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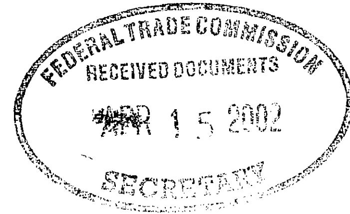
The Market Funded Lending Industry



April 15,2002

By Hand Delivery

Federal Trade Commission
Office of the Secretary
Room 159
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
Attn: FTC File No. R411001

Re: Telemarketing Rulemaking--Comment FTC File No. R411001

Ladies and Gentlemen:

This comment letter is submitted on behalf of the American Financial Services Association ("AFSA") in response to the request for comment on the Federal Trade Commission's ("FTC" or "Commission") proposed amendments to the FTC's Telemarketing Sales Rule ("proposed rule"). AFSA is an association of predominantly market funded consumer financial services providers. Our over 350 members provide and service over 20% of the consumer credit receivables outstanding in the United States today. Our members provide a full range of consumer financial services, including home equity loans, both loan and lease automobile financing, credit cards, and traditional installment lending, We appreciate this opportunity to comment on the Proposed Rule.

AFSA commends the efforts of the Federal Trade Commission to propose a national Do Not Call List. A national Do Not Call List could bring uniformity to what is increasingly an area of significant consumer concern and a very complicated area of regulation. AFSA likewise commends the Commission's efforts in the proposed rule to address certain fraud and misrepresentation problems in the field of telemarketing which have apparently been caused by **a** relatively few aggressive and/or fraudulent telemarketing efforts. **AFSA** members pride themselves on the high standards of their telemarketing programs, and welcome the Commission's efforts to control those who have injured consumers and given certain aspects of telemarketing a bad name.

However, we believe the proposed rule in its present form raises important issues that need to be resolved before a final rule is adopted. While trying to prevent undesirable practices, the proposed rule in fact prohibits practices that provide significant consumer benefits and bring significant efficiency to the consumer credit marketplace.

For example, the Do Not Call provisions are so broad that they seriously interfere with existing customer relations, and the failure to preempt the varying Do Not Call state laws will very seriously increase compliance complexity and consumer confusion. Although well-intentioned to combat fraud and misrepresentation, certain other innovations in the proposed rule also have costs which outweigh the expected benefits.

This comment letter does not directly address whether the Commission has the power to establish a Do Not Call List, restrict transfer of account information much more tightly than Congress did under the Gramm Leach Bliley Act ("GLBA")[1], or impose regulatory constraints upon the ability of telemarketers to contact their own customers. Other members of the industry have strongly questioned the Commission's power to take these steps in their comments on this proposal. AFSA agrees with and joins in these comments. However, this letter focuses upon the practical effect of the proposed rule upon the consumer financial services marketplace. It suggests changes that should be made to the Proposed Rule to reduce compliance cost, limit interference with the competitive marketplace, preserve significant operating efficiencies, which provide important cost savings to consumers, and improve the rule's overall operation.

I. Background: The Significant Role of Telemarketing in Today's Financial Services Markets

AFSA members actively market the financial services products they provide, and telemarketing is increasingly a major marketing tool. While some AFSA members offer financial products like credit cards through banks exempt from the proposed rule, increasingly telemarketing is carried out by entities that will be subject to the rule. These entities can be either a separate subsidiary or affiliate that is not exempt, a third party contractor who executes the telemarketing plan developed by the lender, or a joint venture partner who offers similar or related financial products or services.

While some consumers find telemarketing calls annoying and some telemarketing has been used to commit fraud, it is the general rule that telemarketing in the financial services market is highly beneficial to both consumers and business. It makes known to consumers financial services products of which they may not have been aware and assists them in easily applying for and obtaining these products or services without either burdensome paperwork or troublesome trips to a bank or lender's place of business. It provides an economical and effective way to inform current and prospective customers of attractively priced or conveniently configured products and services. Moreover, telemarketing provides significant jobs within the financial services sector, as well as being responsible for a significant amount of new business over the last decade -- new business that has in turn enabled the industry to expand and provide significant new jobs.

Most telemarketing is neither burdensome to the consumer nor a significant source of fraud. It is critical that the Commission's laudable effort to prevent fraud and abuse not have the actual consequence of seriously restricting the significant benefits

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[1] 15 U.S.C. §§ 6801-6809.

telephone communication and telemarketing provides consumers and the American economy. We believe a line can be drawn which will significantly reduce the fraud and abuse at which the FTC aims with this rule proposal, but still preserve adequate room for legitimate telephone contacts between the providers of financial services products and their present or potential customers. For some of our members, such communication provides important cost savings that allow them to deliver their products at lower prices. For others, telemarketing and telephone communication are essential parts of their business plan.

Unfortunately, some aspects of the proposed rule would seriously impair the ability of financial services companies to deal with their present customers and to present their products and services effectively to prospective buyers. We discuss these aspects of the rule proposal below.

II. Clarifying the Scope of the Proposed Regulation

Any final rule should reflect the fact that the Telemarketing Consumer Fraud and Abuse Prevention Act (hereafter, the "Telemarketing Act") is limited in scope. In particular, it should state that, as provided in section 6(a) of the Telemarketing Act, the final rule does not apply to entities that are exempt from the coverage of the Federal Trade Commission Act ("FTC Act").[2] The exempted entities are set forth in section 5(a)(2) of the FTC Act and include banks and savings associations. In addition, the final rule should clarify that entities that act on behalf of such banks and savings associations, including their subsidiaries, are not covered by the final rule. The federal bank supervisory agencies view bank subsidiaries as operating effectively as divisions or departments of their parent banks.[3] In addition, other companies providing these services to banks and savings associations are subject to regulation and examination by the federal bank supervisory agencies under the Bank Service Company Act[4] with respect to such services, The final rule should clarify that bank and savings association subsidiaries and other companies are not subject to the final rule when they are acting on behalf of banks or savings associations.

III. The Need to Establish an Efficient and Effective "Do Not Call" System (Proposed Rule 310.4(b)(1)(iii)(B); Questions for Comment D.5(a),(e), D.6)

A. Preemption (Questions for Comment D.6)

The rule proposal fails to contain a preemption provision, although the Questions for Comment raise whether and to what extent there should be preemption of similar state regulation, Without preemption to the full extent permitted by the Constitution and the Telemarketing Act, the rule proposal will impose unnecessary and very significant

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[2] 15 U.S.C. § 45(a)(2).

[3] See, *e.g.*, OCC Advisory Letter, AL 2002-3, dated March 22,2002.

[4] 12 U.S.C. § 1867.

inefficiencies, with a resulting high level of unnecessary costs, on those trying to comply with it.

Today, over 20 states have enacted some form of Do Not Call legislation, and the number keeps growing. Just last week, Pennsylvania enacted its version of do not call legislation. Several other states have similar legislation under consideration. None of this legislation goes as far as the rule proposal; however, most of it requires in one way or another that companies establish and regularly update lists of names with related telephone numbers that may not be called.

It is both expensive and operationally difficult to comply with federal and separate state Do Not Call lists with differing requirements. Federal preemption is necessary in order to avoid an unworkable environment for consumer financial services businesses that engage in telemarketing, as well as to permit legitimate communication between companies that merely use the telephone to communicate with their existing customers. Federal preemption also would provide the most effective protection to consumers by: (1) avoiding inconsistent procedures that may lead to errors; (2) minimizing the cost of providing Do Not Call protections to consumers; and (3) minimizing consumer confusion caused when a consumer must choose (whether to sign up on the federal list, the state list, a private list or all of them) when each has a different scope and effect, particularly on the consumer's ability to maintain existing customer relationships.

The operational difficulty of a system in which financial services firms must comply with differing federal and multiple state telemarketing regulatory schemes cannot be minimized. For example, compliance with Do Not Call list requirements requires a telemarketer to invest significantly in systems to extract regularly the updated lists from federal and each state according to each of their separate update schedules, cross check or sort each jurisdiction's list against each specialized list of customer prospects, and reliably delete the names and telephone numbers of those who are on the do not call list. Moreover, since the Commission's proposed rule and multiple states have imposed different restrictions and requirements on the margin, a compliance program must be established which takes account of the federal requirements, but also takes into account each state's specific compliance requirements when dealing with customers in those states. Developing a state specific compliance program is capital intensive, and experience has shown that it seriously deters new entrants into the marketplace.

As a practical matter, for large financial service companies, both the construction of lists of prospective customers and the actual calling process is a complicated, time-consuming process. To increase efficiency, computers handle much of the work of compiling and managing lists. An efficient Do Not Call system must therefore provide the Do Not Call list in a format that can be used by a search and sort computer program which will (1) operate on the software and hardware the company already has and (2) accurately identify and remove from lists of prospective customers the names on a do not call list. Companies are already obtaining lists of prospective customers from various, predominantly private, sources, and then in some instances, pre-qualifying the calling

prospects using another set of software. To be able to comply with the regulation, the result must reliably be a final list of calling prospects, which can be used by the solicitation software (including predictive dialers) which the telephone solicitor uses, Hardware capacity and software programming and incompatibility issues are very significant limitations.

Under current state regulation, larger AFSA members have developed considerable experience in how they must deal with the various state regulatory schemes. Issues arise as to Do Not Call list data incompatibility with current software, different times at which Do Not Call lists must be updated, how long names remain on a Do Not Call list (which may require additional coding), how to handle consumers who have moved to another state and changed their phone numbers, how to handle telephone numbers at which one person but not another has placed their name on a do not call list, and so on.

Smaller companies simply cannot manage this thicket of regulation and expensive computer operational capacity. For them, the only choice is to purchase telemarketing service from a specialist company, which often raises costs and interferes with their ability to compete in certain credit markets, as well as creating risks of non-compliance and exposure to regulatory enforcement.

The Commission can both simplify regulatory compliance and improve competition in credit markets by clearly providing that the proposed rule preempts conflicting state regulation to the full extent permitted by the Constitution and the Telemarketing Act. We believe, as other commentators on this regulation have more extensively set out in their submissions, that the Cornmission can under the existing language of the Telemarketing Act cover virtually all intrastate as well as interstate telephone solicitations and preempt state regulation within that scope. Only a very small range of intrastate solicitation transactions would continue to be regulated solely by state law, and most telemarketers could structure solicitation programs that would fall almost wholly within the scope of the federal regulation, making compliance manageable and regulation uniform.

The Commission should not move forward on the proposed rule without providing for preemption of all state telemarketing laws.

B. Other Efficiency Concerns

1. Clear identification of the consumer who cannot be called. (Proposed Rule 310.4(b)(1)(iii)(B))

Unless the consumer who has added his or her name to the Do Not Call list can be clearly identified by those responsible under the proposed regulation to edit lists of prospective callers, the Do Not Call List will have an erratic effect. Therefore, the consumerjoining the Do Not Call list should have to provide both a telephone number

and his or her name. The provision of both pieces of information should be a condition to effective inclusion on the list.

In order for a Do Not Call list to be effective, soliciting companies must be given sufficient information to identify a particular person at a particular telephone number as the individual who cannot be called. Name alone is not sufficient. The name "Charles Jones" on a national list will not distinguish the person who does not want to be called from thousands of other Charles Jones. Nor is the telephone number alone sufficient, since several people, sometimes unrelated, may use the same telephone number and a list that only included telephone numbers would soon be inaccurate since individuals change their phone numbers. To provide consumers with reasonable assurance that their choice to join a Do Not Call list would be effective, the name and telephone number must be required. Proposed 310.4(b)(iii)(B) should be revised to read "his or her name and~~/or~~ telephone number".

2. Structure of the "Do Not Call" list. (Proposed Rule 310.4(b)(1)(iii)(B); Questions for Comment D.5)

A federal do not call list should be carefully constructed so that it will both operate efficiently and recognize the choices consumers make to either be on or off the list. However, the proposal provides very few details of how the proposed list will function operationally, and those that it does provide raise more questions than they answer. **A** detailed description of the operational features of the list should be proposed in a supplemental rule available for public comment. The proposal should cover:

- How often will the Commission update the list? How frequently will updates be available to those with compliance responsibilities? How will the Commission update schedule interface with the requirement that companies update their do not call records regularly?

- What charges will be imposed, if any, for access to the list? We note that it is extremely unusual to charge those subject to governmental regulation for the basic information they need to comply.

- In what computer format will the list be provided? The format should be compatible with a wide range of software used in the industry, or easily convertible to such format.

- Will the list be downloadable over the internet?

- What, if any, privacy restrictions will there be on access to the list? Identifying individuals by name and telephone number on **a** list that is available broadly may result in the disclosure of individuals who have unlisted telephone numbers but nevertheless receive some telemarketing calls that they wish to avoid. These individuals may include persons seeking to escape an abusive spouse or others

where the disclosure of this information could affect such individuals' personal safety.

- Should contacts with a company's existing customers, with customers of affiliates and subsidiaries, and with customers who initiate calls to the company be subject to Do Not Call and call timing restrictions? We discuss this issue extensively below in Part V.

- Can the Commission restrict access to the Do Not Call list? To the extent that the list is maintained by a governmental entity subject to the Freedom of Information Act, there is no clear legal basis for withholding the names associated with telephone numbers on the list.

- How can consumers effectively exercise their options under the Do Not Call list? The proposed rule should permit a consumer who wishes to avoid some types of telemarketing calls to still preserve his or her ability to receive calls from the companies with which he or she wants to continue to do business or about products for which he or she wants to receive offers. Under the current proposal, the consumer who wishes to preserve the ability to receive calls from some companies is left with the burden of contacting each and every one and provide his or her express verifiable authorization. For example, if the consumer wants to preserve a continuing relationship with two or three competing consumer financial service providers, each of which has several affiliated companies, the burden of going to *each* affiliate of *each* provider and providing "express (written or oral) verifiable authorization" would be considerable. No provision is made for a consumer who wants to receive information on particular products. We recommend an approach in which the consumer, in electing to join the Do Not Call list, could provide a list of excepted companies and/or products, and that list would be available in electronic form and identified to that consumer when a company obtained the Do Not Call list. Moreover, we urge that 310.4(b)(1)(iii)(B)(1) and (2) both should be modified to permit a consumer to give express authorization, either written or oral, for calls made "on behalf of a specific seller or class or group of sellers." This will permit consumers to elect easily to receive calls from a family of financial services providers. The requirement in the proposed regulation to require the consumer to identify *specific* sellers imposes too great a burden on small lenders or credit sellers that may obtain customer consent over the telephone during a conversation with the customer or in a face-to-face meeting in a store. We also suggest that the signature requirement for written authorization should be dropped from this provision because there are situations where a signature may not be practicable. For example, a merchant may wish to provide its customers with services related to the merchandise sold. Thus, a seller of automobile products may offer to arrange for customers to receive offers of automobile financing or insurance from a number of providers. Obtaining a consumer's signature on a written authorization in connection with signing all the other papers involved in an

automobile sale would probably so encumber the sales process as to preclude or seriously discourage offering this service.

- For a telephone number that is used by multiple consumers, does the choice of one user to be placed on or removed from the Do Not Call list control calls to all users of that telephone? Should the telephone subscriber's choice control? If the telephone subscriber's choice controls, is that fair to other users? We think the sensible approach is to permit each adult user of the telephone to prevent calls to him or herself, but not be able to bar all calls to all adults using that telephone.

- What verification procedures would the Commission use in implementing the Do Not Call list to be sure it was dealing with the subscriber or with an adult user of the telephone (whoever is decided to control the Do Not Call choice for a particular telephone), and how would these procedures affect the costs of the Do Not Call list program?

- How long will a name remain on the list once it is placed there and how can a consumer remove his or her name from the list? The proposed rule does not address methods for updating, verifying or removing a consumer's name from the list. The consumer would presumably initiate some of the changes to the list. Some consumers may put their name on the list, and later choose to have it removed. Such choice should be facilitated, consistent with the principles of free choice that presumably underlie the proposed rule. Some other changes to the list would have to be managed by the Commission. For example, if a consumer who has put his or her name and telephone number on the list relinquishes that telephone number, the Commission must remove that name and number from the list, or else the next consumer who is assigned that telephone number would effectively lose the choice to receive telemarketing calls. In general, there must be appropriate mechanisms in place to assure that the Do Not Call list only contains a valid and up-to-date list of consumers who have chosen to block telemarketing calls.

- Will consumers be given information about the effect of putting their names on the list? About how they can "opt out" with respect to specific companies, industries or products? About the need to "opt out" if they want to be kept informed by companies with whom they now have **a** business relationship about improved interest rates, etc.?

- Should a telemarketer be required to verify that express authorization to call is being made from the telephone number to which the customer is authorizing access? The requirement appears to needlessly preclude consumers from exercising their choices at their convenience fiom different telephone numbers than the one they listed in the Do Not Call list. This provision would prohibit a customer who calls a seller from a work or mobile phone from providing express oral authorization at that time, as may be necessary, given the broad reach of the "outbound call" definition.

- Should the only ways that "express oral authorization" can be obtained require a significant investment in technology? Section 310.4(b)(iii)(B)(2) appears to require recorded express authorization at a level of significant detail, including caller identification technology, each time a call considered an "outbound call" occurs under the expansive definition of that term in the proposal. To comply each business which may be covered must acquire caller identification technology and devices. Acquiring that technology would impose a significant burden on business, especially small businesses. Is that burden worth the consumer benefits the proposed regulation is supposed to secure? Cannot the Commission authorize less technology intensive, but still efficient, methods?

- How will the Do Not Call requirements interact with caller ID blocking technology? Subclauses 310.4(b)(2)(iii)(B)(I) and (2), as drafted, appear to require that the telernarketer obtain caller identification information from the customer each time before an authorization is effective. Customers who have chosen to block the transmission of caller identification information from their telephone lines would be required to take affirmative steps to unblock the transmission each time he or she wished to provide express oral authorization.

3. Excessively short period to update do not call lists. (Proposed Rule 310.4(b)(2)(iii))

The rule proposal requires that a seller or telemarketer not make a call to **a** number on the Commission's Do Not Call list if that number was on the list 30 or more days before the call is made. The proposal does not specify if the Commission will add names to the list on a daily basis, but if it does so, a company must check the list every 15 days or less in order to have enough time to provide edited lists to telemarketers. This is an extremely short period of time. Even if the period were extended to 45 days, it would operationally require updating every 30 days in order to have enough time *to* make the changes operational within the permitted period.

In addition, many marketing campaigns are scheduled to last considerably longer than even 30 days. If the lists must be updated in the middle of a campaign, telemarketers, who often contract to solicit a specific number of listed names, would have to change their calling lists midstream, going through an extensive editing process to combine new prohibited names with the original list. To accomplish this task, the telemarketing call list the telemarketer uses to originate calls must combine the new "do not calls" with its main list containing specific information which allows call management software to track as of any one time which people on the list have already been called, have not yet been contacted because they did not answer the first call, and have not been called at all. Integrating that information into a revised call list in the middle of a calling campaign will tax present computer capacity, and require significant change in business practices. The cost of additional hardware and software will be very considerable. Smaller companies may be unable to reliably comply, forcing them to either stop telemarketing or purchase telemarketing services from increasingly large service providers, often to their competitive disadvantage.

The proposed rule will operate much more efficiently if a significantly longer period of time is permitted to update do not call lists. The longer the period of time, the more small businesses will be able to cost-efficiently comply with the proposed rule. Proposed rule 310.4(b)(2)(iii) should be amended to provide a period of no less than 60 to 90 days to update.

C. The Do Not Call List and Collection Activity

The proposed regulation may be read to limit or prevent certain collection calls that have proved beneficial to consumers. Experience has proven that in collection, working with the consumer is an effective repayment technique. Working with the consumer frequently involves offering an extension, restructuring or interest rate change that could be interpreted to be the offer of a good or service subject to the proposed rule. Consumers seeking to avoid collection could join the national Do Not Call list or could use section 310.4(b)(2)(iii)(A), which prohibits calls to a consumer who has "stated that he or she does not wish to receive an outbound telephone call" from the creditor.

Debt collection is recognized to involve different interest and concerns than telemarketing. The field is separately regulated, both by the Commission and by others. Section 310.6 should include an exemption from the regulation for all debt collection activity.

IV. Limits on Use of Billing Information. (Proposed Regulation 310.4(a)(5), 310.2(c))

A, Restrictions on Transfer of Preacquired Billing Information Goes Far Beyond the Limits Worked Out by Congress, the Banking Agencies and the Commission in the Gramm Leach Bliley Act and Implementing Regulations. (Questions for Comment D.1)

For a variety of reasons, many of them regulatory, financial services companies today offer a range of products and services through commonly owned and controlled companies, Insurance, securities sales and investment advice, for example, are each best offered through a separate subsidiary or affiliate so that regulatory requirements can be met. Data processing and internet services are often provided by separate affiliates. Loan servicing and marketing is often provided in whole or in part by a third party, as are collection activities. Furthermore partnerships between a financial service provider and an independently owned company is not infrequent in today's financial services market. The proposed rule would seriously impair the ability of these subsidiaries, affiliates, agents and partners to work together to provide a full range of services to customers who want and ask about them.

Section 310.4(a)(5) of the Proposed Rule prevents a telemarketer from receiving (and therefore also prevents a financial institution from transferring) billing information for use in telemarketing unless that information is disclosed by the consumer and the

consumer has authorized its use in payment processing. These limitations go well beyond the account number disclosure limitations set forth in the privacy provisions of the recently enacted Title V of the Gramm-Leach-Bliley Act and the rules adopted to implement those provisions. For example, the proposed rule does not include any of the exceptions for (1) telemarketers that are agents of the financial institution and are marketing the financial institution's own products, (2) the transfer of encrypted account numbers, or (3) the transfer of account numbers within a private label or affinity card program. These exceptions were adopted after very careful consideration by the eight federal agencies, including the Commission, that wrote rules to implement the GLBA. In the GLBA and its implementing rules, Congress and the eight agencies expressly addressed the account number issue. The Commission should not, with this proposed rule, upset the careful balance on this issue set by GLBA.

Telemarketers Marketing the Financial Institution's Own Products

The GLBA exception for telemarketers marketing the financial institution's own products should be included in the proposed regulation. A consumer who has a credit card with a company or one of its affiliates and who is then called by the company and introduced to a product or service is not likely to be mislead or subjected to abuse of the kind the proposed regulation seeks to limit. An ongoing customer relationship exists which the company has a strong incentive to cultivate, and the customer can promptly terminate the ongoing relationship if dissatisfied. The "one shot" nature of most consumer fraud is entirely absent. Moreover, the customer's expectation is that the financial service organization, including affiliated and subsidiary companies, is aware of his or her account information. Given the broad definition of telemarketing included in the proposed regulation, exempting account information transferred to agents of the financial institution so as to market the financial institution's own products neither jars with consumer expectations nor creates significant opportunities for fraud. Permitting such transfer, however, significantly improves the efficient operation of financial services entities and improves consumer satisfaction with their services.

Encrypted Account Information

The proposed regulation seriously impairs a security feature common in the industry developed to protect consumers, and permitted under GLBA. Most telemarketers are now given only an encrypted account number which the telemarketer cannot decipher, but can bill to. We are seriously concerned that since the definition of "billing information" appears to include *encrypted* account numbers, the prohibition on transferring billing information in proposed section 310.4(a)(5) would prevent even this sensible practice. That result would be clearly contrary to the account number provisions of the GLBA. There appears to be no reason why the proposed regulation should prevent a telernarketer from receiving an encrypted account number, since that practice is consistent with the GLBA and strongly discourages identity theft.

Preventing telemarketers from getting billing information is not in the best interest of consumers nor does it encourage an honest, efficient market for goods and

services sold by telemarketing. If telemarketers cannot obtain preacquired billing information at least in encrypted form, they must rely on credit card or other account numbers given by the consumer. Experience has taught that these are often inaccurate, resulting in misbillings and/or significant collection problems and increased costs, Moreover, to discourage fraud, the credit industry and most consumer advocates urge consumers not to give account numbers to telemarketers on calls the consumer did not originate, Providing a telemarketer with at least encrypted billing information significantly increases the efficiency of the marketing economy, reduces the opportunity for telemarketing fraud, while protecting consumers from misbillings to which they usually strongly object. We strongly urge that the proposed regulation be revised to permit transfer of preacquired account information to and from a financial services organization to the extent permitted by GLBA.

Affinity or Private Label Card Exception

The private label exception is particularly important for credit card programs. For example, customers often obtain credit cards sponsored by or for use at a retailer, where the credit card actually is issued by a separate banking entity. The customer nevertheless may look to the retailer to respond to questions related to the credit card. In such cases, the customer understands that the account number is the means by which the retailer and the bank identify the customers and, therefore, it is appropriate for the card issuing bank to provide the account number to the retailer. Moreover, as this type of credit card typically prominently bears the name of the retailer, the customer will expect that the retailer will be able to bill charges directly to the credit card. Because of the established relationship between the customer and the retailer bank, the likelihood of abusive practices is greatly reduced. Accordingly, the FTC should defer to the GLBA and its implementing rules concerning the disclosure of billing information by financial institutions covered by the GLBA,

Consumer financial institutions are all subject to GLBA and its implementing regulations. Since Congress and the 8 Federal agencies implementing GLBA carefully considered this issue and decided to permit transfer of account information in a few limited situations and tightly restrict it in others, and since that consideration involved a full awareness of telemarketing practices, it would be appropriate for the Commission to provide that account information transferred by **a** company subject to GLBA is not subject to the proposed rule. Revising the proposal in that way would in the long run benefit consumers, The broad limitation on the disclosure or receipt of billing information in the proposed rule would lead to requests for account numbers in telemarketing calls, contrary to the wisdom that, in order to prevent identity theft, account numbers never should be disclosed by a consumer to an inbound caller that the consumer does not know, Following the resolution of this issue laid down in GLBA and the implementing regulations will both solve the Commission's concerns and preserve an efficient and effective marketing system.

B. Overbreadth of the "Billing Information" Definition

An additional problem is that section 310.2(c), defining "billing information", is overly broad. As discussed above, this definition combined with section 310.4(a)(5) effectively establishes limits significantly more restrictive than GLBA on disclosing account information. Equally significant, the definition of "billing information" is so broad that in certain cases, it could be interpreted to include merely *identifying information,* such as name and address, so as to preclude the disclosure to telemarketers of even customer lists. That would effectively end third party telemarketing. In addition to adding the exceptions provided by GLBA as discussed above, the definition should be changed to make clear that "billing information" does not include identifying information (such as name, address and telephone number) except a social security number or account number.

V. Limitations on Contacting Existing Customers and Handling Inbound Calls (Questions for Comment B.7)

A. Existing Customers (Proposed Regulation 310.2(t), 310.4(b)(1)(iii)(B))

Any final rule should provide for an exception to permit providers of financial services to contact (directly or through service providers) individuals with whom the company has an existing business relationship without having to obtain prior affirmative consent from individuals who are listed on the proposed national Do Not Call list. The states which have adopted Do Not Call legislation have all provided this essential exception.

The provision of consumer financial services is, by its nature, a service business involving ongoing customer relationships and ongoing customer service, rather than the sporadic sale of isolated products. For example, a loan establishes a lender-customer relation over a period of months, and often years. Providers of consumer financial services must anticipate customer needs and provide services that evolve to meet changing customer needs, In this context, the difference between servicing an existing customer account and providing new services is illusory in concept and impossible to implement.

The following examples illustrate this point. At the end of an automobile lease term, the lessor or its agent[5] may call the customer to determine if the customer intends to make a payoff or return the vehicle. If the customer does not want to return the vehicle, the call may flow naturally into a discussion of loan or lease extensions or renewal

[5] It is common for a lender or lessor to hire a servicing company to manage the day-to-day customer relationship. In fact, when loans and leases are securitized, the technical "owner" of the loan is a trust or similar entity. All transactions with the customer are handled by the trust's servicing agent.

options. Yet under the proposed regulation, whenever a new product or service is "technically" offered during the call, the lessor must place the customer on hold, consult the national Do Not Call list, and, if the customer is on that list, make all required disclosures and obtain express authorization to continue, mid-call, in order to avoid liability under the proposed rule.

A similar situation would arise in a collection or workout scenario where a lender or its servicing or collection agent talking with a customer having payment difficulty may today be willing to offer an extension, renewal or new loan. Under the proposed rule, such offers of alternative loan arrangements could transform a collection call into a sales call subject to the proposed rule.

Other situations in which the proposed rule would seriously impede providing normal customer service are not difficult to visualize. For example, a lender's service representative may call to respond to a customer question about the customer's tax escrow in connection with a home loan. At the end of the call, the customer asks about refinancing the loan. If the call is after 9:00 p.m., the lender cannot provide *any information* about refinancing under the proposed rule. If it is before 9:00 p.m., the lender's representative must check if the customer is on the national Do Not Call list. If the customer is on the list, the service representative must refuse to respond until the customer gives a recorded "express oral authorization" and the representative verifies that the customer is calling from the proscribed telephone number. Even a call to inform a loan customer with a relatively high rate loan about lower available loan rates would be barred if the customer was on the national Do Not Call list. We do not think that most people want these types of cumbersome restrictions on their ability to deal with their lenders or lessors, no matter how annoyed they are about receiving inconvenient calls from those with whom they don't want to do business.

The final rule should exempt from the regulation all telephone calls from or on behalf of a provider of financial services to individuals with whom the company has an existing business relationship. Without this exception, the normal servicing of consumer relationships will be undermined and customer service will suffer. This exception should apply to all affiliates and subsidiaries of the financial services provider as well as the financial institution that has the existing business relationship with the customer. The exemption should extend to all affiliates and subsidiaries of a provider of consumer financial services and agents acting for those companies. Providers of consumer financial services are heavily regulated and much of their corporate structure is dictated by regulatory requirements. They may make accept deposits and offer some loan products from a bank, while making home loans from an affiliate. The regulatory requirements to which financial services providers are subject generally permit the marketing of products and services across affiliates and subsidiaries in order to permit one-stop shopping for financial services and to foster the synergies between various financial products. Accordingly, the Commission should recognize these efficiencies in the final rule and apply the recommended exceptions to all affiliates and subsidiaries of a provider of consumer financial services and agents acting for those companies, as well as companies acting on their own behalf.

B. Inbound Calls (Proposed Rule 310.2(t), 310.4(b)(1)(ii),(iii),(c))

Section 310.2(t) defines an "outbound telephone call" subject to regulation against "abusive" practices to include a telephone call to "induce the purchase of goods or services . . . when such telephone call: (1) is initiated by a telemarketer; (2) is transferred to a telemarketer other than the original telemarketer; or (3) involves a single telemarketer soliciting on behalf of more than one seller . . .." **As** drafted, the definition includes a call *initiated by a customer* (usually referred to as an "inbound" call) that is transferred to another person to discuss a product or service, or a service call initiated by a customer in which products and services of another party may be discussed.

As drafted, the proposed rule imposes on normal new customer inquiries and existing customer relations and customer service activities the Do Not Call restrictions and the calling time restrictions of the rule. These restrictions prevent a company from discussing during any call characterized as "outbound" any new product or service the company may offer.

In a consumer financial services company today, specialization is common. An employee will be trained to answer one type of customer question, but also trained to transfer the customer to another person with appropriate expertise if the customer question goes beyond a certain scope. That other person may work for the same, or for an affiliated company, or may even work with and agent or a partner company that is not affiliated. The proposed rule has the result that if a consumer calls in to ask about obtaining a new product or service, and the person answering the call transfers the call to a third person, the person to whom the call is transferred cannot discuss with the customer any product or services the company may offer if the inquirer is on the Do Not Call list or the call is between 9:00 p.m. and 8:00 a.m. local time. This rule will cause severe disruption to convenient patterns of serving consumer needs. For example, many financial services firms offer online internet contact during a 24 hour day and provide customer service on a 24 hour basis. Sometimes to resolve a question by a customer phoning in, the representative must transfer the call to another, and sometimes the answer to the customer's question is that they need to buy an additional service in order to obtain what they want. That answer cannot, apparently, be given under the proposed rule to customers on the Do Not Call list or between 9:00 p.m. and 8:00 a.m.

Clearly, this is not the result the Commission intended. The explanation to the Proposed Rule identifies two fundamental concerns justifying this aspect of the rule: privacy and fraud, and specifically in this context, "upselling". Telephone calls initiated by individuals to providers of financial services do not involve any of these concerns. For example, during inbound calls, privacy issues should not be a substantial concern because the customer initiated the call and the customer always is free to terminate the call once the customer has accomplished the purpose of the call. The potential for fraud also is reduced because the call arises out of a transaction initiated by a customer to **a** party the consumer selected. Often there is a continuing relationship involved. Moreover, helping customers who call in inquiring about how to solve a financial

problem naturally involves a degree of counseling them about what products or services the company and its affiliates may offer. There is nothing sinister in this process, and it is not in any way associated with the concerns that consumers will be misled that infuse the Commission's discussion of "upselling" in the discussion section of the rule proposal.

The definition of an "outbound" telephone call in the proposed rule is unworkable in practice because it would be impractical to consult lists of individuals who have placed their names on a national Do Not Call list -- let alone consumers who have notified an individual business that they do not wish to be contacted -- when the financial institution or its servicing entity is in the process of responding to inbound telephone calls. Nor is it good for consumers for the Commission to force businesses to tell inquirers that their questions cannot be answered on this call and they should call back another number which will get them yet another specialist within the affiliated companies. Consumers complain bitterly about that sort of treatment when it does occur, and companies struggle to avoid it yet provide specialized help by setting up systems to smoothly transfer calls to the appropriate person. Nor will any consumer thank the Commission for making it impossible for them to call into a company after 9:00 p.m. and get an answer about whether the company offers a particular product.

For these reasons, the definition of an outbound telephone call should, in fact, be limited to real *outbound* telephone calls and specifically should exclude inbound telephone calls, Further, the proposed rule should be revised to clarify that an inbound or an outbound call that is transferred to an affiliate or subsidiary would not be considered an outbound call. If the Commission is concerned to reach the "upselling" practices about which it seems concerned, a different approach should be taken, and that approach should be presented in a proposed supplemental rule subject to notice and comment.

VI. Virtual Prohibition of Predictive Dialers (Interpretation of Proposed Rule 310.4(d); Questions for Comment D.11)

A. Use of Predictive Dialers in Normal Telemarketing Activity

Predictive dialers are widely used as an efficient way to manage telemarketing, reducing telemarketing costs and permitting effective management of telemarketing employees. The effect of an interpretation of Proposed Rule 310.4(d) which required zero percent abandoned calls or "hang-ups" would be to prohibit use of predictive dialers in telemarketing. The oral disclosures that provision requires cannot be given if the call is abandoned, Prohibition of any predictive dialer that resulted in more than zero percent of abandoned calls is not an efficient approach. At the same time, **AFSA** recognizes that hang-ups may be annoying and in some instances may produce anxiety in some of those who receive them. An appropriate balance should be struck between these competing concerns.

The Commission should adopt a requirement no more stringent than that abandoned calls not exceed 5% of calls placed. This is the standard required in the Best Practices Guidelines of the Direct Marketing Association, and has been tested by experience, Most financial services telemarketers already have predictive dialing

software and hardware that can achieve that level of compliance, so major additional outlay for new computer systems and related software would not be necessary. At the same time, that standard would significantly reduce the level of hang-ups which some consumers have experienced.

Predictive dialers provide a valuable service by materially reducing the cost of telemarketing. Under the Proposed Rule, consumers who may wish to avoid receiving calls from predictive dialers are able to do so by putting his or her name on the national Do Not Call list. On the other hand, consumers who elect not to put their names on the national Do Not Call list effectively have chosen to receive calls from telemarketers, including telemarketers that may use predictive dialers. Since customers will be able to opt out of telemarketing calls if they find them annoying, it is appropriate to permit predictive dialers as long as they do not cause more than and average 5% abandoned calls, Going further and prohibiting predictive dialers entirely is not appropriate. Prohibiting the use of predictive dialers will increase the cost of goods and services that are telemarketed for those who have chosen to receive telemarketing calls without providing those customers with any corresponding benefits.

B. Predictive Dialers and Other Call Technology Used in Connection with Collection Activity

Any limitation on abandoned calls should contain an exception for calls initiated in the process of collection that may involve an offer of an alternate "work out" payment schedule, Such calls are frequently automated in order to efficiently manage collection and workout staff. Because a workout may be offered during a collection call, such calls may be considered "outbound" telemarketing calls subject to the requirements of the proposed regulation. The final rule should not interfere with the use of predictive dialers and other call management technology in the debt collection process. Section 310.6 should contain an express exception for collection calls.

VII. Requirement that Customers Provide Their Account Numbers to Telemarketers Is Undesirable. (Proposed Rule 310.3(a)(3)(ii))

In compliance with restrictions imposed by GLBA, it is the practice that telemarketers who are not part of an issuing financial institution do not, today, obtain preacquired account information which includes the consumer's credit card or other account number. Instead, they are provided only encrypted information which enables them to process billing in connection with a telemarketing call, without having access to the number. This results in significant privacy and financial security for the consumer's account number.

Under the proposed rule, in order for a telemarketer to submit billing infomation for payment other than through a payment system which met the standards of section 310.3(a)(3), the telemarketer must obtain the consumer's "express verifiable authorization", which over the telephone in turn requires that the consumer provide the telemarketer with significant amounts of information. That information includes "the

customer's ... specific billing information, including the name of the account and the account number".

AFSA strongly recommends that this requirement be removed from the regulation, because it significantly increases the opportunity for fraud. AFSA member companies have, over the years, taken significant steps to reduce the frequency and seriousness of consumer harm arising from fraudulent use of account numbers. We believe the Commission shares our concerns, One simple step most of the telemarketing industry has already taken is to not permit telemarketers to obtain billing account information directly from consumers. Instead, the telemarketer is given preacquired, encrypted billing information. In addition, AFSA members, governmental agencies concerned with fraud prevention and others have publicly urged that consumers never give account information in response to an outbound telemarketing call. The requirement in the proposed regulation discussed above appears to run seriously counter to that advice, We urge that in the final rule this aspect of the proposal be revised to remove the requirement that the account information be given to the telemarketer.

VIII, Method of Payment Must Provide Protection Against Unauthorized Charges and Dispute Resolution Procedures Equivalent to Fair Credit Billing Act or Truth in Lending Act. (Proposed Regulation 310.3(a)(3)(ii))

Section 310.3(a)(3) of the proposed rule places new requirements on billing that appear to be based on a misunderstanding of current law, The proposed rule prohibits a telemarketer from submitting billing information for payment without first obtaining the consumer's express verifiable authorization, which can be either written or oral, when the payment method used does not: (1) impose a limit on the consumer's liability for unauthorized charges; or (2) provide for dispute resolution procedures comparable to the Truth in Lending Act as amended ("TILA"). The differing treatment of different means of payment is important because the procedure for obtaining "express verifiable authorization" will be cumbersome and costly to implement.

Section 310.3(a)(3) should expressly exempt payment methods covered both by Federal Reserve Board's Regulation Z (which implements TILA), payment methods covered by Regulation E (which implements the Electronic Fund Transfer Act), and payment methods that limit customer liability by payment system rules.

The explanation to the proposed rule notes that the Commission proposed the billing provision out of a belief that telemarketing gives rise to unauthorized charges and that emerging payment methods do not provide adequate dispute resolution or limits for consumer liability for these unauthorized charges. However, that is clearly not the case when payment is made under a method covered by Regulation E. Regulation E provides for limitations on liability for unauthorized transactions that are, in practice, substantially similar to the limitations on liability in Regulation Z. Although Regulation E itself may provide for somewhat higher liability where lost access devices are not reported promptly, this provision is unlikely to have any application in the context of unauthorized telemarketing transactions where the individual retains control of any physical access

device and the unauthorized transaction is based on knowledge of the account number, rather than possession of the access device. Accordingly, there is no meaningful distinction between the rights of consumers with respect to unauthorized transactions using credit cards and the rights of consumers with respect to unauthorized transactions using debit cards.

In addition, the final rule should permit the use of billing information without "express verifiable authorization" from the customer in the case of transactions using payment systems that limit customer liability by payment system rules. In practice, payment system rules often provide more protection from unauthorized transactions for customers than is provided under either Regulations Z or E. There is no reason to impose artificial restrictions on the use of a payment system that provides its users with greater protection than is otherwise provided under federal law

IX. Calls in Response to Solicitations (Proposed Rule 310.6(f))

Section 310.6(f) exempts from the proposed rule telephone calls initiated by a consumer in response to certain solicitations, *provided* that the solicitations are "clear, conspicuous and truthful". Although a similar provision is included in the FTC's current Telemarketing Sales Rule, the narrowness of this exception combined with the expanded scope of the proposed rule -- including the definition of "outbound" call -- raises the specter of vicarious liability for statements by others. If false statements are made to induce consumers to call sellers, the person who makes the false statements is the appropriate focus of sanctions, rather than the person who receives the customer's call in response to the solicitation and who may not be a party to the falsity in any way. The proposed rule's conspiracy provisions are more than sufficient to reach any collusion. The person who solicits is often, in today's marketplace, not the same person as the person who receives the call in response. For example, when a retailer or other merchant markets to consumers its private label credit card issued by a third party financial institution, the card issuer who receives the customer's acceptance of the card should not be compelled to police the communications between the retailer or merchant and its customers, absent collusion or complicity in any falsity between retailer and consumer.

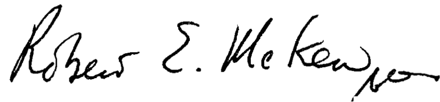
X. Caller ID Blocking (Proposed Rule 310.4(a)(6))

The proposed rule makes it a violation to block the transmission of caller ID information. For historical and technological reasons having nothing to do with caller ID information, some companies use telephoning technology which does not permit the transmission of caller ID information. While the Commission apparently intends, based on the introductory comments to the proposed rule, not to treat those companies whose present systems do not permit transmission of caller ID information as violating this aspect of the proposed rule, the Telemarketing Act and its implementing regulation are enforced not just by the Commission, but also by other public and private parties. The final regulation should include an explicit exemption from section 310.4(a)(6) which makes clear that companies that use telephone equipment not capable of displaying caller ID information do not violate this provision.

* * * *

In conclusion, **AFSA** appreciates the opportunity to comment on the proposed rule, It urges the Commission incorporate the views expressed in this letter before adopting a final rule. If you have any questions concerning these comments, or if we may otherwise be of assistance in connection with this matter, please do not hesitate to contact me or our special counsel in regard to this matter, George J. Wallace, Esq. at 703 578-3679. We also request the opportunity to appear at and address the issues raised by the proposed rule at the public forum announced in the Federal Register Notice with respect to the proposed rule. Please contact Mr. Wallace or myself concerning our appearance.

Sincerely yours,



Robert E. McKew
General Counsel and Senior Vice President