April 15, 2002

Federal Trade Commission
Office of the Secretary
Room 159
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

Re: Telemarketing Rulemaking — Comment (FTC File No. R411001).

Ladies and Gentlemen:

The Electronic Financial Services Council ("EFSC") appreciates the opportunity to respond to the request for comment concerning the Commission's proposed amendments (the "Proposal") to the Telemarketing Sales Rule (the "Rule"), 16 C.F.R. Part 310. *See* 67 Fed. Reg. 4491-4546 (January 30, 2002), FTC File No. R411001. The EFSC represents many of the leading companies offering financial services over the Internet.[1] The EFSC's mission is to seek the modernization of laws and regulations so as to facilitate the electronic delivery of financial services (including mortgages, insurance, real estate, banking services, and securities). The EFSC played a leading role in the enactment of the Electronic Signatures in Global and National Commerce Act ("ESIGN Act"), which is intended to facilitate e-commerce through a uniform, technology-neutral set of rules for conducting business electronically.

Although the EFSC's focus is on emerging new technologies, the older technology of the telephone remains an essential element of our members' online and offline businesses. The availability of a toll-free help line on a web site is often essential to establishing consumers' comfort with online purchases. At the same time, our members are moving toward integrating new technologies such as smart cards into their telephone-based mail-order businesses. These comments are intended to address the specific impact of the Proposal on the interaction between the telephonic communications subject to the Rule and emerging forms of e-commerce.

Summary

While the EFSC strongly supports the goals of the Proposal, we are particularly concerned about two issues:

- **The proposed expansion of the "express verifiable authorization" requirement,** which, we believe, could have an unintended negative impact on the development of e-commerce: Expansion of this requirement could impose significant compliance burdens in connection with alternative payment systems — essentially all payment systems other than traditional

[1] Members include: eOriginal Inc.; Esurance; Fannie Mae; Freddie Mac; GE Capital Mortgage; GMAC Mortgage Corporation; Intuit Inc.; Lender's Services Inc.; Lending Tree; MERS; The Principal Financial Group; AIG/ United Guaranty Insurance; Wells Fargo Home Mortgage; and Wave Systems. Additional information about the EFSC is available on the Internet at www.efscouncil.org.

checks and credit cards — that are not justified by whatever additional consumer protection they might provide. In addition, in implementing those new requirements, the Proposal, as drafted, appears to impose standards for electronic signatures that go beyond both the letter and the spirit of the Electronic Signatures in Global and National Commerce ("ESIGN") Act.[2] The proposal to expand the current requirements for direct mail to include electronic solicitations also has implications under the ESIGN Act.

- **The need for the proposed national "do-not-call" registry to replace similar, state-by-state do-not-call-list requirements.** Continuing state requirements after the FTC's nationwide list is implemented would particularly burdensome for companies engaged in e-commerce, which, by definition, transcends state lines. It would also be unhelpful and confusing for e-commerce customers, who would have to maintain their information on both their home state list and the FTC's list. We believe that the Commission has the authority to preempt state do-not-call list requirements under well-established principles of federal preemption.

As a general matter, we would note that the express verifiable authorization proposals raise significant questions relating to the regulation of payment systems that are of a much more technical nature than those raised by the "do-not-call" proposal. For that reason, if the Commission decides to proceed with the proposal to create a registry, it should consider putting it on a separate track from the proposed expansion of the express verifiable authorization requirements.

Expansion of "Express Verifiable Authorization" Requirement and Other E-Commerce Issues

Under the current Rule, a telemarketer that uses a demand draft (also called a "phone check") to debit a consumer's deposit account must obtain "express verifiable authorization" to do so. *See* 16 C.F.R. § 310.3(a)(3). The Proposal would greatly expand the reach of the express verifiable authorization requirement to cover not only demand drafts, but also any other form of payment that —

> "[D]oes not impose a limitation on the customer's or donor's liability for unauthorized charges nor provide for dispute resolution procedures pursuant to, or comparable to those available under, the Fair Credit Billing Act and the Truth in Lending Act, as amended."[3]

[2] Pub. L. No. 106-229, 106th Cong., 2d Sess., 114 Stat. 464 (2000), *codified at* 15 U.S.C. §§ 7001 *et seq.*

[3] Proposed 16 C.F.R. § 310.3(a)(3), 67 Fed. Reg. at 4542.

At the same time that it would greatly broaden the reach of the express verifiable authorization requirement, the Proposal would also make it more difficult to comply with it. Under the current Rule, express verifiable authorization is defined as:

> "(1) Express written authorization by the customer, including signature; (2) express oral authorization that is tape recorded and made available upon request to the customer's bank; or (3) written confirmation of the transaction, sent to the customer before submission of the draft for payment."[4]

The Proposal would eliminate the third alternative — subsequent written confirmation — and add additional requirements to the already burdensome second alternative of a taped oral authorization.

In combination, these proposals would have a very negative effect on developing electronic payment methods, including methods that are inherently low-risk to consumers and that low-income consumers rely on disproportionately. Moreover, if the Commission adopts its proposed narrowing of the acceptable methods of express verifiable authorization, then many telemarketers will find that their only practical alternative is to obtain a "written" authorization and signature. Although the Proposal permits such "written" authorizations and signatures to be performed electronically, it does not make clear that an authorization and signature that complies with the ESIGN Act also satisfies the Rule. For these reasons, the EFSC believes that the Commission should:

- **Not expand the express verifiable authorization requirement beyond demand drafts** to new technologies such as pre-paid "smart" cards, and clarify that it does not apply to existing, established technologies such as debit cards and Automated Clearing House ("ACH") transactions.
- **Retain the existing alternative of allowing a written confirmation as the express verifiable authorization,** which has served both industry and consumers well.
- **Clarify that an electronic authorization "written" authorization that is consistent with the ESIGN Act complies with the Rule.** Although this principle is inherent in the express language of the ESIGN Act, it would be helpful to make it explicit in the Rule.

---

4 *See* the preamble to the Proposal, 67 Fed. Reg. at 4506, summarizing existing 16 C.F.R. § 310.3(a)(3).

Do Not Expand the Express Verifiable Authorization Requirement Beyond Demand Drafts

The current Rule prohibits a telemarketer from obtaining or submitting a demand draft without the consumer's express verifiable authorization.[5] The Proposal would expand this requirement to cover:

> "[S]ubmit[ting] billing information for payment without the customer's express verifiable authorization when the method of payment does not have the [error resolution and liability limit] protections provided by, or comparable to those available under, the Fair Credit Billing Act ('FCBA') and the Truth in Lending Act ('TILA')."[6]

Thus, the Commission is proposing to replace the current Rule's generally flexible position on alternative payment systems with a vague requirement that any other payment method be "comparable" to the FCBA and TILA. This change is likely to discourage experimentation by businesses in new methods of payment processing. Moreover, the language of the Proposal leaves significant uncertainty as to which payment systems are subject to the express verifiable authorization requirement. The Proposal does not explain what makes a limitation of liability or dispute resolution procedure "comparable" to those of the FCBA and TILA, leaving questions concerning whether ACH payments or debit card transactions are comparable. Nor does the Proposal make clear whether or not a seller that voluntarily adopts liability limitations or dispute resolution procedures comparable — even identical to or stronger than — those of the FCBA and TILA will thereby escape the requirement to obtain express verifiable authorization, or whether the "comparable" limitations and procedures must be imposed by law.

The new burdens imposed by the Proposal — and the risks created by the ambiguities that it introduces — would strongly discourage sellers from allowing consumers to use any payment system other than a credit card. Restricting payment to credit cards could create serious operational issues, as the Visa and MasterCard rules require their branded credit and debit cards to be accepted by merchants on an equal basis. This disincentive is unfriendly to consumers, makes technological innovations less likely, and promotes reliance on a single mode of payment that is not particularly secure from fraud and abuse. The Proposal thus does not achieve great benefits for consumers in exchange for the costs it imposes.

If there is evidence that some method of payment other than the demand draft is being used in a deceptive or abusive manner, the Commission has ample authority to address it. The Commission could either issue a targeted amendment to the Rule or enforce the Rule's existing

---

5 16 C.F.R. 310.3(a)(3).

6 *Id.* at 4495.

general prohibition against "[m]aking a false or misleading statement to induce any person to pay for goods or services."[7] But **there is no basis for applying the express verifiable authorization requirement indiscriminately to all forms of payment that do not provide protections "comparable" to the FCBA and TILA.**

Clarify That Debit Cards and ACH Transactions Are Not Covered Under the Terms of the Proposal

Although the Rule does not define protections that are "comparable" to the FCBA and TILA, it suggests that "negotiable paper" (presumably, instruments subject to the Uniform Commercial Code ["UCC"]) is subject to "comparable" requirements,[8] while debit cards are not.[9] In fact, payments to telemarketers made with debit cards or via the ACH system are subject to the liability limits and error resolution procedures of the EFTA. Federal Reserve Board ("FRB") Regulation E and the Official Staff Commentary on the Regulation define an "electronic fund transfer" as including, among other things:

- Any "transfers resulting from debit card transactions, whether or not initiated through an electronic terminal"[10]; and
- "A transfer sent via ACH."[11]

The EFTA/Regulation E error resolution procedures and liability limits are clearly "comparable," by any reasonable measure, to the protections provided under the FCBA and TILA. The EFTA/Regulation E error resolution procedures generally require that a debit card error be resolved in 90 days,[12] while the FCBA requires that it be resolved in two billing cycles with a maximum of 90 days.[13] The EFTA liability scheme is a hybrid of the TILA and UCC liability limitations (with its own unique twists) in that it provides for a $50 ceiling, as in TILA, in most instances, but provides for increased liability (including unlimited liability) in certain specified instances of customer negligence.[14]

---

7 16 C.F.R. § 310.3(a)(4).

8 *See* 67 Fed. Reg. at 4495.

9 *See id.* note 42.

10 12 C.F.R. § 205.3(b)(5).

11 Official Staff Commentary to Regulation E, § 3(b)-1(ii).

12 *See* Regulation E, 12 C.F.R. § 205.11(c)(3)(ii)(B); Official Staff Commentary to Regulation E § 11(c)(3)-1.

13 *Compare* 12 C.F.R. § 205.11 (Regulation E) *with id.* § 226.13 (Regulation Z).

14 *Compare id.* (Regulation E) *with id.* § 226.12(b) (Regulation Z).

Thus, debit cards and ACH transactions are subject to "comparable" error resolution and liability provisions to FCBA and TILA and should not be subject to the express verifiable authorization requirement even under the terms of the Proposal as drafted. If the Commission decides to expand the express verifiable authorization requirement, it should **specifically state that debit card and ACH transactions that are covered by the EFTA and Regulation E are not subject to it.**

Apart from the legal analysis, imposing onerous requirements on sellers that accept debit cards or ACH payments would not be good for consumers. Debit cards and ACH payments allow consumers who cannot qualify for a credit card or do not wish to add to their credit card balances to take advantage of the convenience of telephone payment. Imposing a redundant and unnecessary express verifiable authorization requirement could result in telemarketers requiring the use of a credit card, which would have a negative impact on this vulnerable group.

Do Not Discriminate Against New Technologies

The Proposal would also apply the express verifiable authorization requirement to other forms of payment, including emerging technologies such as prepaid "cash" cards. As noted, the requirement currently applies only to demand drafts.

Sellers of goods and services through telemarketing and other channels have experimented with a wide variety of billing systems, from the traditional (credit cards, debit cards and other electronic funds transfers) to the innovative (billing through mortgage accounts, utilities accounts, tax refund proceeds, and other methods). They have provided an ever-increasing variety of payment options for consumers.

By requiring express verifiable authorization, the Proposal could significantly limit the use of these alternative payment methods in telemarketing. Although the Proposal would make it a deceptive practice to submit billing information for *any* alternative payment method without obtaining express verifiable authorization, the Commission does not cite evidence that it is deceptive to use these alternative methods of payment simply because FCBA/TILA or "comparable" protections do not apply. Instead, the Commission asserts that consumers do not understand that use of these alternate methods may result in a charge to an "account" such as a mortgage utility account.[15]

The comparison between a demand draft — which results in an immediate debit of funds from a consumer's deposit account — and typical alternative methods of payment in use today is inapposite because an unauthorized charge for those other forms of payment does not create nearly the same injury. In the case of a mortgage account, for example, a charge for mortgage

15 67 Fed. Reg. at 4507.

life and disability insurance may be added to the account, but the consumer does not risk foreclosure by refusing to pay it (and will often have the right to cancel the policy before making any payments). In fact, some emerging payment systems provide significantly greater security than credit card systems. In situations in which there virtually no possibility of an unauthorized charge (or at least of a charge for which the consumer will be held responsible), the lack of TILA or FCBA (or the comparable EFTA) protection does not "present a particular hardship" to the consumer. There is no basis in those situations for concluding that it would be deceptive to bill the consumer using a secure payment method without complying with the express verifiable authorization requirement.

In other systems, such as the Visa cash card or other forms of prepaid payment devices, the consumer is made aware that the card is the equivalent of cash.[16] The FRB proposed subjecting some cash cards to the EFTA and Regulation E in 1996.[17] The FRB has never acted on its proposal, presumably because commenters pointed out that it would have imposed severe burdens on the development of new payment technologies and would have provided very limited consumer benefits. Thus, in the case of cash cards, the FRB, which is responsible for regulating the product, has not seen fit to apply EFTA coverage. The Commission should not second-guess this determination.

In summary, **there is no basis for a blanket extension of the express verifiable authorization requirement to all forms of payment that are not subject to the FCBA/TILA error resolution requirements and liability limits.**

Retain the Existing Alternative of a "Written" Confirmations

Under the Proposal, a telemarketer could no longer verify the use of the demand draft (or the other transactions that would now be subject to the express verifiable authorization requirement) through a written or electronic confirmation before billing information is submitted.[18] Instead, the telemarketer would only be able to obtain the "express verifiable authorization" needed to draw up the demand draft by either (1) prior written authorization, which would have to be signed, or (2) prior oral authorization involving the exchange of a number of specific pieces of information, which would have to be recorded in its entirety and made available on demand to the consumer or the consumer's bank.[19]

---

16 *See* the Visa International Web Site, http://international.visa.com/ps/products/vcash/work.jsp, (stating that "Visa Cash is just like cash and can't be replaced if lost or stolen").

17 *See* existing 16 C.F.R. § 310.3(a)(3)(iii).

18 67 Fed. Reg. at 4506.

19 Proposed 16 C.F.R. 310.3(a)(3).

The existing oral authorization requirement is cumbersome and the Commission is proposing to add still more documentation requirements to it. As a consequence, some telemarketers will conclude that their only practical alternative is to obtain signed, written authorization for alternative payment methods, or simply abandon those payment methods.

The Commission originally proposed to require a written authorization for a demand draft, but replaced that requirement with the existing express verifiable authorization requirement. At the time, the Commission recognized that requiring written authorization would hurt the millions of consumers who do not have credit cards:

> "Demand drafts can provide a means for those consumers to enjoy the same benefits of expeditious telephone transactions that use of a credit card provides."
>
> ". . . .
>
> "Based on the extensive use of demand drafts by legitimate companies, the Commission is persuaded that demand drafts, in and of themselves, are not necessarily harmful, and, in fact may produce real benefits for consumers. The Commission also believes that *requiring prior written authorization could be tantamount to eliminating this emerging payment alternative.* "[20]

In issuing the original Rule, the Commission made a conscious decision to balance the risks and the benefits of the written confirmation method, noting that the general prohibition against misrepresenting a seller's refund policy would protect consumers.[21] Thus, it is perplexing that the Proposal simply disregards the careful balancing that the Commission conducted in permitting written confirmation as a method of express verifiable authorization under the current Rule. Instead, the Proposal makes two assertions that are not supported by the rulemaking record:

- **"[W]ritten confirmation . . . is seldom, if ever, used as a method of express verifiable authorization."[22]** The Proposal cites a letter and statements by participants in a forum that the Commission conducted on the Rule to support this contention. In fact, although some of the participants indicated that they often taped calls, there is no direct statement in any of the

---

[20] FTC, Telemarketing Sales Rule: Statement of Basis and Purpose and Final Rule, 60 Fed. Reg. 43842, 43850-51 (1995).

[21] *Id.* at 43851,

[22] 67 Fed. Reg. at 4508 (footnote omitted).

materials cited that legitimate, mainstream telemarketers are not now using written confirmation to confirm demand drafts.[23]

- **"[W]hen [the written confirmation] method is used, it is subject to abuse."** In fact, the *J.S.A. Society* consent order, which the FTC relies on as the basis for this statement, includes extensive procedures to prevent the abuse of the *tape-recorded* alternative for express verifiable authorization, but imposed no specific remedies directed at abuse of the written confirmation option.[24] In that case, it seems clear that eliminating the written confirmation option would not have prevented the alleged fraud.

As the Commission previously concluded, the written confirmation method, when used by a legitimate, mainstream telemarketer, protects consumers from unauthorized charges without unduly burdening the industry. Therefore, **the Commission should retain the written confirmation option for express verifiable authorization.**

Avoid Imposing Burdensome Electronic Signature Requirements

The Rule in its current form predates most developments in the law of electronic transactions, including the promulgation of the Uniform Electronic Transactions Act ("UETA") in 1999 and the enactment of the ESIGN Act in 2000. Neither the current Rule nor the Telemarketing and Consumer Fraud and Abuse Prevention Act[25] that mandates the Rule mentions electronic signatures or records. In its current form, therefore, the Rule is subject to the ESIGN Act requirement that any signature or writing requirement that it imposes can be satisfied by an electronic signature or electronic record.

This gives telemarketers the flexibility to comply with specific requirements of the Rule in many ways. The requirement that the consumer receive "written confirmation" of the use of a demand draft, for example, is satisfied by a printed document containing the required information sent by mail, an image of a printed document sent by facsimile, an email containing the required information, an email with an attached Acrobat "PDF" file containing an image of a printed

---

23 The *Reese Brothers* letter cited by the FTC states that that telemarketer now records its calls, but does not indicate whether the tapes are used to comply with the express verifiable authorization requirement for demand drafts. In addition, that letter points out that tape-recorded verification is expensive to the industry and can be annoying to consumers. The statements at the FTC July 2000 Forum on the Rule also do not indicate that written confirmation is not used to comply with the requirement. In fact, the witness whose testimony appears to be the main basis for the FTC's contention later noted that his telemarketing firm does not use demand drafts. *See* FTC July 2000 Forum Transcript 159 (statement of Tim Searcy).

24 *See FTC v. S.J.A. Society, Inc.,* No. 2:97cv472, Stipulated Final Judgment and Order for Permanent Injunction and Consumer Redress, Para. VIII (E.D. Va filed Sept. 3, 1997) (available at http://www.ftc.gov/os/1997/9709/sja5.htm).

25 15 U.S.C. 6101 *et seq.*

document, and numerous other modes of delivery. All of these modes of communication can be equally valid, allowing a telemarketer to use electronic disclosures as a substitute for printed ones.

The Proposal appears to threaten this flexibility, however. Although the main text of the Proposal does not discuss electronic signatures or records, in a footnote the Proposal states that "for purposes of this Rule, the term 'signature' shall include a verifiable electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law."[26] This footnote seemingly applies to the entire Proposal, and it could be read to impose a verifiability requirement on the use of any electronic signature in connection with compliance with the Proposal. Generally speaking, public/private key infrastructure ("PKI") encryption for digital signatures is the technology most often understood to constitute a "verifiable" electronic signature.

Although PKI is a very secure technology, it is also very expensive and, as such, is not suitable for the small transactions typical of many telemarketing sales.[27] Moreover, in order to use the technology, both the seller and the customer must have previously obtained, and learned to use, complex software.[28] This makes PKI in its present form unsuitable for use in connection with sales to consumers or small businesses. Other forms of electronic signatures are more appropriate for typical telemarketing transactions covered by the Rule.

In enacting the ESIGN Act, Congress recognized that there is no "one-size-fits-all" solution for authenticating e-commerce transactions. Reflecting that congressional determination, Section 104(b)(2)(C)(iii) of the ESIGN Act makes clear that federal agencies may not promulgate rules that "require, or accord greater legal status or effect to, the implementation of a specific technology or technical specification[.]" Thus, if the footnote were interpreted as favoring digital signature technology, it would conflict with the ESIGN Act.

Furthermore, the ESIGN Act also provides in Section 104(b)(2)(C) that federal agencies may only impose requirements on the use of electronic records if—

- The agency finds that "there is a substantial justification for the regulation, order, or guidance"; and
- The requirements imposed are "substantially equivalent" to those imposed on records that are not electronic and will not "impose unreasonable costs on the acceptance and use of

26 Proposed 16 C.F.R. 310.3, note 3, 67 Fed. Reg. at 4542

27 *See* "Not All E-Signatures Are Equal," *CIO Magazine*, Jan. 15, 2001 (available at http://www.cio.com/archive/011501/fine_content.html).

28 *See id.*

electronic records."

The Commission has not made a finding of substantial justification for additional requirements on electronic signatures, and it is unlikely that it could do so, because handwritten signatures obtained by a telemarketer are no more verifiable than electronic ones. As a result, requiring verifiability only for electronic signatures would mean that the requirements on electronic records are not "substantially equivalent," as required by the ESIGN Act. Handwritten signatures are not necessarily verifiable, particularly when used in a context, such as telemarketing, in which the seller cannot compare the signature received with a trusted sample of the purported signer's handwriting. Even if such a sample were available, the telemarketer's employees would lack the proper training and experience to make such a comparison. The utility of handwritten signatures as a tool for confirming authenticity of assent is often greatly overestimated.[29]

Although the ESIGN Act, by its terms, would take precedence over any contradictory language, the Rule should be clarified so that there is no ambiguity over whether electronic signature is acceptable, by rephrasing the language to read as follows:

> "For purposes of this Rule, the term 'signature' shall include an electronic signature as defined in Section 106 of the Electronic Signatures in Global and National Commerce Act (15 U.S.C. § 7006) or under other applicable federal law or state contract law."

As an additional aid to clarity, we would suggest moving the definition from the footnote to the "Definitions" section of the rule, Section 310.2.

<u>Clarify That the ESIGN Act Applies to the "Direct Mail" Exception</u>

Another issue that implicates the ESIGN Act is the Rule's "direct mail" exception. Under both the existing Rule and the Proposal, an inbound call from a consumer in response to a "direct mail" solicitation is subject to the Rule unless the seller discloses material information in the solicitation such as the total cost of the goods or services, material conditions or restrictions, and

---

29 What little empirical evidence exists suggests, to the contrary, that expert handwriting analysis is less reliable than a polygraph test. A series of unpublished Forensic Science Foundation studies conducted from 1975 to 1987 found that handwriting experts made correct identifications 45% of the time, erred completely or partially 36% of the time, and could not come to a conclusion 19% of the time. *See* D. Michael Risinger, Mark P. Denbeaux and Michael J. Saks, *Exorcism of Ignorance as a Proxy for Rational Knowledge: The Lessons of Handwriting Identification "Expertise,"* 137 U. Pa L. Rev. 731, 747 (1989). *See also* D. Michael Risinger and Michael J. Saks, *Science and Nonscience in the Courts:* Daubert *Meets Handwriting Identification Expertise*, 82 Iowa L. Rev. 21 (1996).

a no-refund policy.[30] The material information that must be disclosed is the same information that a telemarketer in a transaction subject to the Rule must disclose before the customer pays for the goods or services. The Commission is proposing to broaden the scope of the requirement by applying it to facsimile transmissions and e-mails as well as paper materials.[31]

The Rule gives direct-mail marketers two choices: include the material disclosures needed for the exemption in the outgoing solicitation, or elect to be bound by the Rule as to the incoming call. If the Commission expands the scope of the requirement as proposed, then companies that market products and services by facsimile or e-mail will have the same choice—include the disclosures in the outbound fax or e-mail, or treat any inbound calls received as a result of the solicitation as subject to the Rule.

Where the product or service being marketed is relatively simple, it may be possible to include all the material information in the outbound solicitation and thereby qualify for the exemption. It may be difficult to do so for more complex products, including products that are particularly amenable to electronic marketing, such as office supply sales in which the pricing depends on the particular product and quantity ordered.[32] In those situations, marketers may decide to treat inbound calls generated by the solicitation as subject to the Rule. The company may want to make the required disclosures of material information electronically — via facsimile, e-mail, or a display on their web site. For example, a company might direct the customer to the web site to read the details of the transaction and confirm the purchase.

The Commission stated in the preambles to both the existing Rule and the Proposal that the material-information disclosures can be made either orally or in writing.[33] Because the Rule does not specify the method of disclosure, the disclosure falls under the general principle of the ESIGN Act that an electronic "record" has the same status as a written one rather than the special consumer-consent provisions for written records.[34] Therefore, **a telemarketer's electronic disclosure of the material information satisfies the Telemarketing Rule, and the Commission should clarify this point** if it adopts the Proposal in final form.

---

30 See 16 C.F.R. § 310.6(f).

31 *See* 67 Fed. Reg. at 4544.

3232 Outbound telemarketing of these "nondurable office products" is subject to the Rule even when they are offered to businesses. *See* 16 C.F.R. § 310.6(g).

33 *See* 67 Fed. Reg. at 4505, *citing* 60 Fed. Reg. at 43846.

34 *Compare* 15 U.S.C. § 7001(a)(1) with *id.* § 7001(c).

Any Federal Do-Not-Call List Should Be the Only Do-Not-Call List

If the Commission decides to adopt the proposal for a nationwide "do-not-call" registry, it should preempt existing state do-not-call-list requirements. Inconsistent state requirements are a significant obstacle to the efficient electronic delivery of financial services. A state do-not-call list provision is a classic example of the type of requirement that should be preempted, because it provides no benefits for consumers that justify the additional costs of compliance. Those costs include fees imposed by the states to operate separate, duplicative do-not-call registries, which, as most states enact do-not-call requirements, could greatly exceed the cost of a single, national registry.

If the states are allowed to continue to maintain their state lists, several problems could arise:

- **Differences between state and federal requirements and among state laws.** A state law might provide different procedures from the federal Rule for a consumer who has placed her name on a do-not-call list to later "opt-in" to receiving calls from certain companies or certain types of callers, or it might provide no procedures at all. States may maintain different information in their databases, have different or no expiration dates for the do-not-call request, or have different procedures for tracking changes in telephone numbers.
- **Inconsistent database errors.** Any database of a significant size will have errors. One or more states or the FTC might improperly record a consumer's name or number, leaving telemarketers to guess whether the consumer had in fact made a do-not-call request. Consumers themselves might make inconsistent choices on different lists. If a state fails to maintain accurate do-not-call lists, consumers could conclude that telemarketers are not complying with the Rule — or that the FTC is not properly maintaining its nationwide registry.
- **Consumer confusion and negative competitive impact.** Consumers should have a clear understanding of the effect of placing their names on the do-not-call list. For example, if the Commission adopts its proposal for a national registry, then consumers who opt-out of calls should understand that they may still receive calls from some types of entities. But if the state do-not-call lists are allowed to remain in effect, then consumers who place their names on the national registry may still receive calls from local telemarketers who are operating on an intrastate basis. Since e-commerce marketing is generally nationwide in scope, this disparity would put e-marketers at a competitive disadvantage.

Therefore, to simplify compliance and make the Rule more "user-friendly" for consumers, **the Commission should preempt state do-not-call list requirements.** We believe that the Commission clearly has the power to do so under well-established Supreme Court precedent. *See Barnett Bank v. Nelson*, 517 U.S. 25, 31 (1996) (federal law may preempt state law where state law is an obstacle to the accomplishment of objectives of Congress); *New York v. Federal Communications Commission*, 486 U.S. 57, 64 (1988) (a properly authorized federal agency "may determine that its authority is exclusive and pre-empts any state efforts to regulate in the forbidden area").

The Commission Should Preempt All State Do-Not-Call Lists

In addition to preempting state do-not-call list laws for interstate telemarketers, **the Commission should also make the federal registry the sole list for intrastate telemarketers.** Under this approach, existing state lists might be integrated into the new federal list. We recognize that the Telemarketing Act does not literally apply to purely intrastate telemarketing campaigns. It applies only to "telemarketing," which is defined as "a plan, program, or campaign" that, among other things, "involves more than one interstate telephone call." 15 U.S.C. § 6106(4).

Because federal jurisdiction is determined on the basis of the entire "plan, program, or campaign," intrastate calls in the course of a campaign that involves two or more interstate telephone calls are subject to the federal Rule. But even a nationally-oriented telemarketer may have some telemarketing programs that are conducted wholly within the state in which the telemarketer is based, and, therefore, are not subject to the existing federal Rule. It is no less burdensome for a national company to comply with state law in an intrastate campaign than in a national campaign, particularly when most of the company's activity is interstate. Moreover, as noted, allowing intrastate telemarketers to disregard the federal list would create consumer confusion and place nationwide telemarketers at an unfair competitive disadvantage.

Since the problems created by the dual statutory do-not-call schemes are similar for interstate and intrastate calls, the FTC should have the power to preempt state law for intrastate calls, to the limited extent needed to create a single, national do-not-call list. There is ample precedent for preemption by a federal agency of state regulation of purely intrastate activities when the state regulation frustrates the congressional intent in enacting a federal statute. For example, in *New York v. Federal Communications Commission, supra,* the Federal Communications Commission ("FCC") issued a regulation containing technical standards for cable television systems that preempted more stringent state or local requirements. *See New York v. Federal Communications Commission,* 486 U.S. at 64, *quoting United States v. Shimer,* 367 U.S. 374, 383 (1961).

The Rule Should Protect Consumers Without Impeding Legitimate E-Commerce

In summary, we urge the Commission not to make changes in the Rule that would have a negative effect on electronic commerce — and on the consumers and small businesses that the Rule is designed to protect.

We appreciate the opportunity to comment on the Proposal.

Sincerely,

/SIGNED/

Jeremiah S. Buckley Jr., P.C.
General Counsel
Electronic Financial Services Council