BEFORE THE
FEDERAL TRADE COMMISSION

COMMENTS OF

THE DIRECT SELLING ASSOCIATION

ON THE

PROPOSED AMENDMENTS TO THE TELEMARKETING SALES RULE

16 CFR § 310
FTC File No. R411001

April 15, 2002

John W. Hesse, II
Senior Attorney and Director, Government Relations

Joseph N. Mariano
Executive Vice President and Legal Counsel

John W. Webb
Attorney, Government Relations

Direct Selling Association
1275 Pennsylvania Avenue, NW, Suite 800
Washington, DC 20004-2411

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I. Introduction\General Background

The Direct Selling Association (DSA) is pleased to have this further opportunity to comment on the proposed amendments to the Federal Trade Commission's ("the Commission" or "the FTC") Telemarketing Sales Rule. DSA participated in earlier Commission discussions regarding this and related rulemakings.[1]

By way of background, DSA is the national trade association representing companies that sell their products and services by personal presentation and demonstration, primarily in the home. These direct selling companies, with almost 11 million individual American direct sellers, include some of the nation's most well known commercial names, such as Amway Corporation, Avon Products, Inc., Mary Kay Inc., and Shaklee Corporation. The home party and person-to-person sales methods used by our companies and their independent contractor sales forces have become an integral part of the American economy. Our industry represents over $25 billion in domestic sales and over $83 billion in worldwide sales. The 11 million individual direct sellers who sell for direct selling companies are independent contractors; they frequently sell on a part-time basis to their neighbors, relatives and friends as a means of supplementing other income sources. Their direct selling activities are generally neither extensive nor sophisticated.

We understand that the intent of the Rule and its underlying legal authority is to regulate deceptive and abusive telemarketing campaigns.[2] In enacting the Telemarketing and Consumer Fraud and Abuse Prevention Act, ("Act") Congress directed the Commission to create regulations that would stop abusive telemarketing practices without unduly burdening legitimate businesses.[3] We believe that the proposed rulemaking does not strike that balance with respect to direct sellers.

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[1] See, e.g., Comments of the Direct Selling Association on the Revised Notice of Proposed Rulemaking Telemarketing Sales Rule, FTC File No. R411001, 16 C.F.R. § 310, June 8, 1995; Comments of the Direct Selling Association on the Telemarketing Sales Rule Review, 16 CFR § 310, April 19, 2002

[2] 15 U.S.C. § 6102 (a) (2001); 16 C.F.R. § 310.3 (2002); 16 C.F.R. § 310.4 (2002)

[3] As the sponsor of the Telemarketing and Consumer Fraud and Abuse Prevention Act, Congressman Swift stated on the House floor, "The telemarketing bill does not impose further regulations on the legitimate telemarketing industry. It is targeted strictly to telemarketing fraud, deception and other patterns of clearly abusive telemarketing activities." See, 140 CONG. REC. H6158-06, *6160 (1994), Indeed, some commenters have noted that Congress did not grant the FTC authority to adopt measures, like the do not call registry, that advance a privacy interest or seek to prevent merely perturbing business practices. We note that neither the Act nor the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act ("USA PATRIOT Act") of 2001, specifically describe or authorize a do-not-call registry.

Direct sellers are *not* telemarketers.[4] Their primary marketing channel is through *personal, face-to-face,* contact with their customers.[5] Nonetheless, direct sellers do occasionally use the phone for a variety of reasons in conjunction with their businesses.[6] Typically, if a direct seller uses the telephone to make a sales call, she will use a residential telephone line in the home to call people she knows or with whom she has a mutually established relationship. On occasion, a direct seller will be referred by a current customer to a prospective customer and will contact that person by telephone to set up an appointment. Additionally, a hostess of a direct selling party might use the telephone to invite potential guests. These legitimate, occasional and harmless uses of the telephone by direct sellers are not the telemarketing practices so often cited by consumers as problems.[7] In short, there are a variety of legitimate, occasional, non-obtrusive uses of the telephone by direct selling individuals and companies that could be significantly (and negatively) affected by the Commission's rulemaking.

II. Misapplication of the Rule to Direct Sellers' Use of the Telephone Would Adversely Affect Individual Direct Sellers, Direct Selling Companies, Direct Selling Customers, and the Public

[4] Exemptions from various laws directed at telemarketers. 16 C.F.R. § 310.2(u) (2000); 16 C.F.R. § 310.6(c) (2000); 16 C.F.R. § 429 (2000); 47 C.F.R. § 64.1200(c)(3) (2000); Ala. Code § 8-19-A-4(1) (2000); Ala. Code § 8-19-A-4(21) (2000); Ala. Code § 8-19-A-4(3)(c) (2000); Ariz. Rev. Stat. Ann. § 44-1273(A)(3) (2000); Ark. Code Ann. § 4-99-103(C)(iv) (Michie 2000); Ark. Code Ann. § 4-99-103(C)(v) (Michie 2000); Cal. Bus. & Prof. Code § 17511.1(e)(8) (West 2000); Cal. Bus. & Prof. Code § 17511.1(e)(9) (West 2000); Colo. Rev. Stat. Ann. § 6-1-302(h) (2000); Colo. Rev. Stat. Ann. § 6-1-302(t) (2000); 2000 Delaware Laws Ch. 262 (H.B. 135); Fla. Stat. Ann. § 501.604(1) (West 2000); Fla. Stat. Ann. § 501.604(21) (West 2000); Fla. Stat. Ann. § 501.604(3) (West 2000); Ga. Code Ann. § 46-5-27(b)(3)(B) (1999); Idaho Code § 48-1005(1)(a) (2000); Idaho Code § 48-1005(1)(b) (2000); Idaho Code § 48-1005(1)(c) (2000); Ky. Rev. Stat. § 367.46951(d)(15) (Baldwin 1999); La. Rev. Stat. Ann. § 45:822(B)(7) (West 2000); La. Rev. Stat. Ann. § 45:822(B)(8) (West 2000); Md. Code Ann. Com. Law § 14-2202(2) (1999); Miss. Code Ann. § 77-3-609 (b)(iii) (West 2000); Miss. Code Ann. § 77-3-609(r) (West 2000); N.C. Gen. Stat. § 66-260(11)(g) (2000); N.C. Gen. Stat. § 66-260(11)(q) (2000); Nev. Rev. Stat. § 599B.010 (11)(l) (2000); Ohio Rev. Code Ann. § 4719.01(B)(1) (Baldwin 2000); Ohio Rev. Code Ann. § 4719.01(B)(3) (Baldwin 2000); Okla. Stat. Ann. tit. 15 § 775A.2(1)(h) (West 2000); Okla. Stat. Ann. tit. 15 § 775A.2(1)(r) (West 2000); Or. Rev. Stat. § 646.551(2)(h) (1999); Or. Rev. Stat. § 646.551(2)(i) (1999); Pa. Stat. Ann. tit. 73 § 2242 (2000); Tex. Bus. & Com. Code Ann. § 38.059 (2000); W. Va. Code § 46A-6F-204 (1999);Wash. Rev. Code Ann. § 19.158.020(3) (West 2000)

[5] 26 U.S.C. § 3508(b)(2) (2001)

[6] DSA surveys indicate that approximately 15% of our direct sales are consummated over the telephone (perhaps in conjunction with or as a result of a pre-existing business relationship or personal contact.) Direct Selling Association, *2001 Direct Selling Growth and Outlook Survey*.

[7] See telemarketers referenced as "unknown organizations and "telemarketing firms" or "telemarketing companies," Jennifer H. Sauer, *Michigan Telemarketing Fraud and "Do Not Call" List: An AARP Survey*, April 2001; Joanne Blinette, *Minnesota Telemarketing Fraud and "Do Not Call" List: An AARP Survey*, December 2001; Katherina Bridges, *AARP New Jersey Telemarketing and "Do Not Call" List Survey*, January 2002

Among its many proposals to revise the Rule, the Commission suggests at 16 C.F.R. § 310.4(b)(1)(iii)(B) of the proposed Rule the creation of a national do-not-call registry with which a direct seller may have to consult before making any telephone call; the Commission also proposes narrowing certain of the current exemptions that ensure that direct sellers (and others) are not covered inappropriately by the Rule.

DSA has always believed that because direct sellers are guests in our customers' homes, we should adhere to the highest standards of courtesy and business ethics. We support the desire of consumers to determine who will have access to their time and attention while they are in their homes.[8] Unfortunately, we believe that should direct sellers be required to consult a do-not-call list before making the occasional telephone contact described above, consumers' choices will actually be limited, not enhanced.

DSA believes, as we did in 1992, when the Federal Communications Commission considered rules pursuant to the enactment of the Telephone Consumer Protection Act (TCPA) of 1991, that a national no call list without appropriate exemptions will be an onerous and potentially damaging restriction on the ability of small businesses, like those of most direct sellers, to use the telephone[9]. We also believe that the practical feasibility of implementing such a list, and small business ability to easily comply with it, is highly questionable.[10]

The potentially substantial access and renewal costs of such a list will fall as much on the small businesses making only incidental use of the telephone as they will on high volume "telemarketers." The average direct seller is a woman, working part-time out of her home to earn additional income to pay for Christmas gifts, family vacations, tuition, or simply to help make ends meet. She is attracted to direct selling for many reasons, including the low start-up costs of direct selling. The potential cost of acquiring the do-not-call list, and the potential penalties for inadvertent violation of the Rule, will likely discourage individuals from engaging in their otherwise simple and inexpensive direct selling activities.

Similarly, DSA expects significant difficulties and costs should direct selling *companies* be made responsible for communicating the do-not-call list to individual, independent contractor direct sellers. Should direct selling companies be responsible for the reproduction of millions of copies of the registry for distribution, the administrative burden would be incalculable, given the turnover of salespeople within this industry. This burden is further compounded by the uncertainty within the proposed Rule regarding registry updates and changes.

Finally, the Commission solicits comment on the interplay between existing state do-not-call lists and the proposed national registry. This interplay will likely be confusing for individual direct sellers who will be unsure of what exemption applies where; which lists to access; which customers are on which list, and a host of other potential conflicts. Such confusion could only

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[8] See Commission's Comments, 67 Fed. Reg. 4492 (2002) (to be codified at 16 C.F.R. § 310) (proposed January 30, 2002) p. 4495

[9] See, Direct Selling Association Comments on the Notice of Proposed Rulemaking Telephone Consumer Protection Act, May 26, 1992.

[10] The very questions outlined in Section IX. (D)(5) of the Commission's Notice of Proposed Rulemaking foreshadow the many practical difficulties facing the FTC, consumers, and covered entities when dealing with the no-call list, 67 Fed. Reg. 4492 (2002) (to be codified at 16 C.F.R. § 310) (proposed January 30, 2002)

add to the difficulties that would face direct sellers attempting to comply with this myriad of state and federal law and regulation.

A. The Rule Does Not and Should Not Apply to Direct Sellers' Occasional Use of the Telephone

We understand that the intent of the Rule and its underlying legal authority is to regulate intrusive and sometimes fraudulent telemarketing campaigns. Accordingly, DSA suggested in its earlier commentary that the Regulation be amended to specifically exempt *occasional* uses of the telephone, like those engaged in by direct sellers. The Commission declined to accept DSA's recommendation as unnecessary, and responded that "an isolated transaction would not constitute 'a plan, program, or campaign' and thus would not be subject to the Rule's provisions." We concur with the Commission's pronouncements in this regard; nevertheless, DSA reiterates its suggestion that the Commission explicitly identify an exemption for telephone calls where the solicitation is an isolated transaction and is not done in the course of pattern or repeated transactions of like nature. Such an exemption is entirely consistent with the statutory authority described above, the Commission's own position, and existing law.[11] Further, regulatory language could better define which activities would or would not constitute a telemarketing "plan, program, or campaign" as used in the Act. DSA suggests that the activities described in Section II of these comments would not and should not constitute such a plan, program or campaign.

B. The Rule Should Not Apply to Direct Sellers Who Make A Telephone Call to Schedule a Later Face-To-Face Appointment

The FTC's proposed amendment in 16 C.F.R. § 310.6(c) of the Rule would limit the existing exemption for telephone contacts intended only to schedule later face-to-face appointments. Specifically, these telephone contacts would not be exempt from the do-not-call provisions of the Rule.

Individual direct sellers might engage in such telephone contacts and thus be covered by the proposed Rule. For example, a salesperson of cosmetics who arranges in home "parties" (i.e. demonstrations of the product at semi-social gatherings of friends and potential customers) might call a friend of a friend to gauge her interest in setting up a later sales party. That innocuous (and frequently welcome) contact could force individual direct sellers to check a do-not-call registry before arranging the home party. We believe such coverage to be inappropriate, unnecessary, and damaging to direct sellers.

An individual direct seller might be so daunted by the potential difficulties of accessing and checking the registry, the cost of the list[12], and/or the possible penalties for inadvertent violation of the list provision of the Rule, she might forego making any use of the telephone, or forego the

[11] Such an exemption already exists in many state laws. See, e.g., Ala. Code § 8-19-A-4 (1) (2000); 2000 Delaware Laws Ch. 262 (H.B. 135); Fla. Stat. Ann. § 501.604(1) (West 2000); Idaho Code § 48-1005(1)(a) (2000); Miss. Code Ann. § 77-3-609 (a) (West 2000); N.C. Gen. Stat. § 66-260(11)(g) (2000); Ohio Rev. Code Ann. § 4719.01(B)(1) (Baldwin 2000); Wash. Rev. Code Ann. § 19.158.020(3)(a)(i) (West 2000).

[12] We observe that the practical requirements for small businesses trying to comply with the Rule are as yet unknown.

direct selling business altogether. Direct sellers, their customers, and the marketplace would be damaged. We believe this result to be counter to the intent of the Act.

The Commission suggests that face-to-face transactions are no less susceptible to abusive practices than telephone contacts and therefore should not be the basis of any exemption. Face-to-face sales presentations are already subject to significant, long-standing regulation that has largely eliminated or mitigated such abusive practices.[13] DSA has long supported these "cooling-off" laws and regulations, which effectively ended the reportedly prevalent high-pressure sales tactics of certain door-to-door salespeople in the 1960's and 1970's. In any case, we believe telephone contacts made by direct sellers to arrange later face-to-face presentations should not be covered by the do-not-call registry, and that these later personal presentations are subject to sufficient and appropriate regulation.

Accordingly, DSA respectfully urges the Commission to again consider extending the current face-to-face exemption to the proposed do-not-call list requirement in the Rule. Many jurisdictions have exempted such contacts from coverage of their do-not-call list laws.[14]

C. The Rule Should Not Apply to Direct Sellers Who Make a Telephone Call to An Existing Friend or Customer

The Rule does not exempt telephone calls made to foster or service an existing business relationship or in connection with an existing personal relationship. It should. Such an exemption exists in many state telemarketing laws. [15]

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[13] See, Rule Concerning a Cooling-Off Period for Sales Made at Homes or at Certain Other Locations, 16 C.F.R. § 429 (2002).

[14] We note with interest the comments of FTC Chairman Timothy J. Muris, who indicated in a speech to the National Association of Attorney's General on March 20, 2002 that the FTC was trying to learn from the experience of the states with regard to the do-not-call list. Examples of state laws which we believe should provide a model to the FTC in this regard include the following which exempt telephone contacts intended to arrange a later face-to-face meeting: Ala. Code § 8-19-A-4(3)(c) (2000); Ariz. Rev. Stat. Ann. § 44-1273(A)(3) (2000); Ark. Code Ann. § 4-99-103(C)(v) (Michie 2000); Cal. Bus. & Prof. Code § 17511.1(e)(9) (West 2000); Colo. Rev. Stat. Ann. § 6-1-302(h) (2000); Fla. Stat. Ann. § 501.604(3) (West 2000); Idaho Code § 48-1005(1)(c) (2000); Ky. Rev. Stat. § 367.46951(d)(15) (Baldwin 1999); La. Rev. Stat. Ann. § 45:822(B)(8) (West 2000); Miss. Code Ann. § 77-3-609 (b)(iii) (West 2000); Nev. Rev. Stat. § 599B.010 (11)(l) (2000); N.C. Gen. Stat. § 66-260(11)(q) (2000); Ohio Rev. Code Ann. § 4719.01(B)(3) (Baldwin 2000); Okla. Stat. Ann. tit. 15 § 775A.2(1)(h) (West 2000); Or. Rev. Stat. § 646.551(2)(i) (1999); Pa. Stat. Ann. tit. 73 § 2242 (2000); Tex. Bus. & Com. Code Ann. § 38.059 (2000); Wash. Rev. Code Ann. § 19.158.020(3)(d) (West 2000); W. Va. Code § 46A-6F-204 (1999).

[15] Ala. Code § 8-19-A-4(21) (2000); Ark. Code Ann. § 4-99-103(C)(iv) (Michie 2000); Cal. Bus. & Prof. Code § 17511.1(e)(8) (West 2000); Colo. Rev. Stat. Ann. § 6-1-302(t) (2000); Fla. Stat. Ann. § 501.604(21) (West 2000); Ga. Code Ann. § 46-5-27(b)(3)(B) (1999); Idaho Code § 48-1005(1)(b) (2000); La. Rev. Stat. Ann. § 45:822(B)(7) (West 2000); Md. Code Ann. Com. Law § 14-2202(2) (1999); Miss. Code Ann. § 77-3-609(r) (West 2000); Okla. Stat. Ann. tit. 15 § 775A.2(1)(r) (West 2000); Or. Rev. Stat. § 646.551(2)(h) (1999); Wash. Rev. Code Ann. § 19.158.020(3)(c) (West 2000).

A direct seller might occasionally call individuals with whom they have an on-going commercial or personal relationship, or those with whom they had a previous commercial or personal relationship. We believe these calls to be reasonable, frequently welcome and *expected* by the consumer. Indeed, it is the personal relationship with a direct seller that makes direct selling so unique and valuable to the consumer. Were a direct seller to be effectively prohibited from servicing and communicating with her customers, the value that she delivers to the consumer would be significantly lessened. We believe that consumers who otherwise might asked to be placed on the do-not-call registry, would expect and hope that the direct seller with whom they have developed a productive personal and/or commercial relationship would continue to contact them. These ongoing contacts, including those by telephone, add to the convenience and sociability that so characterize direct selling. The proposed Rule should allow these business and personal contact without obtaining potentially cumbersome and unworkable "express verifiable authorizations, " required by 16 C.F.R. § 310.4(b)(1)(iii)(B). The do-not-call list should be clearly focused on telemarketers, not direct sellers and other small businesses that pride themselves in providing personal service to their customers.

We suggest an exemption from the Rule for telephone calls made to any person with whom the caller has an established or prior business or personal relationship. The established business relationship language is currently part of the Federal Communications Commission's (FCC) Telephone Solicitation Rule.[16] By including similar language the Commission would harmonize federal law and provide small entrepreneurial businesses with additional regulatory comfort and predictability. The telemarketing laws of twelve other states currently exempt prior personal relationships, as well.[17]

III. Calls to Direct Sellers From Consumers Who Are Responding to General Media Advertisements Should Not Be Covered By the Rule.

Direct selling companies and individuals sometimes place general media advertising that describes their businesses and solicits phone calls from prospective customers and salespeople. The existing Rule provides an exemption for telephone calls initiated by a customer in response to an advertisement through any media, other than direct mail. The proposed amendment to the Rule in 16 C.F.R 310.6(e), the general media exemption, would disallow this exemption for those offering "business opportunities" not already covered by the existing Trade Regulation Rule on Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures (the "Franchise Rule").[18] DSA is concerned that the placement of any general media advertising by direct sellers could thus cause calls *initiated by consumers* to direct sellers to be covered by the Rule. We believe such coverage to be unnecessary, potentially damaging to individual direct sellers, and unauthorized by Congress.

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[16] 47 C.F.R. § 64.1200(c)(3) (2000).

[17] Ala. Code § 8-19-A-4(21) (2000); Ark. Code Ann. § 4-99-103(C)(iv) (Michie 2000); Cal. Bus. & Prof. Code § 17511.1(e)(8) (West 2000); Colo. Rev. Stat. Ann. § 6-1-302(t) (2000); Fla. Stat. Ann. § 501.604(21) (West 2000); Ga. Code Ann. § 46-5-27(b)(3)(B) (1999); Idaho Code § 48-1005(1)(b) (2000); La. Rev. Stat. Ann. § 45:822(B)(7) (West 2000); Md. Code Ann. Com. Law § 14-2202(2) (1999); Miss. Code Ann. § 77-3-609(r) (West 2000); Okla. Stat. Ann. tit. 15 § 775A.2(1)(r) (West 2000); Or. Rev. Stat. § 646.551(2)(h) (1999); Wash. Rev. Code Ann. § 19.158.020(3)(c) (West 2000).

[18] 16 C.F.R. § 436(2001)

For example, an individual direct seller may leave a flyer soliciting customers or salespeople on a local grocery store bulletin board. Consumer calls in response to the flyer could be covered by the requirements of the Rule. The part-time direct seller who receives the call might easily and unknowingly violate the requirements of the Rule, never suspecting that such an innocuous communication could be the subject of intense government regulation requiring detailed record-keeping and specific, detailed disclosures. Ironically, an isolated call by an individual direct seller to a consumer would not be covered by the Rule, but an isolated call *initiated by the consumer* in response to that flyer would be. This result seems at best incongruous and confusing.

DSA believes that a communication about prospective involvement in an activity not otherwise covered by the Franchise Rule should not be covered by the proposed Telemarketing Rule. There is nothing inherently deceptive or abusive about communications over the telephone (particularly those initiated by the consumer) regarding a business opportunity; there should be even fewer concerns about communications related to *prospective* transactions involving activities clearly deemed de minimis by the Franchise Rule. DSA strongly believes that if a business, where the required payments for participation is less than $500, poses a minimal risk under the Franchise Rule, then communications initiated by the consumer about prospective involvement in those businesses should not require coverage under the proposed Telemarketing Rule. Additionally, coverage of those communications under the proposed Rule will add burdensome regulation not contemplated or authorized by the Act.

We believe that the general media exemption of the existing Rule should not be amended.

IV. Summary

In summary, DSA respectfully asks the commission to adopt the recommendations made within this document. DSA has raised several concerns and suggestions:

- Congress mandated that the FTC strike an equitable balance between stopping abusive telemarketing practices without unduly burdening legitimate businesses. This rulemaking does not strike that balance with respect to direct sellers.
- DSA believes, as we did in 1992 when the Federal Communications Commission considered rules pursuant to the enactment of the Telephone Consumer Protection Act (TCPA) of 1991, that a national do-not-call list will be an onerous and potentially damaging restriction on the ability of small businesses, like those of most direct sellers, to use the telephone.
- DSA concurs with the FTC position that isolated telephone calls, like those of direct sellers, are not covered by the Act or Rule. DSA, nevertheless, reiterates its suggestion that the Commission explicitly identify an exemption for telephone calls where the solicitation is an isolated transaction and not done in the course of pattern or repeated transactions of like nature. Such an exemption is entirely consistent with the statutory authority described above, the Commission's own position, and existing law.
- The FTC's proposed amendment would limit the existing exemption for telephone contacts intended only to schedule later face-to-face appointments. Specifically, these

telephone contacts would not be exempt from the do-not-call provisions of the Rule. We believe it unnecessary to subject telephone contacts made by direct sellers to arrange such appointment to any requirements of the Rule.

- We suggest an exemption from the Rule for telephone calls made to any person with whom the caller has an established or prior relationship.
- DSA opposes narrowing the general media exemption with respect to business opportunities. It is DSA's position that any communication regarding activities exempted from coverage under the Franchise Rule should be exempted from coverage under the Telemarketing Sales Rule.

Effective laws and regulations are always narrowly tailored to address a specific harm. Overly broad laws and regulations create administrative problems for the public and private sector and dilute their own effectiveness. We ask the FTC to maximize the effectiveness and efficiency of the Telemarketing Sales Rule by tailoring it to regulate the elements creating the harm and not overburdening business in a time of economic recovery. The Direct Selling Association appreciates the opportunity to express our views.