Before the
FEDERAL TRADE COMMISSION
Washington, D.C. 20580

COMMENTS OF
Time Inc.

TELEMARKETING RULEMAKING—COMMENT
FTC File No. R411001

(Proposed Amendments to the Telemarketing Sales Rule)

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I. Background/Introduction

Time Inc. ("Time") is pleased to submit these comments on the Federal Trade Commission's ("Commission") proposed amendments to the Telemarketing Sales Rule ("TSR"). Telemarketing Sales Rule; Proposed Rule, 67 Fed. Reg. 4492 (proposed January 30, 2002) (to be codified at 16 C.F.R. pt. 310) ("NPRM," "Notice," or "proposed rule"). Time is the world's leading magazine company, publishing over 50 regular-frequency titles in the United States with over 128 million readers of one or more of our magazines. Some of our best known brands include Time, People, Fortune, Sports Illustrated, Field & Stream, Entertainment Weekly, Golf and Popular Science Magazines.

In our experience, many consumers respond favorably to telemarketing when it is performed responsibly. This fact is evident in the dollar amounts consumers spend purchasing our products through telemarketing sales. Particularly with respect to our rural customers, telemarketing affords unique opportunities to obtain products such as magazine and book sales and renewals that may not otherwise be available, thus maximizing consumer choice. Typically, the people to whom we promote these services are current or former customers.

At Time, protecting and respecting our customers' privacy always has been one of our top priorities. We have dedicated significant time, energy, and resources to establishing strong privacy policies and educating consumers about their privacy options. We are committed to providing meaningful choices regarding how we use personal information in all facets of our consumer relationships, including in the telemarketing context. Because of our commitment to privacy, we applaud the proactive steps being taken by the Commission on this issue. We agree that companies should provide consumers with appropriate notice and choice regarding how their personal information is collected and used, and that consumers should have the ability to opt out of telemarketing calls that they do not wish to receive. However, the costs and benefits of any regulation in this area must be properly balanced.

In our view, the current TSR, the Telephone Consumer Protection Act ("TCPA") and its corresponding regulations, in conjunction with the Direct Marketing Association's ("DMA") Telephone Preference Service ("TPS") strike the appropriate balance. While Time thinks some of the suggestions in the NPRM may have promise, we are concerned that the proposal is problematic in several areas. For example, with respect to the proposed creation of a national do-not-call list, we believe any such list must preempt state do-not-call lists in order to ensure consistency and uniformity. Further, it is critical to ensure that any such list does not restrict our ability to communicate with our customers whose decision to take advantage of a general do-not-call list cannot be presumed to indicate a desire not to hear from a company with which they have an established relationship. Under the Commission's proposal, the ability to contact existing or former customers would severely curtailed.

Similarly, we are concerned that the predictive dialing and preacquired account provisions of the proposed rule are overly restrictive and will prohibit legitimate, generally accepted business practices. Our concerns are outlined in more detail below.

II. The Proposed National Do-Not-Call List Requirements are Overbroad and Would Impose Unnecessary Costs on Businesses and Consumers

A. If a National Do-Not-Call List is Created, State Do-Not-Call Lists Should be Preempted

Time believes that the Commission's goal of creating a "one-stop list" for consumers who do not wish to receive telemarketing calls is laudable. However, we oppose the list as currently proposed. It is flawed, among other reasons, because of its failure to provide for preemption of similar state lists. In creating this rule, the Commission should take into account compliance costs and the broader impact on business. Compliance costs associated with processing consumer information against a national list, without preemption would be significant to companies.

As the Commission recognized in its proposed rule, more than 20 states have enacted do-not-call statutes as of January 2002 and additional state legislative efforts to establish do-not-call

lists are either currently under way or likely in the near future. 67 Fed. Reg. at 4517. Moreover, pursuant to the requirements promulgated by the Federal Communications Commission ("FCC") under the TCPA, companies already are subject to company-specific do-not-call requirements. As the Commission itself acknowledges, companies may have to comply with both regulations—*i.e.*, the requirements to suppress names that appear on the national do-not-call list would not be a substitute for the company-specific approach to consumer opt out. *Id*. at 4519. Companies that are members of the DMA, including Time, have yet another list, the TPS, against which to process consumer information in connection with telemarketing campaigns.

The result of a national registry without preemption would be that we, and similarly situated companies with a national presence, ultimately would be subject to more than 50 differing, and potentially inconsistent, requirements to "scrub" and manage duplicative lists. In addition the lack of preemption could result in innumerable local or municipal do-not-call lists. Thus, a national list without preemption would not add simplicity or uniformity to the existing system, and in fact would increase confusion for companies and consumers alike. In order to avoid the complexity and costs of compliance with so many conflicting laws, as well as to minimize consumer confusion over how to opt out of telemarketing, we believe that the Commission's proposed do-not-call list should preempt state and municipal lists for interstate calls. Without preemption the goal of the Commission to obtain "one stop shopping" will become an impossibility.

B. Renewals or Other Means to Ensure Accuracy Should be Required

In the proposed rule, the Commission indicates that consumer choice regarding telemarketing activities will be accomplished through a person's placement of his or her name and telephone number on the Commission-maintained registry. *Id*. at 4543. However, we live in a highly mobile society (approximately 16% of the population moves every year), and telephone numbers are frequently reassigned. A particular telephone number will often correspond to a particular consumer only for only a limited time, and thus over time the numbers on the list may not accurately reflect consumers' telemarketing preferences. We believe that, in order to fully

recognize consumers' preferences and to have a list of names and phone numbers that is relatively accurate and up to date, the Commission must provide an annual renewal requirement for individuals who elect to put their names and numbers on the list. In the alternative, if the Commission adopts a longer renewal period there must be more information including name and address on the list to permit change of address screening. Otherwise the list would shortly become inaccurate and therefore obsolete.

In any circumstance, the Commission must allow companies to remove the number from the do-not-call list if they have knowledge that a person's phone number has been reassigned to a different individual. This approach would help ensure that the Commission's rule does not have the unintended consequence of preventing companies from communicating with consumers who have not chosen to place themselves on the list.

C. The Commission Should Establish an Exemption for Pre-established Business Relationships

If a national registry is created, the Commission should provide an exception that enables companies to contact consumers with whom they have a pre-established business relationship, even if these individuals have placed their numbers on the national registry. Such an exception is consistent with state do-not-call legislation and self-regulatory practices. It has proven an effective means of affording consumer choice, while enabling consumers to continue to receive information from companies with which they have initiated relationships. Nearly all of the state do-not-call registries have recognized this type of exception. *See, e.g.,* Alaska Stat. Ann. § 45.50.475, Me Rev. Stat. 4690-A., Conn. Gen. Stat. Ann. § 42-288a, Wyo. Stat. Ann. § 40-12-301. In addition, under the DMA's Guidelines, members are not required to use the TPS on their customer files before contacting their own customers. *See* The DMA Privacy Promise at <<http://www.the-dma.org/library/privacy/privacypromise2.shtml#part4.>> Of course, under the DMA Guidelines and as required by current law, the consumer always retains the right to tell the individual company not to contact them further. This approach makes sense because market realities strongly discourage companies from alienating consumers through unwelcome telemarketing.

The great majority of outbound telemarketing calls made by Time is to individuals who are currently, or were recently, our customers. As currently drafted, the Commission's do-not-call registry would severely and unnecessarily limit the ability of Time and other companies to communicate with established customers. For example, TIME Magazine calls its established customers to renew their magazine subscriptions. Likewise, TIME sells via telemarketing to its existing customers its highly popular "TIME Annual—The Year in Review" publication. Without an established business relationship exemption, these legitimate telemarketing activities that provide choices and opportunities to existing Time customers would be significantly curtailed. This is precisely the result that Congress cautioned against when passing the Telemarketing and Consumer Fraud and Abuse Protection Act ("Telemarketing Act") in 1994.[1] *See* H.R. REP. NO. 103-20, at 2 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1626, 1627.

We believe the Commission should ensure that companies can continue to communicate with all of their consumers, including those with whom they have less frequent or only periodic contact. For example, Time-Life Books may wish to contact a customer two years after he has completed purchasing installments of the multi-volume set of "Understanding Computers" to inform him of a new book series about the Internet. The fact that the customer last purchased a product two years ago does not make him any less of a customer, and Time-Life Books should be able to telemarket to him under an established business relationship exception, subject of course to the consumer's right to opt out of future calls on a company-specific basis.

The fact that the company-specific approach under the current TSR does not contain an established business relationship exception does not provide justification for this aspect of the new proposal. It is one thing for consumers to specifically inform Time that they do not want the company to telemarket to them; but quite another for consumers, in an effort to avoid telemarketing from total strangers or to reduce the overall volume of telemarketing, to

[1] Pub. L. No. 103-297, 108 Stat. 1724 (codified at 15 U.S.C. §§ 6101 *et seq*.)

inadvertently cut off phone communications from Time when they have had a relationship and received telemarketing for years without exercising their existing right to object. It is not reasonable to require Time to obtain express verifiable authorization from millions of customers when the company is still subject to company-specific opt-out lists. The purpose of the Commission's do-not-call registry, if one is adopted, should be to fill the gap where current law does not provide adequate protection and enable consumers to reduce telemarketing calls from strangers.

For these reasons, if the Commission proceeds with a national registry, an exception for established business relationships is critical. At a minimum, prior to proceeding with the do-not-call proposal, the Commission should undertake an economic impact study to fully understand the effect of imposing a national do-not-call list without exempting established business relationships.

III. Transfers of "Preacquired Account Information" Should Be Permitted

The Commission proposes to amend the TSR (Section 310.4(a)(5)) to prohibit practices that facilitate "preacquired account telemarketing," which it characterizes as instances when a telemarketer already possesses information necessary to bill charges to a consumer at the time that a telemarketing call is initiated. 67 Fed. Reg. at 4512. These practices are: (1) "receiving from any person other than the consumer for use in telemarketing any consumer's billing information," and (2) "disclosing any consumer's billing information to any person for use in telemarketing." *Id*. at 4514. Time believes that such a flat prohibition in the proposed rule is overbroad. The deceptive abuses that the Commission is attempting to address involve transfers of billing information without prior permission. Therefore, disclosure and consent requirements should be sufficient to satisfy the Commission's concerns. Such requirements will ensure that consumers are aware of and have agreed ahead of time to the transfer of their billing information.

In support of its determination that "preacquired account telemarketing" is abusive, the Commission relies primarily upon testimony in the record from critics stating that the practice:

(1) presents "inherent" opportunities for abuse and deception, particularly when used in connection with free-trial offers or negative option plans; and (2) deprives the consumer of effective form of demonstrating his or her consent—"divulging" the information necessary to effect payment. *Id.* at 4513. However, critics of the transfer of preacquired account information did not propose a flat ban on this broad practice, as the Commission has proposed. Rather, these critics suggested requiring improved disclosures to consumers or explicit consent from consumers as a condition of transferring account information in telemarketing. *Id.* at 4513-14. Based on this record, the Commission should therefore narrow its proposal to focus on improved disclosures, rather than implementing a complete ban on this broad practice which can be executed responsibly in certain contexts.

Specifically, Time believes that informed consent could be achieved by: (1) informing the consumer that the billing information may be transferred, (2) disclosing to whom the information may be transferred, and (3) obtaining informed consent prior to the transfer of the information. The disclosures prior to transfer could be made either by the first business or second business. Where the first company's sales representative is making its second sale or "upsell," that company should only have to make one request for a credit card number. To ask for the credit card number twice may often be seen as intrusive, annoying, and redundant by the customer. In addition it will add significant time and costs to each call for telemarketers, which will inevitably increase costs for consumers.[2]

In some instances, allowing a transfer of information to occur may actually enhance the consumer's sense of privacy. For example, where the consumer is transferred from a company he knows to a company he is unfamiliar with, and the second company gives the consumer the opportunity to use the credit card he has on file with the first company for billing purposes, a transfer of account information—performed with clear notice to and consent from the consumer—gives the individual an opportunity to avoid giving his credit card number to a

[2] See the Comments of Magazine Publishers of America in this proceeding for more detail on time and costs that would result from the adoption of the proposed rule.

stranger over the phone and yet enjoy the purchase of a product or services that is of interest to him.

In summary, market realities discourage businesses from alienating established customers or otherwise engaging in the types of abusive practices that generate the types of complaints that led to the negative testimony cited by the Commission. Where opportunities for abuse do exist, such problems can be avoided through appropriate disclosure and consent requirements. Moreover, when dealing with a company they know, most consumers appreciate the benefits and efficiencies of not having to restate their address and credit card information, particularly when they have just provided that information within the same call. Thus, the Commission should not proceed with its proposal to prohibit the transfer of account information in instances when specific consent is given by the customer.

IV. The Commission Should Not Expand the Definition of "Outbound" Calls

The Commission proposes to extend the Rule's definition of "outbound telephone call" to encompass two additional situations: "(1) when, in the course of a single call, a consumer … is transferred from one telemarketer soliciting one purchase … to a different telemarketer soliciting a different purchase …, and (2) when a single telemarketer solicits purchases … on behalf of two separate sellers." 67 Fed. Reg. at 4500. The Commission's justification for the proposed change is the need to ensure that consumers receive material disclosures. However, the effect of this proposal would be to subject all calls in these new categories to all of the TSR requirements for outbound calls. Time respectfully submits that the Commission can fully achieve its goal by requiring that such calls be subject to the relevant disclosure requirements under the TSR, without also imposing extraneous, impractical and unnecessary obligations by incorporating the calls into the definition of outbound call.

In the Notice, the Commission reasons that it is crucial in an external upsell (and when a single telemarketer solicits on behalf of two distinct sellers) that consumers clearly understand that they are dealing with separate sellers. The Commission has proposed to treat these calls as

outbound calls under the TSR, in order to "ensure that consumers receive the disclosures required by § 310.4(d)." *Id.* However, by classifying such calls as "outbound calls," they would become subject to additional TSR obligations, such as calling time restrictions and the proposed national do-not-call list. Applying these restrictions in an upsell situation is overbroad and impractical and does not further the Commission's stated goal of ensuring that consumers are made aware that they are dealing with a second seller. It should be sufficient if, for example, prior to transferring a call in an upsell, the business discloses that it will be transferring the individual to another business.

Accordingly, rather than changing the definition of "outbound calls," the Commission should amend its rule in a way as to impose disclosure requirements rather than the entire panoply of additional obligation that correspond to outbound calls.

V. The Commission Should Preserve the Important Benefits of Predictive Dialers

Predictive dialing is a technology that greatly increases the efficiency of telemarketing and other calls from businesses. Predictive dialing results in significant increases in telemarketing efficiencies, translating into savings to businesses and less expensive products for consumers.

Predictive dialers also create tremendous efficiencies for businesses in contexts other than telemarketing. The same predictive dialing equipment used for telemarketing is used to help Time and other companies communicate with customers for non-marketing purposes. For example, predictive dialers are used in the customer care context to determine whether a person, rather than a mechanical device, is at the end of the line so that a customer service representative does not have to be available in the case where a consumer does not answer the phone.

The use of predictive dialers is a common practice in industry and results in a very small percentage of abandoned calls. However, at the same time the Commission acknowledges the existence of abandoned calls in the NPRM, the Commission asserts that telemarketers who

abandon calls are violating § 310.4(d) of the current Telemarketing Sales Rule, which requires that a telemarketer promptly and clearly disclose specified information to the person receiving the call. The result of this assertion is that in an abandoned call situation, once the phone has been answered, the required disclosures must be made. 67 Fed. Reg. at 4523. The Commission's assertion is an unprecedented interpretation of the TSR, which is not appropriately announced in an NPRM. At the same time the Commission announces this novel interpretation, it requests comments to the maximum setting for abandoned calls, when, in fact, under the Commission's declaration of existing law it is unclear whether abandoned calls are even permissible.

It is by no means clear that requiring disclosures for abandoned calls, as the Commission asserts should occur, would be favored by consumers. For example, consider the instance when a call placed using a predictive dialer is answered by an answering machine or voice mail. Under the Commission's assertion of current law, disclosures would be required in this situation. Presumably the disclosures would be given by a recorded message because if a sales rep were available the call would not be abandoned. Consumers could be faced with listening to their voice mail to find disclosures for services that they would have been, but were not offered. Surely, this is not a result consumers would favor. Furthermore, with a few exceptions, the FCC prohibits the use of pre-recorded messages under the TCPA. Thus, such a rule change could effectively result in a prohibition on the use of predictive dialing. This prohibition would adversely impact the situations outside telemarketing where predictive dialers are used. Because businesses often use the same phone equipment for all types of consumer calls, companies that want to use predictive dialing outside the telemarketing context would be forced to undergo the very expensive undertaking of using different phone banks for different types of calls.

Time supports evaluating measures that make predictive dialing more effective and limit abandoned calls to the extent possible. However, a small percentage of abandoned calls are inevitable. Additional regulation should not result in eliminating the important efficiencies that result from predictive dialing both for telemarketing and other purposes.

VI. Conclusion

Time thanks the Commission for the opportunity to submit these comments. We are committed to working with the Commission to strike the appropriate balance between the costs and benefits of the proposed regulations, creating a regulatory framework that encourages responsible telemarketing practices and maximizes consumer choice. Please feel free to contact us with any questions.

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