NATIONAL ASSOCIATION OF REALTORS®

The Voice for Real Estate®

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Office of the Secretary
Room 159
Federal Trade Commission
600 Pennsylvania Ave, N.W.
Washington, D.C. 20580

RE: Notice of Proposed Rulemaking –Amendments to Telemarketing Sales Rule, 16 C.F.R. Part 310

Ladies and Gentlemen:

The National Association of REALTORS® (NAR), appreciates this opportunity to comment on the Federal Trade Commission's proposed amendments to the Telemarketing Sales Rule (TSR), 15 CFR Part 310, as published at 67 Fed. Reg. 89851 (Feb 27, 2002). The NAR represents over 800,000 members that are engaged in all aspects of the residential and commercial real estate business and therefore have a significant interest in the outcome of this rulemaking process.

While NAR respects the Commission's obligations and efforts to protect consumers from telemarketing fraud and abuse, we feel the proposed changes to curb these abuses go too far and will result in penalizing business owners, such as real estate professionals from engaging in legitimate telephone communications with consumers. Specifically, we oppose the elimination of the current exemption in the TSR, 16 CFR § 310.6(c) for "calls made in which the sale of a service or good is not completed until after a face-to-face presentation," as that exemption relates to the proposed do-not-call registry. Most telephone practices of real estate professionals currently meet the requirements for this exemption and the Commission has shown no evidence to demonstrate a need to remove this exemption as it relates to the do-not-call registry, since the calls of a real estate professional do not generally involve sales over the telephone or "abusive" sales activity. Elimination of the exemption will have a potentially dramatic impact on real estate professionals, particularly to the many modest sized real estate brokerage firms among our membership. These firms engage in a variety of marketing practices designed to acquaint consumers with the services they offer and promote among consumers an awareness of and familiarity with their real estate firms. These promotional efforts by real estate professionals are intended not only to identify consumers seeking real estate brokerage services at that particular point in time, but also equally to cultivate personal relationships with consumers so that at a future time when they require real estate brokerage services consumers will look to them for those services.

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Therefore, NAR objects to the exclusion of the application of §310.6(c) to the do-not-call provisions because it exceeds the scope of the Commission's authority to regulate, as defined by the clear Congressional intent set forth in the underlying statute.

1. Exclusion of application of 16 CFR § 310.6(c) to the do-not-call requirements is improper.

The proposed revisions by the Commission to the TSR (ATSR) include a significant limitation of a provision that now exempts most activities of real estate professionals from the TSR. Presently, the TSR contains an exemption at 310 C.F.R. 310(c) for telephone activities which require a follow-up face-to-face presentation. This exemption properly removes the telephone calling activities of real estate professionals from the requirements of the TSR. However, the ATSR eliminates this exemption from the TSR with respect to the proposed do-not-call registry. NAR strongly opposes the Commission's the exclusion of this exemption from the do-not-call registry provisions.

a. *Congress did not intend for the TSR to cover the kinds of telephone activities in which real estate professionals generally engage*

The revisions to the Telemarketing Sales Rule are proposed pursuant to the authority delegated to the Commission under the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. 6101-6108 (Act). It is inappropriate for the Commission to propose changes that do not serve the purpose of the Act or the intent of Congress. The following legislative language of the Telemarketing and Consumer Fraud and Abuse Prevention Act makes it clear Congress intended the law to address abusive, deceptive and fraudulent telemarketing practices:

Sec.2. FINDINGS
The Congress makes the following findings:

(1) *Telemarketing differs from other sales activities in that it can be carried out by sellers across State lines* ***without direct contact with the consumer****. Telemarketers also can be very mobile, easily moving from state to state.*

(2) Interstate telemarketing ***fraud*** *has become a problem of such magnitude that the resources of the FTC are not sufficient to ensure adequate consumer protection from such* ***fraud.***

(3)Consuemrs and others are estimated to lose $40 billion a year in telemarketing ***fraud***

(4) Consumers are victimized by other forms of telemarketing ***deception and abuse****.*

(5) Consequently, Congress should enact legislation that will offer consumers necessary protection from ***telemarketing deception and abuse****.*

Deception, fraud, and abuse were clearly the targets of this legislation. Further, the legislative language relative to the Telemarketing Sales rule includes the following:

(a) *In General.-*

(1) *the Commission shall prescribe rules prohibiting* ***deceptive*** *telemarketing acts or practices and other* ***abusive*** *telemarketing acts or practices.*

(2) *The Commission shall include in such rules respecting* ***deceptive*** *telemarketing acts or practices a definition of* ***deceptive*** *telemarketing acts or practices which may include acts or practices of entities or individuals that assist or facilitate* ***deceptive*** *telemarketing, including* ***credit card laundering****.*

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(3) *The commission shall include in such rules respecting other **abusive** telemarketing acts or practices-*
*(A) a requirement 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.*

The clear intent of Congress is to address abusive, deceptive and fraudulent telemarketing practices. That legislative authority does not extend to prohibit or otherwise regulate a single telephone call from a real estate professional to a consumer intended to provide helpful real estate information and to offer to meet with the consumer in person to describe the services offered by the real estate professional. A single call by a real estate professional, not intended to consummate a sale, cannot be deemed a "pattern," nor could a reasonable consumer consider a truthful, legitimate communication offering to provide information and services be deemed "coercive or abusive." To the extent the do-not-call registry provisions are applied to preclude real estate professionals from making a single non-sales call within a given time period to consumers who have indicated their desire to be relieved of a "pattern" of "coercive or abusive" calls, the ATSR is unfounded and unnecessary. Moreover, the ATSR would interfere with the opportunity of real estate professionals to provide, and of consumers to receive, information about real estate services that are available. The changes being proposed today go much further than the very specific target set by Congress when it enacted the law.

b. Telephone activities of real estate professionals are outside the scope of the TSR

In its present form, the TSR is correctly confined to the scope of the authority delegated to the Commission by Congress by incorporating certain specific exemptions to the application of the rules at 16 C.F.R. §310.6. The exemption in 16 C.F.R. 310.6(c) of the TSR follows directly from, and indeed is required by, the text of the Act itself. The Act directs the Commission to issue rules addressing deceptive or abusive "telemarketing," where telemarketing is defined as "a plan, program or campaign which is conducted to induce purchases of goods or services by use of one or more telephones (emphasis added.) Thus, the TSR is intended to and limited to inducement of purchases using the telephone. It does not extend to regulate lawful, non-deceptive communication of information about services that are not even offered or made available for purchase in a telephone conversation.[1] The array of marketing techniques used by many real estate professionals to establish these relationships and enhance their market presence includes telephone marketing activities. These telephone communications by real estate professionals to consumers are, as noted, as much to develop a foundation of personal trust and confidence among consumers who might need real estate brokerage services in the future as to identify those who at that specific time may be seeking such services. For that reason, and because of the manner in which consumers hire real estate brokers, such telephone contact is not intended, and virtually never results in, a "sale." That is, the agreement by which a consumer contracts for the services of a real estate broker is entered into subsequent to any telephone contact initiated by the broker to the consumer, in connection with one or more in person meetings and discussions between the consumer and the broker.

Because of the exemption of 310.6(c), telephone marketing activities of real estate professionals are presently essentially always exempt from the TRS. This is quite appropriate, given that the objective of the Act is to regulate deceptive or abusive telephone *sales* activities. In contrast, as discussed above the very purpose of real estate telephone marketing activity is not to complete, or even discuss, a specific sales or other

[1] That Congress intended the Act to proscribe abusive and deceptive sales practices, rather than more broadly to address privacy concerns, is also supported by the Congress' delegation of the authority to address those concerns to the Federal Communication Commission in the Telephone Consumer Protection Act, 47 U.S.C. 227(b)(2). There Congress expressly delegated authority to the FCC to protect consumer privacy. Although NAR has the concerns described herein regarding the need for a nationwide do-not-call registry as applied to real estate telephone marketing, if such regulation is appropriate at all it may only be done pursuant to the authority granted to the FCC in the TCPA, not to the Commission under the Act.

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transaction by telephone. Real estate professionals engage in telephone marketing activity to provide general real estate information to consumers, to develop and advance personal relationships with consumers, and also to offer to provide services to such consumers who may happen to have a present need for or interest in real estate services. Where a consumer responds affirmatively to such an inquiry, however, the real estate professional follows up by making an appointment for a face to face meeting, or by sending the consumer further detailed written information describing the particular real estate services of interest to the consumer. In adopting the TSR, the Commission previously recognized that the scope of the rule is purposely limited to sales transaction made (or at least offered) via the telephone. This is clear from the provisions of the rule defining "telemarketer" as "any person who, in connection with telemarketing, initiates or receives telephone calls to or from a customer." 16 C.F.R. §310.2(u), where "customer" is, in turn, defined as a "person who is or may be required to pay for goods or services offered through telemarketing." 16 C.F.R. §310.2(i) (emphasis added). Thus, without at least the offer of goods and services and the requirement that a consumer be required to pay for same, there is no "telemarketer," and can be no telemarketing. Indeed, the very name of the TSR, the Telemarketing *Sales* Rule, expresses the proper focus of its reach to apply to telephone-based activities by which sales are made. This exemption is also necessary to preserve the appropriate distinction between the application of the rules to entities whose very business is to regularly seek to engage consumers via telemarketing, and businesses, like real estate firms, who have employ many marketing and promotional techniques including from time to time providing information to consumers via telephone.

The revisions now proposed by the Commission to the TSR , however, eliminate this exemption with respect to the do-not-call registry. Proposed 16 C.F.R. §310.6(c). This is unwarranted and unlawful. The Act empowers the Commission only to enact rules governing "telemarketing," that is, efforts "to induce purchases or goods or services by use of one or more telephones …." 15 U.S.C. 6106(4). Extension of the reach of the TSR to real estate marketing activities that are not intended for such purposes, such as by application of the do-not-call provisions to real estate telephone marketing activities, is not permitted by the Act.

That this limitation on the application of the exemption of 16 C.F.R. §310.6(c) is inappropriate is recognized by the Commission itself. In its December 1995 Business Guide to Complying with the Telemarketing Sales Rule, the FTC recognized the Congressionally intended scope of the TSR in explaining the rationale for exempting calls made that are part of a transaction involving a face-to-face presentation:

The goal of the rule is to protect consumers against deceptive or abusive practices that can arise in situations where the consumer has no direct contact—other than the telephone sales call itself—with an invisible and anonymous caller. A face-to-face meeting provides the consumer with more information about, and direct contact with, the seller, and helps to limit potential problems the Rule is designed to remedy.

NAR believes that rationale holds true today . If the do-not-call provisions are retained in the ATSR the existing exemption of 16 C.F.R. §310.6 must nevertheless apply to such provisions of the ATSR. To do otherwise, as in the present proposal, would be to exceed the scope of authority delegated to the Commission to regulate telemarketing, as provided by and as delimited by Congress.

2. The do-not-call provisions are vague as applied to real estate telephone marketing activities.

In its present form, the ATSR is unclear and ambiguous regarding whether real estate professionals who make occasional interstate marketing telephone calls in connection with a predominantly intrastate call telephone marketing efforts must abide by the do-not-call provisions. The ATSR precludes a "telemarketer" from calling a consumer who has placed his or her name on the do-not-call registry, where "telemarketing" is defined a "a plan, program or campaign which is conducted … by the use of one or more telephones and which involves more than one interstate call." 15 U.S.C. §6106 (4), 16 CFR §310.2(aa) (emphasis added). But neither

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the Act, the TSR nor the ATSR offer any definition whatsoever of "plan, program or campaign," including, in particular, any guidance regarding the time period over which such a "plan, program or campaign" extends. Thus, a real estate professional who engages in telephone marketing activities which are virtually exclusively intrastate, but who from time to time makes more than one interstate call, will be nevertheless compelled to abide by the do-not-call provisions at all times.

Real estate professionals engage in a variety of lawful, truthful, non-deceptive telephone marketing activities. Such activities involve, for example, contacting consumers in a given market area to describe the nature of the real estate services offered by the real estate professional making the call, and to offer to meet in person consumers who indicate a need for or interest in such activities. Because real estate is an inherently personal service and local activity, real estate professionals generally provide services to consumers and organizations in close geographic proximity to the locations of the real estate firm. For that reason, most telephone marketing activities by real estate professionals are directed to persons or entities in the same area, and do not involve interstate telephone calls.

In some cases, however, a real estate market area may extend to one or more neighboring states, even though the market area is confirmed to a limited geographic scope of reasonable proximity to the real estate firm. This commonly occurs where a real estate firm operates near a state border. The Washington, DC metropolitan area is a prominent example, since two states as well as the District of Columbia are essentially contiguous, and many real estate professionals in the area are licensed and practice in more than one of those jurisdictions. A real estate firm might also have a small number of out-of-state clients or customers that it telephones periodically in order to maintain relationships with individuals who might require real estate services at some future time. In such cases, therefore, telephone marketing activities by real estate professionals may consist largely of intrastate calls but with a few number of interstate calls included.

If, for example, a real estate broker makes 20 telephone marketing calls on each days of a given week, all of which are intrastate on some of those days but which include a few interstate calls on one or two, he may be obligated to comply with the do-not-call provisions with respect to all intrastate calls if his telephone marketing activities over the several days are considered a single "plan, program or campaign." The absence of a definition in the ATSR of "plan, program or campaign," precludes him knowing whether each day, or all calls made over a series of days, constitutes a "plan, program or campaign," and thus whether and when the do-not-call provisions apply to his activities. The broker is therefore likely to avoid the risk of inadvertently violating the rule by conforming *all* telephone marketing activities to the ATSR simply because of the vagueness of the rule.

At a minimum, in the event the Commission elects to implement the do-not-call provisions, NAR would urge inclusion of a definition of "plan, program or campaign," in order to allow real estate professionals to distinguish those interstate telephone marketing activities to which the rule applies from those which are wholly intrastate and not subject to the rule.

3. If the do-not-call provisions are adopted, the registry must be operated and organized in a user-friendly fashion.

If despite the defects described above the Commission were to adopt the do-not-call provisions as proposed in the ATSR, NAR urges the Commission to consider carefully how the do-not-call registry will be constructed and made available to persons doing telephone marketing activities, or telemarketing. To do otherwise would be to risk imposing an onerous and undue burden on users of the registry, and may result in inappropriately and unnecessarily infringe to ability of commercial entities to engage in lawful activity. A registry not created in a careful, thoughtful and user-friendly fashion is likely to cause real estate professionals

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who wish to conduct lawful telemarketing activities, that is, directed to persons not on the registry, to refrain from doing so for fear of inadvertently violating the rule by telephone communication with parties who have placed their name on the registry. This means, at a minimum, organizing and operating the registry so that it is easily and quickly accessible, and that it is available in electronic form that is searchable on the basis of a variety criteria, including the address and telephone number of the consumers listed.

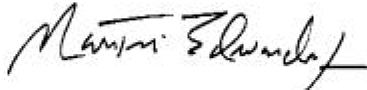
Unless the registry is organized in a highly accessible manner, allowing users to readily identify among a group who they intend to direct telemarketing calls those persons who have placed their names on the registry, the do-not-call provisions may constitute such a chill on the practice of real estate telephone marketing efforts as to constitute a violation of such persons First Amendment rights.

Conclusion

We strongly believe the legitimate objectives of the TSR, and thus the ATSR, are limited to alleviating the "deceptive" and "abusive" telemarketing practices about which Congress was concerned in adopting the Act. The Commission has not indicated why those objectives can only be achieved by also unnecessarily restricting non-deceptive, non-fraudulent, non-coercive, legitimate commercial informational communications by real estate professionals to consumers. We hope the Commission will rethink the proposal to remove 16 C.F.R. § 310.6(c) and instead continue to target those practices that are deceptive, abusive and fraudulent.

We appreciate the opportunity to offer these comments and look forward to participating in further deliberations on this matter.

Sincerely,



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