April 12, 2002

Mr. Donald S. Clark
Office of the Secretary
Federal Trade Commission
Room 159
600 Pennsylvania Avenue, NW
Washington, DC 20580

RE: Telemarketing Sales Rule Review—Comment. FTC File No. R411001

Dear Mr. Clark:

Statement of Interest

This letter is filed on behalf of Advanta Corp. ("Advanta") in response to the Notice of Proposed Rulemaking filed by the Federal Trade Commission ("FTC") seeking comments on amendments to the Telemarketing Sales Rule ("TSR") issued under the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. §§ 6101-6108 (67 *Federal Register 4492, et seq*., January 30, 2002).

Advanta is a highly focused financial services company which has been providing innovative financial solutions since 1951. Advanta leverages its first-class direct marketing and information based expertise to develop state-of-the-art data warehousing and statistical modeling tools that identify potential customers and new target markets. Over the past five years, it has used these distinctive capabilities to become one of the nation's largest issuers of MasterCard® business credit cards to small businesses. Advanta also offers select deposit and investment products to consumers via direct marketing.

From time to time, Advanta also retains third party telemarketing firms. As drafted, the proposal applies to such third party telemarketers working on behalf of federally insured financial institutions. These telemarketers, when acting as agents of the bank, are already subject to regulation by their relevant banking agency. For example, the Office of the Comptroller of the Currency ("OCC") has issued guidance to national banks, which require on-going due diligence with their third party service providers (*OCC Bulletin 2001-47*, November 1, 2001). We are concerned about this additional regulatory burden.

For these reasons, we are keenly interested in the outcome of this proceeding.

General Policy Comments

Advanta supports the FTC's goal of eliminating deceptive and abusive telemarketing calls. While we welcome the establishment of a national *"do-not-call"* list, we believe, without federal preemption to

replace the existing 26 often-conflicting state laws, the proposal as drafted would place impractical and expensive burdens on legitimate businesses.

Additionally, the proposal as drafted would further muddy already-complex compliance issues arising from the Gramm-Leach-Bliley Act dealing with the transfer of credit card account numbers and information sharing among corporate affiliates. Further, the structure of the national *"do-not-call"* list as drafted will have the practical effect of limiting business-to business telemarketing activities, as the proposal fails to account for the millions of home-based small businesses that may have only one telephone number.

Specific Policy Comments

A National "Do Not Call" List Is Ineffective Without National Uniformity

Advanta supports the concept of a national *"do not call"* list if such a list could truly provide the benefits the FTC seeks. Such a list, if properly constructed, could simplify compliance burdens and be easier for business and consumers alike. Regrettably, the registry as proposed in section 310.4(b)(iii)(B) fails to do this.

Advanta notes that neither the Telemarketing and Consumer Fraud and Abuse Prevention Act nor its legislative history contains any direction to create a *"do not call"* list. The closest hint of Congressional intent is found in the legislative history for the Telephone Consumer Protection Act of 1991, when Congress directed the Federal Communications Commission to consider such a list. Stretching legislative intent directed at a different agency with a different regulatory regime is in counterpoint to two of the foundations of statutory analysis: *"[N]othing is better settled than that statutes should receive sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or absurd conclusion."*[*Lau Ow Bew v. United States*, 144.U.S. 47(1892)] and *"[W]hen Congress has definitely fixed the tests and qualifications attendant upon the determination of a given act, it is not within the power of an administrative officer to add to or subtract from the congressional rule."*[*Chin Fong v. Backus*, 241 U.S. 1 (1916)]

Having decided there is sufficient legislative intent to create the national list--instead of preempting existing state laws--an action that is well within the FTC's inherent authority and one that the Commission has not historically been diffident in exercising--the proposal is simply added to the 26 exiting state laws. Further, the proposal is inconsistent with the existing *"do not call"* list required by the Telephone Consumer Protection Act of 1991 and the accompanying rules promulgated by Federal Communications Commission.

Since the FTC has decided it has the inherent authority to create such a list, we urge the FTC to finish the job and unequivocally preempt state law in this area. Should the current Commissioners believe that such preemption is beyond the scope of the FTC's authority, the proper course would be to ask Congress to enact the appropriate enabling legislation.

The Scope of the Proposal is Over-broad and Inconsistent with the Gramm-Leach-Bliley Act

Advanta is concerned about the sweeping scope of the proposal. Unlike state laws, the proposal applies to both outbound calls and, oddly, in Section 310.2 (t), to some inbound calls. It also fails to provide an exemption for prior or existing business relationships. Failure to distinguish between

prospective and existing customers raises issues about the treatment of calls that both service accounts and present marketing opportunities.

We are also concerned about the treatment of calls made on behalf of or by affiliates—especially in light of Gramm-Leach-Bliley Act ("GLBA") provisions designed to allow affiliates to operate in concert.

Further, section 310.4(a)(5) of the proposal differs from the Act's treatment of pre-acquired account information as well as, once again, the FTC's own implementing Privacy Regulation. The proposal also removes a number of exceptions contained in GLBA and the FTC's own implementing Privacy regulation. These include the sharing of account numbers with service providers to market an institution's own products and the sharing of encrypted account numbers as long as the recipient is not given a means to decode the encrypted number. The proposal also removes a number of exceptions contained in GLBA and the FTC's own implementing Privacy Regulation.

The proposal also changes the definition of *"billing information"* to such an extent that, if left unchanged, it would restrict the sharing of publicly available non-billing information, such as a consumer's name, phone number, and address. This effectively moots a consumer's decision not to opt out of the GLB Act's privacy protections.

The *"Do Not Call"* List Inadvertently Impacts Business to Business Marketing

The proposal's *"do not call"* list is raises a number of real world operational concerns. The proposal simply enables a consumer to able to place his or her name ***and/or*** telephone number on the *"do not call"* list. Advanta believes that, in order to prevent the proposal from inadvertently impacting business to business telemarketing, the list should include ***both*** the name, the telephone number ***and*** the address. This will also solve problems arising from common names as well as multiple residents at the same address.

The proposal fails to consider changing numbers when consumers move, the assignment of new telephone numbers as regional telephone operating companies create new area codes in response to the burgeoning wireless market or, indeed, any way of getting off the list.

The proposal also fails to account for the millions of home-based businesses; many of which do not have separate business telephones or may have call forwarding from one telephone line to another.

This is a large and vibrant part of the economy. According to the U.S. Small Business Administration's *The State of Small Business*: *A Report to the President* (1998), *"[H]ome-based businesses were 53.4% of all businesses, with only a small percentage of businesses moving out of the house…"* [*Characteristics of Business Owners*, U.S. Department of Commerce, Bureau of the Census (1992)]. Since this data is based on the 1990 dicennial census, with the explosive growth of on-line activities and lower cost of technology, the 2000 census will reflect an even larger percentage of home-based businesses.

Additionally, 19.8 million Americans usually do at least some work at home as part of their primary job [Bureau of Labor Statistics, *Work at Home 2001, USDL 02-107*, March 1, 2002]. In their case, absent clarification in the Final Rule, making an inbound call to a business for a business reason that, in turn, morphs into a telemarketing call would trigger a violation of the TSR.

We recommend that the final rule clarify that a B2B telemarketing call made to a home number is exempt from the TSR.

The Proposal Fails to Adequately Consider Economic Impact

Finally, we are concerned about the cost of these proposed changes to the TSR. The true real world costs of the *"do not call"* list are murky. It is unclear who will pay for maintenance of the list after the first two-year "trial" period. Is industry to presume that, following the example of some of the states, user fees will be imposed? If so, how will they be levied—especially on institutions not traditionally subject to the FTC's jurisdiction? We note Chairman Muris has testified before the Senate that the FTC may need up to $5 million to establish the *"do not call"* list.

In the public policy arena, the proposal mixes concerns with fraudulent or deceptive practices with concerns about privacy. While both are legitimate subjects for debate, Advanta urges the FTC to more thoroughly consider the economic impact of the proposal. Limiting telemarketing may well reduce consumer choice and thereby raise the cost of selected goods and services.

For example, at least one provision (Section 310.4(c)(1)(i)) dealing with specified disclosures and requiring a specific standard of abandonment rates has the impact, if implemented as drafted, of effectively banning predictive or automatic dialers.

While we certainly hope that the final rule does not do so, we believe that the economic cost stemming from lost efficiencies as well as the stranded cost of suddenly unusable, and not inexpensive, equipment should be carefully studied in a cost benefit-analysis.

This is not the only provision with direct cost. Another provision expands the definition of *"outbound telemarketing call"* to include some inbound calls that would have to be tape-recorded—a capability some inbound call centers may lack. Such a change would not be cheap.

Calls for this type of analysis are not new to the FTC. For example, in his dissent to the May 2000 Privacy Report, Commissioner Swindle noted:

> [T]he Privacy Report fails to pose and answer basic questions that all regulators and lawmakers should consider before embarking on extensive regulation that could severely stifle the New Economy. Shockingly, there is no consideration of the costs and benefits of this regulation; nor the effects on competition and consumer choice…

[*FTC, Privacy Online: Fair Information Practices In the Electronic Marketplace—Dissenting Statement of Commissioner Swindle 16* (May 2000), www.ftc.gov/os/2000/5/privacyswindle.htm]

While telemarketing may be considered more of a facet of the *"Old Economy"*, the economic issues raised in this Rulemaking are no different. We urge the FTC to carefully tailor the final TSR to narrow the scope of the proposal to address targeted problems at minimal cost to business and consumers alike.

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The foregoing comments deal with select key provisions, and we urge the Commission to carefully consider the comment letters filed on behalf of the trade associations which represent our interests, in particular, the Direct Marketing Association and the Consumer Bankers Association.

Thank you for the opportunity to participate in this vital rulemaking.

Sincerely,

/s/

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