April 15, 2002

Mr. Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

RE: Telemarketing Rulemaking Comments – FTC File No. R411001

Dear Mr. Secretary:

On behalf of the Association of National Advertisers (ANA), I am submitting these comments on the Commission's proposed amendments to the Telemarketing Sales Rule (TSR).

ANA is the advertising industry's oldest trade association and the only organization exclusively dedicated to serving the interests of corporations that advertise regionally and nationally. The Association's membership is a cross-section of American industry, consisting of manufacturers, retailers and service providers. Representing more than 8,700 separate advertising entities, these member companies market a wide array of products and services to consumers and other businesses.

Telemarketing is one of the multiple ways by which our member companies communicate with consumers. Telemarketing is an important part of the U.S. economy and provides real benefits to consumers. The WEFA Group, a highly regarded economic research organization, found in a recent study that consumer telephone marketing generated $274.2 billion in sales in 2001.

No legitimate business wants to annoy or offend its potential customers. ANA and our member companies recognize that there are some consumers who want to limit the number of telemarketing calls they receive, or the number of companies that call them. We share the goal of the Commission to develop an effective do-not-call registry. However, we urge the FTC to work with the business community to develop a private sector solution, rather than imposing a government-controlled do-not-call regime.

We have several concerns about the Commission's proposal. As a government-controlled registry, with very restrictive rules, the proposal raises First Amendment concerns. It would make it substantially more difficult and expensive for companies to communicate with both current and potential customers. Also, the registry is likely to be confusing and frustrating for consumers, because they would continue to receive substantial numbers of telemarketing calls

from companies that are outside of the FTC's jurisdiction. For these and all of the other reasons enumerated in our submission, we urge the Commission to seek a private sector solution that will provide consumers with a more effective mechanism for limiting telemarketing calls.

ANA would like to associate ourselves with the detailed comments filed by the Direct Marketing Association (DMA), particularly regarding the proposed do-not-call registry. Since those comments also address non-profit issues and others beyond the direct concern of our member companies, we chose to file these separate comments.

The Do-Not-Call Proposal Raises First Amendment Concerns

As a form of commercial speech, telemarketing is protected by the First Amendment. ANA is concerned that the FTC's proposal to establish a government-controlled "do not call" registry raises serious First Amendment concerns.

For any government regulation that restricts truthful, nondeceptive commercial speech to pass constitutional scrutiny, the government must: (1) assert a substantial interest; (2) prove that the particular regulation directly advances that interest in a material manner; and (3) demonstrate that the regulation is narrowly tailored and no more extensive than necessary. *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York,* 447 U.S. 557 (1980); *Lorillard Tobacco Co. Reilly,* 533 U.S. 525 (2001).

The FTC's proposed registry would impose serious impediments on the ability of marketers to communicate with consumers using the telephone. The registry provides an approach that is not narrowly tailored. The only "choice" the Commission's registry provides consumers is either to (1) bar all calls or (2) go through the potentially time consuming and cumbersome process to opt back in to receive any further telemarketing calls. If a consumer "joined" the FTC registry because of one or even a number of annoying telemarketing calls, an extremely broad range of other companies would be blocked from calling about other products or services that consumers may very well have an interest in. Under this all or nothing approach, the entire telemarketing industry can be punished because of the actions of a few.

A legitimate telemarketer would not be permitted to call anyone on the FTC registry unless that person had specifically opted-in to receiving calls from that company, by providing "express verifiable authorization." As the Commission noted, written authorization would be necessary in most cases, since once a consumer "joined" the do-not-call list, he could not be called to request authorization for future calls.

For those consumers who truly desire to eliminate all telemarketing calls, the FTC's proposal might seem to have some merit. However, the goal of eliminating all calls would be illusory. As we will discuss below, an FTC do-not-call registry could never cover all telemarketing calls, given the statutory limits on the FTC's jurisdiction.

Some consumers may want to limit calls from certain telemarketers, but not the entire universe of companies. The "company-specific" approach of the current TSR allows consumers to do that. This approach is more narrowly tailored and "First Amendment friendly."

However, those consumers who "joined" the FTC do-not-call registry but still wanted to receive calls from certain companies would be faced with a burdensome obligation to provide a written opt-in for all of those specific companies. A sophisticated consumer may be able to come up with a list of companies that he knows immediately about that he is willing to hear from. Even the most sophisticated consumer could never opt-in to calls from companies that he has not yet learned about. The logistics of this opt-in approach could result in many consumers unintentionally blocking a multitude of companies from calling them, even though they may have a genuine interest in the products and services of those companies.

The Commission's opt-in approach would also make it much more expensive for marketers to communicate with consumers. ANA is a member of the Privacy Leadership Initiative (PLI). PLI has carried out a number of economic studies to determine the value of information transfer in our economy and the potential costs of an opt-in regulatory regime. In the financial arena, a number of studies demonstrate multi-billion dollar annual savings from accurate credit reporting and the avoidance of fraud due to the collection of data and data access. In the apparel sales area alone, it was demonstrated that if catalog sellers were unable to use routine data that they collect from customers and obtain third party data, they would have to raise their prices by more than $1.4 billion annually. These studies are available at the PLI website, www.understandingprivacy.org.

The PLI studies show that gaining affirmative consent under an opt-in system from consumers is a very difficult and expensive process. For example, US West recently conducted an affirmative consent trial using both call centers and direct mail. Outbound telemarketing calls obtained an opt-in rate of 29% of residential subscribers at a cost of $20.66 per positive response. Direct mail was much less successful, obtaining a positive response rate between 5% and 11% and costing between $29.32 and $34.32 per positive response. US West concluded that opt-in was not a viable approach because it was too difficult, too time intensive and too costly.

These are the kinds of costs and burdens that would be imposed on legitimate marketers through the written opt-in requirement of the Commission.

An opt-in requirement implicates issues that go far beyond cost and economic efficiency. Some courts and legal scholars believe that it raises serious First Amendment issues. In 1999 in *U.S. West v. Federal Communications Commission*, 182 F.3d 1224, the 10th Circuit Court of Appeals held that the government must carry out a careful calculation of costs and benefits associated with burdens on speech imposed by an opt-in rule.

We don't believe that the Commission has adequately carried out that calculation in this proposal. For example, the NPRM does not evaluate the cost and inconvenience to consumers of losing access to important information they would otherwise receive.

Just last month, a federal district court held that the government had not met its burden under the *Central Hudson* test when it passed the ban on unsolicited fax advertisements. In *State of Missouri v. American Blast Fax*, (Case No. 4:00CV933SNL), the U.S. District Court for the Eastern District of Missouri held that section 227 of the Telephone Consumer Protection Act (TCPA) violates the First Amendment.

Therefore, before it imposes these very heavy burdens on this important sector of the economy, the Commission must analyze (1) the costs involved for both consumers and businesses and (2) whether there are more narrowly tailored approaches that accomplish the goals of the proposal.

The Do-Not-Call Registry Would Be Confusing to Consumers

The Commission's do-not-call regime would be confusing and frustrating for those consumers who believed that signing up for the registry would actually stop sales calls to their homes. These consumers would continue to receive numerous telemarketing calls from the broad range of companies that are not subject to the jurisdiction of the FTC. The FTC has no jurisdiction over a number of industries that make significant numbers of telemarketing calls. Further, the FTC has no jurisdiction over purely intrastate telemarketing calls. Thus, a consumer who signed up for the Commission's do-not-call list would most likely continue to receive many telemarketing calls from firms that are not required to comply with the registry. The FTC's do-not-call proposal contains so many exceptions that it arguably fails to advance the stated goals of the Commission.

Exceptions for Pre-Established Business Relationships

If the Commission decides to create a national do-not-call list, ANA believes it must preserve the ability of a company to communicate with individuals with whom they have a pre-established business relationship, even if they register for the do-not-call list. It is unlikely that most consumers would realize that by placing themselves on a national do-not-call list, that trusted companies with whom they have had a long-standing business relationship would no longer be permitted to contact them.

As discussed above, the FTC would require that a company's existing customers provide "express verifiable written authorization" to opt back into telemarketing calls after they have registered for the do-not-call list. This opt-in requirement would create a substantial barrier, both for consumers and marketers, to communicate about valuable information and opportunities. Since many consumers will not comply with the complex procedures envisioned by the Commission to opt-in on a company by company basis, the FTC's proposal could result in a total ban on any telemarketing to many of a company's best customers.

A National Do-Not-Call List Should Preempt State Lists

Any national do-not-call list that is established should preempt state laws so that companies will not have to face the significant burden of complying with numerous state do-not-call regimes. At least twenty states have already enacted do-not-call lists and many other states are considering such an approach.

The ideal solution, both for consumers and marketers, would be one registry that could encompass both state lists and a national list. Unfortunately, it does not appear that the FTC has statutory authority to preempt state lists or to create such a truly national, "one-stop" list that would cover the entire universe of telemarketers.

Under the Commission's proposal, telemarketers could ultimately be subject to fifty inconsistent state laws, the FTC's national do-not-call list, and the company-specific do-not-call lists under the FCC's Telephone Consumer Protection Act. This is clearly a costly and unworkable framework.

Even the largest companies will face significant costs in cross-checking the various independent do-not-call lists. For smaller companies and start-ups, these types of costs may prove backbreaking. Again, the Commission has not carried out an adequate cost-benefit analysis of these types of burdens that would be imposed on telemarketers.

A National Do-Not-Call List Must be Accurate

If the FTC decides to establish a national do-not-call registry, it must have a renewal period to ensure the accuracy of the list. In our highly mobile society, it is estimated that up to 20% of the population moves each year. The Commission has indicated that it plans to capture only a consumer's "name and/or telephone number."

A registry limited to this information requires at least an annual renewal. Otherwise, an individual who obtains a reassigned number that someone else placed on the registry would be blocked from receiving telemarketing calls. This type of result is unfair to companies and consumers and would be at odds with the Commission's goals to protect the actual wishes of consumers.

The Commission Should Seek a Private Sector Solution

Rather than establishing a government-controlled do-not-call list, ANA urges the Commission to work with the business community to develop a private sector solution to address the desires of those consumers who wish to stop receiving telemarketing calls. We urge the Commission to work with the Direct Marketing Association (DMA) to enhance the visibility and operations of their do-not-call program, the Telephone Preference Service (TPS).

TPS already allows consumers to opt-out of telemarketing calls. More than four million Americans have signed up through the TPS since 1985. The DMA list is a more effective do-not-call list because it covers many companies and industries that are beyond the jurisdiction of the FTC. As a private sector program, TPS raises none of the First Amendment concerns involved in a government-controlled registry. Working with the Commission and the states, we believe DMA and the business community could create a more effective "one stop" registry that would provide the most options for consumers.

Predictive Dialing and Caller ID Services

ANA supports the goal of the Commission to evaluate ways to make predictive dialing more effective and to reduce the number of abandoned calls. However, the Commission's conclusion that abandoned calls without disclosures violates the TSR will limit tremendous business efficiencies.

The use of predictive dialers is a common practice in industry, both for telemarketing and other areas where businesses call consumers, such as market research or bill collection. The use of predictive dialers for telemarketing results in only a very small percentage of calls being abandoned. It is unlikely that consumers would desire that TSR disclosures be required for abandoned calls, particularly on their voice mail or answering machines. Any proposed regulation of predictive dialers must recognize the tremendous economic efficiencies that result for companies from the use of this technology.

ANA supports the Commission's proposal to limit the blocking of caller ID services. However, we urge the Commission not to impose an affirmative requirement for companies to disclose and display caller ID. If caller ID is functioning, it provides consumers with another means of choice with respect to those contacting them and it should not be blocked. However, a requirement that all companies use caller ID would raise serious technical problems. It may be technically impossible given the current architecture of the phone system and could be very costly for businesses to implement. As the Commission noted in the NPRM, many telemarketers use a large "trunk side" connection, which is not capable of transmitting caller ID information.

Use of Preacquired Account Information and Upselling

The Commission proposes to prohibit receiving from any person other than the consumer, for use in telemarketing, any consumer's billing information, or disclosing any consumer's billing information to any person for use in telemarketing. ANA does not believe that the prohibition should extend to upsells, because the potential for abuse or confusion as to where the information was obtained does not exist in that situation; the consumer has provided it in the instant conversation.

In the context of upsells, we believe that the laudable goals of the Commission to protect consumers from abusive uses of preacquired account information can be best accomplished through disclosures, rather than prohibitions. It should be sufficient if, prior to transferring a call

in an upsell, the business discloses that it will be transferring the consumer to another company and the consumer consents to such transfer. The Commission could also require that the second business obtain permission prior to using the account information.

This would be a more narrowly tailored approach than a complete prohibition on the use of this information.

Conclusion

ANA appreciates the opportunity to present our concerns about the Commission's proposed rule.

A number of companies use the telephone to conduct consumer surveys or market research. Since there is no intent to offer a product or service for sale in these calls, the TSR does not apply to these types of conversations. We urge the Commission to proceed carefully to ensure that there are no changes in the NPRM that would impair the ability of companies to continue to conduct market research over the telephone.

The stated purpose of the NPRM is to enhance the privacy of consumers. While some consumers may find telemarketing calls to be annoying or intrusive, we do not share the view of the Commission that legitimate telemarketing calls raise privacy concerns.

Telemarketing provides a valuable service to consumers, marketers and our economy. It is also a form of commercial speech protected by the First Amendment. It is critical for the Commission to strike the appropriate balance between consumer choice and burdens on legitimate businesses.

We look forward to working with the Commission on this important matter.

Sincerely,

Daniel L. Jaffe
Executive Vice President

C: John J. Sarsen, Jr., ANA