconds before. Moreover, and this is the critical point,

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[15] NPRM, 67 F.R. at 4495-6.

the telemarketing agent is not authorized to and will not transfer the consumer billing information to the magazine publisher unless the consumer has consented to the transaction.

MPA members also engage in joint marketing and affinity campaigns pursuant to which, for example, a marketer of exercise equipment may allow the publisher of a fitness magazine to market its customers via the telephone. In this scenario, the marketer of the exercise equipment may transfer the consumer's name and telephone number to the magazine publisher to permit the publisher to contact the customer. The file may also contain an encrypted version of the consumer's account number or partial account number which will be used for identification and/or verification purposes only. The file will not, however, contain either the consumer's complete billing information or any code that would allow the seller to gain access to the consumer's account number.

If the consumer accepts the magazine subscription in response to the telemarketing solicitation, then and only then would the consumer's complete, unencrypted account information be transferred to the magazine publisher. Again, such transfer and use occurs only with and after the consumer has consented. MPA believes that these examples fall outside the definition of pre-acquired account information because the seller has not acquired the consumer's account information without the consumer's knowledge or consent.

Nonetheless, the Proposed Rule, which prohibits all uses and transfer of consumer account information, irrespective of consumer consent, could be interpreted theoretically to apply to these consumer-consented transactions as well. The Commission must, therefore, clarify the types of activities it proposes to restrict.

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[16] See NPRM, 67 F.R. at 4512 footnote 192.

Again, if the Commission's intent is to seek to prohibit only the use of pre-acquired account information as precisely defined above, MPA would fully support the Commission's position provided the term "pre-acquired account information" is properly and narrowly defined. If, on the other hand, the Commission truly intends to prohibit all transfer and use of consumer billing information among marketing entities, even where the consumer has consented to such use, then MPA has serious concerns with such a proposal on both legal and practical grounds.

B. The Commission Lacks the Authority to Prohibit All Transfers and Use of Consumer Billing Information.

An agency's authority to promulgate regulations is limited to the authority that was delegated to the agency by Congress. Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988). The Commission's Proposed Section 310.4(a)(5), which appears to prohibit obtaining billing information from a source other than the consumer, exceeds the scope of the Commission's authority under the TCFPA because the federal statute expressly authorizes the Commission only to prescribe rules prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or practices.[17] Any telemarketing regulations promulgated by the Commission pursuant to the TCFPA must be consistent with this standard.

The Commission's apparent proposed ban on obtaining billing information from a source other than the consumer is based on its assertion that this constitutes an "abusive" practice within the meaning of TCFPA. The term "abusive" is not defined within the statute; however, the Commission asserts that the use of pre-acquired account information is "abusive" because it meets the Commission's traditional criteria of "unfairness" under the FTC Act. The Commission's reliance on the unfairness

standard is legally flawed and represents an attempt by the Commission to expand the scope of its rulemaking authority beyond that authorized by the TCFPA. The abusiveness and unfairness standards are distinct standards which cannot be used interchangeably. As noted by Commissioner Swindle in his concurring statement upon the issuance of the NPRM: "Nothing in the language of the [TCFPA] or its legislative history indicates that Congress intended the Commission to use unfairness principles to determine which practices are 'abusive.' Given that Congress amended the FTC Act to define unfairness in the same year that it passed the TCFPA, Congress presumably would have given some indication if it wanted the Commission to employ unfairness principles to decide which telemarketing practices are abusive."[18] To the extent that the apparent proposed ban on obtaining consumer account information from any source other than the consumer is based upon an unfairness standard, we respectfully submit that the Commission has exceeded the scope of its rulemaking authority.

C. Transfer of Account Information with Consumer Consent Is Not Inherently Unfair or Abusive.

Even if the Commission had the statutory authority to promulgate rules based on a standard of "unfairness," the Commission has failed to establish that it is inherently "unfair" or abusive to receive a consumer's billing information from any source other than the consumer. The Commission's stated rationale for the apparent proposed ban is that consumers often do not know that the second seller is in possession of this information.[19] The Commission also observes that "particular dangers for consumers arise when pre-acquired billing information is used in connection with free trial offers and/or negative option plans."[20] These comments and the cases alluded to by the Commission in the NPRM suggest that the Commission is basing this proposal on its

[17] 15 U.S.C. § 6102.
[18] NPRM, 67 F.R. at 4545.
[19] NPRM, 67 F.R. at 4513.

experience with the manner in which pre-acquired account information may have been utilized by a very limited segment of marketers whose business practices are not representative of the vast majority of legitimate marketers.

Specifically, in virtually all of the enforcement actions which have been brought to date by the Commission or State Attorneys General, consumer account information was transferred and used either prior to and/or without the consumer's consent to such transfer. The MPA agrees with the Commission that such business practices are potentially problematic. The MPA also notes that even under the current Rule, federal and state regulatory authorities have had sufficient power to bring enforcement actions against such companies. This fact alone suggests that current law may be adequate to address the Commission's concerns, and should give the Commission some pause as to the regulatory need for imposing additional regulations as extreme as those being proposed in the NPRM.

As discussed above, we believe legitimate marketers, and MPA members in particular, do not engage in the practice of sharing consumer credit card numbers without consumer knowledge and consent, and do not condone such practices. What MPA is seeking to preserve is the convenience and efficiency of being able to obtain a consumer's account information for billing purposes from a source other than the consumer where the consumer has expressly authorized such transfer and use.

We believe it is important for the Commission to understand that legitimate marketers want the ability to obtain account information from sources other than the consumer, not because they wish to hide the fact that the purchase transaction is occurring from the consumer, but to the contrary, because such arrangements make the

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[20] Id.

purchase transaction easy, efficient and convenient for the consumer and marketer alike.

As noted previously, when a consumer who calls to purchase a piece of exercise equipment subsequently purchases a subscription to a fitness magazine, the consumer will have just provided their account billing information to the seller of the exercise equipment. Sparing the consumer the inconvenience of having to retrieve and repeat their credit card number again is hardly abusive or unfair to the consumer. To the contrary, the process offers convenience to consumers while enabling them to make individual choices about how and when their credit card information will be used. In the case of the joint marketing or affinity program described above, the ability of the primary marketer to transfer the account information directly to the seller, if the consumer has authorized the transaction, spares the consumer from having to provide that account information to the telemarketer. As the Commission is aware, many consumers are leery of providing their account numbers to telemarketers. By allowing consumers to authorize the transaction without having to provide their credit card number over the telephone, this arrangement provides the consumer with peace of mind and security regarding the handling of their account information.

The Commission must also not underestimate the economic efficiencies such practices afford to business. Telemarketing space is a valuable and expensive commodity. It is estimated that requiring consumers to retrieve and repeat their entire account number and verifying this information will increase the length of the call substantially, with one provider estimating an increase of 35 seconds and additional evidence suggesting the increase could be 60 seconds or more. While the Commission estimates that call center charges are approximately $15[21] an hour, a provider estimates

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[21] See Agency Information Collection Activities Notice, 66 F.R. 33701, 33701 (June 25, 2001).

call center charges to be $24 an hour. Using $15 per hour and 60 additional seconds per call, the average cost of a completed sales call would increase by approximately 25 cents. When one considers these figures in light of the volume of telemarketing sales, it is clear that the economic impact on the industry of the Commission's apparent proposed ban is substantial. Indeed, based on our estimates of successful upsell sales, the cost of the requirements would raise the cost of upsells by approximately $25 million per year. Ultimately, it is likely that these costs would have to be passed on to the consumer.

D. A Total Ban on the Use of Pre-Acquired Account Information Is More Restrictive Than Necessary to Achieve the Commission's Intended Purpose.

To the extent that the Commission's concerns regarding pre-acquired account information are rooted in the transfer of billing information without consumer knowledge and consent, the Commission's concerns can be more appropriately and narrowly advanced through means far less restrictive than a total ban. Indeed, the Commission itself has acknowledged that law enforcement representatives and advocacy groups have offered potential solutions to the perceived harm associated with the use of pre-acquired account information that fall well short of a total ban.[22]

The MPA agrees with the Commission's desire to modify the rule to ensure that consumer billing information is not transferred without the consumer's knowledge or consent. The MPA believes, however, that the Commission's goals can be directly advanced by adding provisions to the Rule which would require notice to the consumer of the material billing terms and the consumer's express verifiable authorization to the transfer of the consumer's billing information. Such an approach will clearly prohibit unscrupulous marketers from using consumer account information without the

[22] NPRM, 67 F.R. 4514.

consumer's knowledge or consent while not depriving consumers and businesses of the efficiencies and convenience afforded by this marketing technique when properly and legitimately used.[23]

E. The Commission Should Require Express Verifiable Authorization Prior to Data Transfer

Accordingly, the MPA would recommend that the Commission add a provision to the Rule that would require obtaining the consumer's express verifiable authorization prior to obtaining billing information from any source other than the consumer. As an additional safeguard, MPA would also recommend that the Commission require that certain disclosures concerning material billing information be made to the consumer before the express verifiable authorization is obtained. The MPA notes that there is precedent for requiring express verifiable authorization in instances where the Commission feels that a more reliable method of consent is required. For example, this concept is embodied in the Children's Online Privacy Protection Rule, 16 C.F.R. §312, with regard to parental consent mechanisms, and already exists in the Rule with respect to authorizations for check debits. Consequently, imposing a verifiable consent requirement would be consistent with Commission policy.

[23] As a threshold matter, the Commission must also clarify the definition of the term Billing Information to ensure that the term applies only to such information which allows complete access to a consumer's account. As noted previously, it is not uncommon, as part of a joint or affinity marketing campaign, for one marketer to permit another to make product and service offerings to its customers via a telemarketing campaign. In such situations, some consumer information such as name and telephone number, and encrypted or partial account information may be transferred. Encrypted or partial account information is frequently transferred for the consumer friendly purpose of enabling the telemarketer to verify the consumer's billing information. The consumer is fully protected, however, because the encrypted or partial information does not provide the marketer with access to the consumer's account and the full or un-encrypted information is not provided to the marketer until the consumer has expressly consented.

In terms of the disclosure requirements that would be imposed, MPA believes that the consumer should be informed as to (1) the identity of the seller that will be billing the consumer; (2) when and how much the consumer will be billed; and (3) sufficient information to enable the consumer to reasonably identify the account that will be billed.[24] MPA would recommend that the Commission require that these disclosures be made before the consumer's verifiable authorization is obtained.

In terms of the method of obtaining verifiable authorization, MPA recommends that the Commission adopt a safe harbor approach pursuant to which the seller shall be deemed to have obtained the consumer's express verifiable authorization if the marketer employs one of the three methods provided in the existing Rule for obtaining express verifiable authorization, i.e., (1) a written signature; (2) a tape recording evidencing that the required disclosures have been made and that the consumer has affirmatively consented to the offer; or (3) a written acknowledgment that is sent prior to billing in sufficient time for the consumer to avoid a payment obligation, and that reiterates the required disclosures and complete instructions on how the consumer can cancel to avoid a payment obligation.

Although the Commission has proposed removing the written acknowledgement process as an acceptable methodology for obtaining express verifiable consent on the theory that industry has not used such an approach, we urge the Commission to continue to allow the written acknowledgement method to exist as an express verifiable consent mechanism both for novel payment methods and for pre-acquired account information. The Commission's stated reason for removing the written acknowledgment as an express verifiable consent mechanism is that the industry has not used the method. With all due respect, MPA does not believe this

[24] For example, on an inbound call in which the consumer has just provided their account information it should be sufficient to reference the credit card the consumer just used to make the previous purchase.

impression is accurate. Moreover, we believe that the Commission's original view, which deemed such a method to be an acceptable and reliable form of verifying consent, was correct. Indeed, MPA has already recommended in its educational packet on Advance Consent Marketing that its members send such a written acknowledgment prior to billing explaining all the material terms of the offer when an oral consent for advance consent.

In making this proposal, MPA recognizes that the Commission would more likely prefer taping as a method of verifying telephone sales. In theory, MPA finds some merit to such a requirement. The practical reality is, however, that many telemarketing agents, particularly smaller businesses, simply do not have the technical capability at this time to record all calls, particularly in the inbound channels. If such a requirement were imposed, MPA estimates that many telemarketers would require three to five years to invest in and implement such technology. Therefore, even if the Commission were to consider requiring taped verification, it would have to allow an extensive phase-in period for industry to comply with the requirement. Otherwise, the impact on telemarketing companies, particularly small call centers, would be devastating. Indeed, it is unlikely that small call centers, many of which currently lack taping capability, could survive. The cost of taping, particularly in the inbound channel, would be prohibitive for these companies. For example, it is estimated that the cost of installing taping equipment is approximately $1,000 per station and $30,000 per server. In addition, the costs of maintaining this equipment are estimated to be $12,000 per year per call center. A major cataloger which operates 13 call centers has thus estimated that the incremental costs to its business of having to install and maintain taping equipment at all of its call centers would be approximately $6,403,000.[25] Recognizing the added cost burden of taping inbound calls, the Commission could not

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[25] The minimum cost for a small call center would be $75,000, still a staggering sum for a small business.

reasonably consider a taping requirement without considering an exemption for the inbound channel.

While MPA believes that requiring disclosures to and verifiable authorization from consumers prior to the transfer of billing information will more than adequately satisfy the Commission's objectives, there is an additional measure the Commission could consider should the Commission feel that additional protection is necessary. Specifically, the Commission could consider requiring marketers who do not use taping or a signature as the method of verification to maintain a liberal cancellation/refund policy pursuant to which any consumer who claims that the charge was unauthorized is automatically entitled to cancel and receive a refund. An automatic refund policy will certainly help ensure that consumers are adequately protected against unauthorized charges to their account resulting from the use of pre-acquired account information.

IV. The Use of Predictive Dialers

The Commission has requested comments regarding the industry's use of predictive dialers, indicating that high levels of abandoned calls resulting from the use of predictive dialers frustrate consumers and prevent them from understanding the identity of the calling party.[26] The Commission also asserts, for the first time, that any abandoned call constitutes a Rule violation.[27] We respectfully disagree with the latter interpretation on the grounds that it is inconsistent with the plain language of the Rule as well as with prior Commission statements. In fact, we note that predictive dialers benefit consumers because they increase industry efficiency, resulting in lower prices for consumers. In the revised Rule, we urge the Commission to strike the proper balance between industry's need for efficiency, on the one hand, and the concerns of

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[26] NPRM, 67 F.R. at 4523.
[27] NPRM, 67 F.R. at 4524.

those consumers who object to abandoned calls, on the other hand, by setting a low threshold for abandoned calls, such as five percent over a thirty-day period.

A. Abandoned Calls Do Not Constitute a Per Se Rule Violation

As the Commission acknowledges, predictive dialers have been used successfully by telemarketers for a long period of time.[28] For that reason, we were surprised to find the Commission asserting in the NPRM, for the first time, that calls that are disconnected prior to the start of a conversation between a telemarketing sales representative and a consumer constitute a Rule violation.[29] The assertion that a call that is abandoned constitutes a violation of the existing Rule appears to us to be both contrary to the plain language of the Rule and inconsistent with the Commission's request for comment regarding a potential abandonment rate standard.

If calls that are disconnected prior to the appearance of a live telemarketing sales representative on the line already constitute a Rule violation, then a zero percent abandonment rate standard would technically have been in effect since 1995, and there would be no need for the Commission to request comments from stakeholders on the issue as part of the instant proceeding. However, we are not aware of any prior statements or actions to this effect by the Commission. Indeed, the fact that the Commission has sought comments regarding the potential imposition of a zero percent abandonment standard in the NPRM is itself inconsistent with the assertion that any abandoned call constitutes a Rule violation. While we agree with the Commission's overall objective of reducing the number of abandoned calls we believe the better approach on this issue is to determine a reasonable abandonment rate that both consumers and industry can tolerate rather than pursuing the notion that an abandoned call constitutes a *per se* Rule violation.

[28] NPRM, 67 F.R. at 4523.

B. A Low Abandonment Rate Standard, Such as Five Percent, Would be Sufficient to Meet the Commission's Objectives.

As a practical matter, we note that the industry uses predictive dialers because they greatly enhance overall efficiency. By automatically dialing calls for sales operators, predictive dialers allow operators to handle calls more effectively and efficiently by reducing the time spent on administrative activities such as dialing a phone number. The use of predictive dialers allows marketers to operate more efficiently, and therefore to offer consumers a greater variety of products and services at lower prices than might otherwise be available in the marketplace.

Although predictive dialers provide significant benefits to both consumers and industry, MPA understands that the Commission must balance these benefits against consumer objections regarding abandoned calls. While the MPA supports the concept that predictive dialer abandonment rates should be as low as reasonably possible, the Commission should be aware that the imposition of a federally-mandated zero percent abandonment rate would be ruinous to the industry.

As the economic efficiencies generated by predictive dialers are not linear in nature, a reduction from a five percent abandonment rate to a zero percent abandonment rate would result in a thirty to forty percent reduction in the productivity of telemarketing operations. Faced with such an impact, many companies in the publishing industry could be forced to abandon telemarketing campaigns entirely. Those publishing companies that continue conducting telemarketing campaigns would almost certainly be required to use the larger telemarketing service providers because the smaller service providers will be unlikely to be able to absorb the increased costs associated with the lower productivity rates.

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[29] NPRM, 67 F.R. at 4524.

On the issue of cost, we note further that some telemarketers have older predictive dialer equipment that does not allow for a zero percent abandonment rate to be set. Smaller telemarketers are more likely to use such older equipment than larger telemarketers. For these smaller telemarketers, the imposition of a zero percent abandonment rate standard would require either the acquisition of expensive equipment or the elimination of predictive dialer technology altogether. The imposition of a zero percent standard would thus have a disproportionate competitive impact on smaller telemarketers, and would likely drive a number of those small businesses out of existence.

Moreover, the record does not support the imposition of a zero percent abandonment standard upon the segments of the industry that are subject to the Commission's jurisdiction. MPA's information indicates that a significant portion of complaints regarding abandonment rates are generated by segments of the industry that are exempt from the Commission's jurisdiction. Indeed, the MPA's information indicates that political fundraisers have abandonment rates that are close to 70 percent. Consequently, imposing a zero percent standard on segments of the industry that are subject to the Commission's jurisdiction would impose a concrete financial burden on the industry without having a correspondingly concrete impact on the Commission's perceived problem.

The MPA does believe that it is appropriate at this time to set a standard for abandoned calls. We recommend that the Commission set the standard at "five percent of calls over a thirty day period." The "five percent" element of the standard would be consistent with the DMA's existing self-regulatory standard. The "thirty days" element of the standard is necessary to account for abandonment rate fluctuations that are due to differences in calling times, types of offers, number of operators available, and other similar factors. The Commission should ensure that the definition of an "abandoned

call” is appropriately limited to include only those circumstances in which a call is disconnected by the predictive dialer because no operator was available. Calls which are disconnected for other reasons, such as no response from the consumer, should not fall within the definition of an abandoned call.

As part of its recommendation, MPA would also urge the Commission to include a safe harbor provision, similar to that which currently exists in Section 310.4(b)(2) of the Existing Rule, for compliance with the recommended 5 percent abandonment rate. Since the abandonment rate is highly vulnerable and susceptible to technical malfunctions or errors, marketers and telemarketers must have protection from liability in the event of inadvertent errors. Accordingly, under this safe harbor approach, a seller or telemarketer would not be deemed to be liable for violating this provision if it has established and implemented procedures to comply with the 5 percent abandonment rate.

In sum, the MPA believes that the establishment of a five percent abandonment rate standard will be very likely to resolve any consumer complaints in this area, at least with respect to those industry segments that are subject to Commission jurisdiction.

V. The National Do-Not-Call List Proposal is Legally and Structurally Flawed

The MPA fully supports the concept of an effective do-not-call list which empowers consumers who do not wish to receive outbound telemarketing calls. However, we are very concerned that the do-not-call registry (the "DNC List") proposed by the Commission in Proposed Rule Section 310.4(b)(1)(iii) will be neither effective nor empowering. Indeed, the MPA believes that the Commission's current DNC List proposal is not well conceived, either as a legal matter or as a practical matter. Consequently, we strongly suggest that the Commission either strike the proposal in its entirety or, at the very least, significantly modify the current proposal.

First, as a legal matter, the DNC List proposal appears to significantly exceed the scope of the statutory authority granted to the Commission under the TCFPA, and to enter regulatory territory that was expressly granted by Congress to the Federal Communications Commission (the "FCC") in the Telephone Consumer Protection Act (the "TCPA"), 47 U.S.C.§ 227. The NPRM misinterprets the plain language of the TCFPA in order to allow the Commission to import broad consumer privacy principles into the statute and to justify the Commission's imposition of a national DNC List requirement. Moreover, the DNC List proposal raises serious First Amendment concerns, and appears unlikely to pass the Central Hudson test which requires regulations governing speech to be as narrowly tailored as possible in order to advance directly a substantial government interest. These fundamental concerns raise the distinct possibility that the Commission's proposal will not withstand judicial scrutiny. For that reason, we urge the Commission to re-evaluate its position on this issue.

Second, as a practical matter, the Commission's DNC List proposal contains a number of serious structural flaws that must be addressed before the proposal can move forward. The proposed Automatic Number Identification ("ANI")-based verification methodology is unlikely to work, and may well result in increased levels of

consumer confusion. Moreover, to the extent that any federally maintained DNC List is created, the list will not be workable unless it preempts state Do-Not-Call Lists, contains an exemption for prior business relationships, and includes an appropriate renewal requirement. Otherwise, the Commission will be creating a DNC List with less reach and effectiveness than the existing state and self-regulatory Do-Not-Call Lists that the Commission seeks to supplement, while imposing a significantly greater burden on telemarketers.

Indeed, the significant number of legal and practical flaws in the Commission's DNC List proposal, as well as the fact that this proposal represents a material alteration in the Commission's historical approach to this issue,[30] have given the MPA pause. Overall, the MPA believes that the company-specific Do-Not-Call List approach contained in the existing TSR strikes the appropriate balance between consumer and business needs and among federal law, state law, and self-regulatory initiatives. Although the Commission cites the growing number of consumers who have placed their names on the Direct Marketing Association's (the "DMA's") Telephone Preference Service (the "TPS"), as well as on the state DNC Lists as one of the main reasons for its proposal to create a national DNC List[31], we believe the opposite conclusion is correct: the increasing number of consumer names on the TPS and the state lists clearly demonstrates that existing Do-Not-Call List options meet consumers' needs, and that no federal action is necessary.

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[30] Given that the Commission's longstanding approach has been to encourage the growth and use of self-regulatory do-not-call lists, MPA was somewhat surprised by the position taken in the NPRM. Indeed, before the House of Representatives' Subcommittee on Telecommunications, Trade, and Consumer Protection on January 13, 2000, the Commission testified in part that "Legislation should encourage self-regulatory initiatives like DMA's 'do-not-call' list, but not impose additional burdens on them."

[31] NPRM, 67 F.R. at 4517.

A. The Commission's Proposed DNC List Exceeds the Scope of the Commission's Statutory Authority

As the Commission is likely aware, the Administrative Procedure Act states that a federal administrative agency may not issue a substantive rule "except within jurisdiction delegated to the agency and as authorized by law." 5 U.S.C. § 558(b). In the instant situation, Congress delegated to the Commission only the right to promulgate rules "prohibiting deceptive telemarketing acts and practices and other abusive telemarketing acts or practices." 15 U.S.C. § 6102. The grant of authority to the Commission in the TCFPA neither directly addresses nor contemplates the potential creation of a national DNC List.

In marked contrast, in the Telephone Consumer Protection Act (the "TCPA"), 47 U.S.C. § 227, Congress expressly gave the FCC the authority to create and develop a national do-not-call database.[32] In 1992, the FCC declined to do so, in part citing the high cost and administrative burdens associated with maintaining such a database.[33] When it passed the TCFPA in 1994, Congress was presumably aware of the FCC's decision not to establish a national DNC List. Nevertheless, in the TCFPA, Congress did not expressly direct the Commission to create such a DNC List or to review the

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[32] Indeed, 47 U.S.C. 227 (c)(1) required the FCC to "initiate a rulemaking proceeding" that would, in part "(A) compare and evaluate alternative methods and procedures (including the use of electronic databases, telephone network technologies, special directory markings, industry-based or company-specific 'do not call' systems, and any other alternatives, individually or in combination) for their effectiveness in protecting such privacy rights, and in terms of their cost and other advantages and disadvantages."

[33] The FCC concluded that "Upon careful consideration of the costs and benefits of a national do-not-call database, we believe that the disadvantages of such a system outweigh any possible advantages. A national database would be costly and difficult to establish and maintain in reasonably accurate form. "Rules and Regulations Implement; the Telephone Consumer Protection Act, 7 FCC Rcd 8752, ¶14 (1992) (the "TCPA

FCC's decision not to establish such a list. Given this history, we firmly believe that the clear statutory authority to create such a list was vested by Congress in an agency other than the Commission, and that the establishment of such a list is outside the scope of the Commission's statutory authority.[34]

Apparently recognizing that the Congress did not expressly grant to it the statutory authority to create a national DNC List, the Commission has suggested that its statutory authority to create a national DNC List is supported by an implied privacy authority granted to it under the TCPFA. With all due respect, we do not believe such an interpretation is supported either by the express language of the statute or by the legislative history. The words "consumer's right to privacy" appear only once at the end of a long clause of one subsection of the TCFPA that directs the Commission to issue a rule requiring "that telemarketers may not undertake a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy." 15 U.S.C. § 6102 (a)(3)(A).

The House of Representatives' Report in turn clarifies the types of activities that Congress considered to be "abusive" for purposes of the TCFPA: threats or intimidation, obscene or profane language, refusal to identify the calling party, or continuous or repeated ringing of the telephone, engagement of the called party in conversation with an intent to annoy, harass, or oppress any person at the called number. H.R. Rep. No. 20, 103rd Congress, 1st Sess. (1993) at 8. The MPA respectfully

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Order"). The FCC noted that such an alternative is "not an efficient, effective, or economic means of avoiding unwanted telephone solicitations." Id at ¶15.

[34] See H.R. Rep. No. 79-1980 (1946), reprinted in U.S. Gov't Administrative Procedure Act: Legislative History, S. Doc. No. 79-248, at 233, 274-75 (1946) ("[N]o agency may undertake directly or indirectly to exercise the functions of some other agency. The section confines each agency to the jurisdiction delegated to it by law. . . . It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted . . . . [Otherwise,] statutes would in effect be blank checks drawn to the credit of some administrative officer or board.").

submits that these are the types of activities that Congress authorized the Commission to prohibit in order to protect "consumer privacy." This view is supported by the fact that the two areas the TCFPA expressly directed the Commission to promulgate regulations on were calling time restrictions and prompt disclosure requirements.

Clearly, had the Congress intended to grant the Commission statutory authority to promulgate a national DNC List, it would have done so in the TCFPA. The TCPA very clearly directed the FCC to "initiate rulemaking proceeding concerning the need to protect residential subscribers' privacy rights to avoid receiving telephone solicitations to which they object." 47 U.S.C. §227(c)(1). This language indicates that Congress provides regulatory agencies with direct guidance on privacy issues. In this case, not only did the Congress decline to grant to the Commission the express authority to create a national DNC List, it expressly granted that authority to a different agency.

While the Commission appears to be acting upon its good faith belief regarding appropriate federal policy on a national DNC List, we believe it is clear that Congress neither directed nor intended the Commission to address this issue under the authority of the TCFPA. "In our anxiety to effectuate the congressional purpose of protecting the public, we must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop." 62 Cases of Jam v. United States, 340 U.S. 593, 600 (1951).

B. The Proposed DNC List is More Restrictive than Necessary and Unlikely to Achieve the Intended Purpose

The Commission's proposal to establish a national do not call list will have a substantial impact on truthful, non-deceptive telemarketing calls. As such, the Commission's proposal must meet the legal criteria for restricting commercial speech

established by the Supreme Court in Central Hudson.[35] The Central Hudson test requires that regulations governing speech, including commercial speech, must directly advance the stated objectives and be no more restrictive than necessary to achieve the intended purpose.[36] While the government has a substantial interest in prohibiting deceptive and abusive telemarketing practices, the Commission's DNC List proposal is neither likely to directly advance that interest nor narrowly tailored to achieve that objective.

Specifically, a regulation which restricts commercial speech in a selective manner that distorts the marketplace does not meet the Central Hudson standard.[37] The Proposed Rule will create precisely this type of impermissible marketplace distortion. For example, the Commission lacks jurisdiction over various entities and industries including banks, common carriers, certain insurance companies and political parties.[38] These entities and industries are heavy users of telemarketing. The Commission's national DNC List would not cover calls from such entities. Similarly, the Commission's jurisdiction under the TCFPA extends only to interstate telemarketing calls.[39] The Commission's national registry will therefore not provide any protection to the consumer against the receipt of unwanted intrastate calls. As a result of the myriad of these jurisdictional exclusions and limitations, the Commission's DNC List will not directly, substantially or effectively advance the government's stated purpose of protecting consumers' privacy.

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[35] Central Hudson, 447 U.S. at 566.
[36] Id.
[37] See, e.g., Rubin v. Coors Brewing Co., 514 U.S. 476, 481 (1995); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976).
[38] 15 U.S.C. § 45(a)(2).
[39] 15 U.S.C. § 6106.

Regulations governing speech must also carefully calculate the associated costs and benefits.[40] Although the Proposed Rule would impose a significant economic burden upon specific segments of industry, the Commission's NPRM does not explain why its proposed approach would be more effective than other, less stringent approaches that could have been selected. For example, in its NPRM, the Commission does not appear to have considered the fact that voluntary self-regulatory lists, such as the DMA's TPS, exist and may be sufficient to prohibit unwanted telemarketing calls. Indeed, the DMA's TPS covers many entities and many calls that would be outside the scope of the Commission's proposed DNC List. State-based do-not call lists also exist. In short, the Commission's proposed DNC list would be both duplicative of, and narrower than, existing do-not-call list options. However, the Commission's NPRM does not explain why its proposed DNC List will be more effective than those options. Consequently, the current DNC List proposal is unlikely to meet the Central Hudson-based requirement that it be as narrowly drawn as possible to achieve its intended goals.

C. The Commission's Proposed DNC List Contains a Number of Structural Flaws Which Will Impair Its Effectiveness

As will be detailed more fully below, while the Commission's proposal is clearly well intentioned, it contains a number of structural flaws and deficiencies which MPA believes will irreparably impair its effectiveness. Many of these structural flaws do not exist in the Telephone Preference Service maintained by the DMA. Accordingly, the MPA supports the DMA's position that a national DNC List is not required in light of the DMA's existing TPS and further supports the DMA's efforts to increase publicity and visibility for the TPS. The DMA has been effectively administering its TPS for over

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[40] See, e.g., U.S. West v. Federal Communications Commission, 182 F.3d 1224, 1235 (10th

ten years. The list is well established, properly funded and covers calls made by DMA members and others that subscribe to the TPS. The MPA believes that the TPS, coupled with the company specific DNC lists, is sufficient to protect consumers, who desire such protection, from the intrusion of receiving unwanted calls.

Given the inherent limitations of a Commission administered DNC List, the structural defects in the Commission's current proposal and the fact that a well established and maintained national DNC List already exists, the MPA does not see how the extraordinary cost of establishing and maintaining a Commission-created and Commission-maintained DNC List, which appears to be grossly underestimated in the Commission's proposal[41], can be justified. If the Commission is concerned about strengthening the enforcement of the DNC List requirements, the MPA would suggest that this goal could effectively be achieved by certifying the DMA's TPS and making it an abusive telemarketing practice for telemarketers to fail to subscribe to the TPS or other industry maintained DNC lists that may be subsequently certified by the Commission. The MPA is also troubled by the fact that the Commission has failed to provide any meaningful details concerning the manner in which the DNC List would be established, funded or administered. It is difficult for the MPA to provide meaningful comments on this proposal without the benefit of such details. The details that the Commission has provided, however, raise a number of serious concerns for MPA as to the efficacy and efficiency of the Commission's proposal which would have to be cured before the MPA could even consider supporting such a proposal.

Cir. 1999), <u>cert. Denied</u>, 120 S.Ct. 2215 (2000).

[41] We note, for example that while the FCC estimated that it would cost approximately $20 million to $80 million in the first year and $20 million thereafter to operate a national database [TCPA Order, 7 FCC Rcd 8752, ¶14 (1992)], Chairman Muris has requested $5 million from Congress to operate the DNC List.

1. The Verification Mechanism in the Commission's Current DNC List Proposal Is Structurally Flawed.

Unlike the DMA's TPS, which requires the consumer to provide a name, address and telephone number, the verification mechanism in the Commission's proposed DNC List would be based strictly upon the capture of the Automatic Number Information (the "ANI"). This aspect of the Commission's proposal is problematic for a number of reasons.

First, as the Commission itself noted in the context of the Pay Per Call Rule Review, reliance upon ANI provides no way to ensure that the person making the call is, in fact, the authorized party who is responsible for that telephone account.[42] This approach is therefore likely to lead to a high incidence of unauthorized requests that cannot be verified by the Commission. Moreover, the industry's experience is that it is very difficult to match the ANI to the individual's name and address.

Second, certain telephone operating companies do not currently transfer the ANI. For consumers residing in the geographic areas that are serviced by those telephone companies, access to the Commission's DNC List will be functionally unavailable. Industry experience has been that the limitations of current technology coupled with the inability of certain telephone companies to transmit the ANI has resulted in an inability to match ANI to name and address in approximately 60 percent of cases.

Third, United States consumers are extremely mobile and relocate regularly. Between 1999 and 2000, approximately 15 percent of all consumers relocated, including

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[42] In part, the Commission stated that "it is not reasonable for vendors to presume that telephone-billed purchases made from a subscriber's phone were, in fact, authorized by the subscriber." Notice of Proposed Rulemaking, 63 F.R. 58524, 58549 (October 30, 1998).

approximately 34 percent of individuals who are 20-24 years old and 31 percent of individuals who are 25-29 years old.[43] Without capturing the consumer's name and address, the Commission will have no way to pass the names of consumers who appear on the DNC List through the National Change of Address. Without a name and address match, persons who subsequently acquire a telephone number that was previously placed on the DNC List will automatically end up on the DNC List, regardless of their wishes. This situation will almost certainly lead to high levels of consumer confusion and frustration. It may even result in a situation where virtually 100 percent of the telephone numbers in the country eventually end up on the DNC List.

To address the significant structural deficiencies outlined above, name and address information would have to be captured and added to the national DNC List. Such a change will substantially increase the cost of administering and maintaining the list. The Commission must take into account those additional costs as part of this TSR review process.

The DMA's TPS, which captures the consumer's name, address and telephone number, does not suffer from the structural deficiencies outlined above. This fact strongly supports the maintenance of the TPS as a more efficient and cost-effective method of providing a national DNC List option to consumers than a federally maintained list.

[43] U.S. Census Bureau, Statistical Abstract of the United States: 2001, No. 26. Mobility Status of the Population by Selected Characteristics: 1980 to 2000.

2. No Federally Maintained DNC List Should be Created Without Preemption of State Lists.

The Commission has specifically requested comments regarding the interplay between a national do-not-call list and the various state lists.[44] To that end, we note that the TCFPA does not address the issue of the effect of the establishment of a national DNC List on similar state lists. The only discussion of the federal statute's effect on state laws is in 15 U.S.C. §6103(f)(1), which states that nothing in the statute prohibits a state from proceeding in any state court to enforce a state law. This provision would not prohibit the Commission from either requiring that state and federal DNC Lists be unified in some manner or from preempting state DNC List laws.

Indeed, similar language can also be found in the TCPA, 47 U.S.C. § 227(f)(6). The presence of this similar language in the TCPA did not prevent Congress from expressly also providing that, if the FCC's regulations under the statute require the establishment of a national DNC List, any state Do-Not-Call List must include the portion of the FCC's list that relates to that state. 15 U.S.C. § 227(e)(1). In the MPA's view, the language in the TCFPA provides only that the grant of authority to proceed in federal court does not impact a state's ability to proceed in state court. Such a provision does not prohibit the Commission from adopting a regulation that would require the states and the Commission to unify their respective DNC Lists.

Moreover, as a practical matter, the efficiencies contemplated by the establishment of a federally-maintained national DNC List cannot be achieved unless that list preempts existing state DNC Lists. Absent preemption, the industry would be faced with the extraordinary burden of having to comply not only with the federal DNC List requirements, but also with the growing number of state DNC List requirements as well. Currently, 21 states have separate DNC provisions in their

[44] NPRM, 67 F.R. at 4519.

statutes.[45] Already, the burden on the industry of complying with these myriad state laws has been enormous, particularly because of the differences in frequency and renewal times for these lists. Moreover, without state preemption, the enormous expense of a federally-administered DNC List could not be justified, as such a list would merely be duplicative of the lists already existing in the states and of the DMA's TPS.

Moreover, the Commission must take into account the fact that telemarketers and telemarketing service providers of all sizes will have to be able to interact with the Commission's national DNC List. Millions of numbers would be placed on the Commission's DNC list, with some estimates reportedly as high as 64 million names.[46] Many small businesses will be daunted by or unable to afford the computer processing time and expense involved in "scrubbing" their relatively small marketing lists against a database of that size. We note that the current cost associated with scrubbing a mailing list is approximately $3 to $5 per thousand names scrubbed. For a small business that is advertising nationally to a list of approximately 300,000 potential customers, the current estimated scrubbing cost would be up to $1500 ($5 x 300) each time scrubbing occurs. These costs would increase substantially if small businesses were required to scrub against such a large list because the charges they face are based both on the size of their lists and the size of the list against which their list is scrubbed. Needless to say, such costs would put the cost of telemarketing well beyond the reach of many, if not most, small businesses, and will likely drive some small businesses out of existence altogether. Moreover, when one considers the fact that, without preemption, the national DNC List will be highly duplicative of the state DNC Lists and

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[45] The states in question are Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Idaho, Indiana, Kentucky, Louisiana, Maine, Missouri, New York, Oregon, Pennsylvania, Tennessee, Texas, Wisconsin and Wyoming.
[46] Caroline E. Mayer, *FTC Anti-Telemarketer List Would Face Heavy Demand*, THE WASHINGTON POST, March 19, 2002, at A7.

TPS, the substantial incremental costs to the industry are hardly balanced by the incremental number of names that will likely be captured.

In addition, absent state preemption, there is a high risk of consumer confusion. Consumers may be confused as to which lists apply to them, and what, if any, protections may be afforded by each of the lists. Moreover, to the extent that the state lists and the proposed national DNC List may not share the same statutory exemptions, this disparity is also likely to create consumer confusion and dissatisfaction with the efficacy of the lists.

3. No Federally Maintained DNC List Should be Created Without an Exemption for Established Business Relationships

If the Commission establishes a national DNC List, the list must contain an exemption for pre-established business relationships. The Commission's desire to create a national DNC List must be balanced against the need for businesses to contact individuals with whom they have an established or preexisting business relationship. When it was originally promulgated, the TSR included the creation of company-specific DNC Lists. For that reason, the issue of exemptions for established business relationships was not addressed in detail during the rulemaking proceedings. If a national DNC List is to be established, however, there must be an exemption for both existing and prior business relationships. This approach is consistent with that taken in the majority of states with DNC Lists, each of which has some form of prior or existing business relationship exemption. The TCPA also exempts established business relationships from its company-specific DNC List requirements. 47 U.S.C. §227(a)(3).

In addition, an established business relationship exemption would need to be defined sufficiently broadly to coincide with existing business practices. Our members generally consider an individual to be one with whom an established business relationship exists if the consumer has had any business-related contact with the company within the preceding two years. Such contact is not limited to purchases and orders, but may include other activities such as responses to communications without consideration, customer service inquiries, change of address requests and similar contacts. Moreover, industry data shows that marketing is efficient and productive to consumers with whom the business has had contact during the preceding two-year period.[47] Accordingly we would recommend that the exemption for pre-existing business relationships be defined to include any consumer who has received product or service from the seller within the preceding two year period or any consumer who has initiated contact with the seller within the preceding two year period. Any more restrictive definition of a pre-existing business relationship would severely impact the marketing efforts of our members, and result in a substantial diminution in subscriber bases.

4. No Federally Maintained DNC List Should be Created Without an Appropriate Renewal Period Requirement.

The current Commission proposal does not specify how long a consumer will remain on the list once they have requested to be added to the list. An expiration and renewal provision would have to be added for the DNC List to be practicable and manageable. The DMA's TPS calls for a five-year renewal period. In the event that the Commission adopts the same verification requirements as the DMA's TPS (*e.g.,* capture

[47] In a case study of an apparel direct marketer, for example, the researchers found a response rate of 4-5 percent from the company's recent customers as compared to a response rate of 2 percent from people who were not recent customers. Michael A. Turner, The Impact of Data Restriction on Consumer Distance Shopping, Information Services Executive Council 2001 at page 23.

of name and address information), we would urge the Commission to adopt no more than a five-year requirement. However, if the Commission intends to rely upon the ANI as the only verification mechanism, notwithstanding the inherent flaws of such an approach, we would urge the Commission to adopt a significantly shorter renewal period, such as one year, in order to help reduce the impact of the structural defects discussed in Section B above on both consumers and industry.

Given the changing nature of the telemarketing industry and the changing nature of individual circumstances, consumers should be encouraged to periodically review their decision as to whether they wish to remain on the list. It is also worth noting that the state Do Not Call Lists in Arkansas, Florida, Louisiana and Oregon embrace this concept with a one–year renewal period. Moreover, even local phone books generally become outdated within six months.

5. No Federally Maintained National DNC List Should be Established Without DNC List Exemptions Segmented by Product/Service Categories.

The approach proposed in Section 310.4(b)(1)(iii)(B) of the Commission's Proposed Rule would place the burden on consumers to provide express verifiable authorization to receive telemarketing calls from specific companies once their numbers have been placed on the national DNC List. Such an approach is counterintuitive because consumers cannot be expected to know in advance the names of the companies from whom they will be willing to receive calls. In fact, consumers will most likely grant such express verifiable consent only to those companies with whom they have previously done business. Consequently, the Commission's proposal will result in higher barriers to entry for new entrants into the marketplace. To avoid such an inequitable result, the MPA recommends that any DNC list be structured in a more flexible manner to allow consumers to select those product or service categories for

which they do not want to receive calls. A categorical approach is more consistent with consumer choice than an all-or-nothing list, and is likely to encourage more consumers to utilize the list because of the flexibility it will afford.

6. No Federally Maintained DNC List Should be Created Without Protections to Ensure That DNC List Requests are Made by an Authorized Account Holder

Since the promulgation of the TSR in 1995, the industry and government have witnessed the potential for abuse when third parties attempt to capitalize on a provision intended to afford personal choice to individual consumers. The Commission must, as an essential component of any DNC List proposal, mandate that the request must come from the individual or his or her legal representative. The Commission's proposal should specify that requests from third parties will not be honored. Absent such a proposal, this new mechanism could give rise to fraud and abuse by unscrupulous third parties looking to prey upon the fears and insecurities of consumers.

VI. The Commission's Proposal to Prevent the Blocking of Caller Identification Services Should be Modified to Allow for the Substitution of Appropriate Alternate Numbers.

The Commission's proposal to prohibit the blocking of caller identification services appears logical on its face, and is one that the MPA supports. The MPA would not support, however, a proposal that would affirmatively require the disclosure and display of Caller ID as many systems in use today are not capable of such transmission. We also note that responsible industry members sometimes find it useful to replace the caller identification callback number belonging to a telemarketing center with the seller's customer service number or another appropriate number that allows the consumer to reach the seller directly. As telemarketing center callback numbers are often numbers that, as a technological matter, cannot receive calls, responsible

marketers often find that the substitution benefits consumers. The MPA recommends that the Commission allow marketers to substitute a customer service number or another similar valid callback number that belongs to the seller when technologically and economically feasible. As telemarketing call centers often operate on systems that provide a non-accessible callback number to caller identification services, we believe that our proposal would help reduce consumer confusion and frustration with non-functional callback numbers.

VII. Conclusion

We thank the Commission for providing us with the opportunity to submit the preceding comments on behalf of our membership. Our organization is committed to working with the Commission to ensure that the revised Rule represents an appropriate balancing of the needs and requirements of the various stakeholders in the Rule revision process. If you have any questions or concerns regarding these comments or any other aspects of the MPA, please feel free to contact us.

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