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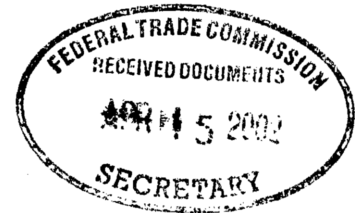



Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW
Room 159
Washington, DC 20580

Re: **TELEMARKETING RULEMAKING - COMMENT**
**FTC FILE No. R411001**

Dear Sir:

We appreciate the opportunity to submit this comment to the Notice of Proposed Rule Making ("Proposal") published by the Federal Trade Commission ("Commission") to amend the Commission's Telemarketing Sales Rule (the "Rule").

Household Automotive Finance Corporation, OFL-A Receivables Corp., and Household Automotive Credit Corporation (collectively "Household") are issuers of auto-secured consumer loans and purchase motor vehicle retail installment sales contracts from dealers secured by motor vehicles. Household offers auto financing to middle-market Americans underserved by traditional credit providers. Household makes its auto credit products available via auto dealers, mail offers, telephone, the internet, and partnership marketing. Household manages over $6.5 billion in auto credit receivables and its customer base totals over 500,000. Household employs 2,100 men and women throughout the United States, and maintains credit processing centers in San Diego, California; Newark, Delaware; Lewisville, Texas; and Jacksonville, Florida.

Telemarketing is a valuable tool that enables legitimate businesses to offer goods and services to consumers in a cost effective and efficient manner. Consumers and the national economy benefit from this method of marketing in a number of ways, including the increased availability of low cost goods and services, a wider variety of choices, and the convenience of shopping nationwide and completing a purchase in the comfort of their own home. For these reasons, Household supports the efforts of the Commission to curtail telemarketing fraud and abuse in accordance with its authority under the Telemarketing and Consumer Fraud and Abuse Prevention Act of 1994 (the "Act"). As further discussed below, however, we are concerned that in trying to address the abusive practices of unscrupulous telemarketers, the Commission has included a number of provisions in its Proposal which will negatively impact the ability of legitimate businesses to serve their own customers, as well as other consumers who may want or need their goods and services.

As discussed in greater detail below, we have significant concerns with respect to the do-not-call provisions of the Proposal (§ 310.4(b)(1)(iii)(B)). Significantly, the Commission's proposed do-not-call provisions do not exempt calls made to existing customers. In addition, the provisions would, in effect, create an additional do-not-call list that would be layered on to an already complicated and inconsistent patchwork of state do-not-call laws.

We are also concerned with the provisions of the Proposal that would restrict the sharing of billing information (§ 310.3(a)(3) and § 310.4(a)(5)) and would require consumers to provide their account numbers to telemarketers. This requirement is contrary to the longstanding advice against this practice given by the Commission and the financial services industry. (See e.g., the brochure issued by the Office of the Comptroller of the Currency ("OCC") entitled "How to Avoid Becoming a Victim of Identity Theft" and Section VI of OCC Advisory Letter AL 2001-4). Moreover, the information sharing restrictions of these proposed provisions would conflict with the Gramm-Leach-Bliley Act (15 U.S.C. § 6801 et seq.) ("GLBA) and the Commission's own regulations implementing that law (16 C.F.R. Part 313). While GLBA was enacted after the Commission completed its review of the Rule, any final rule adopted by the Commission should acknowledge that the sharing of billing information between a financial institution and a third party telemarketer is governed exclusively by the GLBA and, in the case of an affiliate, by the Fair Credit Reporting Act (15 U.S.C. §16.81 et seq.) ("FCRA").

For these reasons and as discussed further below, we urge the Commission to continue its careful consideration of revisions to the Rule and refrain from issuing final revisions until it has published a revised proposal for public comment.

Definition of "Billing information" (§ 310.2(c))

in order to avoid conflict with GLBA, we suggest that the definition of "billing information" be clarified to exclude encrypted account numbers where the means to decode the encryption are not provided to the recipient. This clarification would be consistent with the Commission's interpretation of GLBA, which provided that the Commission "believes an encrypted account number without the key is something different from the number itself..." (65 Fed. Reg. 33646, 33669 (2000)). Rather, the Commission continued, "[an encrypted account number] operates **as** an identifier attached to an account for internal tracking purposes only." *Id.* In the Commission's GLBA publication, the Commission acknowledged the concerns of commenters that "if internal identifiers may not be used, a consumer would need to provide an account number...which would expose the consumer to a greater risk than would the use of an internal tracking system that preserves the confidentiality of an account number that may be used to access the account." *Id.* The Commission concluded that "[c]onsumers will be adequately protected by disclosures of encrypted account numbers that do not enable the recipient to access the consumer's account." *Id.* These conclusions should apply equally with respect to the Proposal.

Although the specific language of the proposed definition of "billing information" does appear to be consistent with the Commission's GLBA interpretation, the explanation of the term in the Supplementary Information to the Proposal is broader and creates a conflict with the GLBA interpretation. Specifically, the Commission states that it intends "billing information" to include "information such as a credit or debit card number and expiration date....customer's date of birth or mother's maiden name, and any other information used as proof of authorization to effect a charge against a person's account" (67 Fed. Reg. 4492, 4499 (2002)). This appears to go well beyond the Commission's specific proposal which defines the term as "data that provides *access* to a consumer's account" (emphasis added) and, as used in proposed section 310.4(a)(5), conflicts with the sharing of non-public personal information as permitted by GLBA. To avoid such a conflict, we suggest that the Cornmission clarify that the term "billing information" includes only account numbers, and specifically excludes encrypted account

numbers where the method for decoding the encryption is not provided to the recipient.

Definition of "Outbound telephone call" (§ 310.2(t))

We strongly oppose defining an "outbound telephone call" to include certain calls initiated by a consumer. Under the Commission's Proposal, if a consumer voluntarily decides to contact a company by telephone to inquire about a product or otherwise obtain services, and during the telephone conversation the customer is offered a second product on behalf of an affiliated company or is transferred to a telemarketer other than the original company, the second part of the call appears to be subject to the restrictions of the Rule that apply to "outbound telephone calls." These restrictions include the limitation on contacting customers who have put themselves on the do-not-call registry (proposed section 310.4(b)(1)(iii)(B)), the restrictions on what time an outbound telephone call may be made (section 310.4(c)), and the making of required disclosures (section 310.4(d)). This proposed change would create an unworkable procedure that is neither justified by the concerns raised in the Preamble nor authorized by statute.

The Act specifically authorizes the Commission to issue rules to protect against "deceptive telemarketing acts or practices and other abusive telemarketing acts or practices," but not telephone calls in general (15 U.S.C. 6102(a)(1)). Indeed, the only times the Act references "telephone calls," it clearly specifies "unsolicited telephone calls" or calls made by the telemarketer "to the person receiving the call" (15 U.S.C. 6102(a)(3)). The Act lacks any indication that Congress intended the Commission to regulate anything but outbound calls (in the sense meant by the Rule), and there is no alternative authority for the Commission's proposed expansion of the Rule to apply to inbound calls.

Even if the Commission did have statutory authority to issue this novel proposed change, the new definition as proposed is clearly not tailored to the problems it is intended to address. The Commission states that it has proposed this change to the definition of an outbound telephone call in response to a reported increase in the practice of "up-selling" (67 Fed. Reg. 4492,4500). The Commission specifically highlights certain egregious practices that may arise in the case of "up-selling" after a consumer has provided a telemarketer with billing information (67 Fed. Reg. 4492, 4495). The new definition may restrict these practices, but would also restrict numerous completely harmless situations, none of which pose similar risks.

Attempting to force inbound calls to fit the regulatory model created for outbound calls would create absurd consequences. For example, if a consumer initiates a call to a business and is put on hold, and the recorded message playing during the hold period describes other products or services offered by an affiliated entity, the Proposal would appear to require the call to be treated as an outbound telephone call. If the consumer initiated such a call before 8 a.m. or after 9 p.m., the call would be considered an "outbound telephone call" being conducted at an impermissible time – despite the fact that the consumer herself chose the time of the call. Moreover, a company receiving an inbound telephone call will have no reason to know the hour of day for the consumer's time zone. Meanwhile, if the caller had previously registered on the do-not-call registry, the second telemarketer could violate proposed section 310.4(b)(1)(iii)(B), even though the consumer placed the call. There is simply no reasonable basis for treating inbound calls as "outbound." There should be no change to the Rule in this regard.

It is also worthwhile to note that, contrary to the implicit assumption in the Proposal that all "up-

selling" is bad for consumers, there exist "up-selling" opportunities that provide significant benefits to consumers. Numerous examples of these exist in the consumer credit industry, and telemarketing provides an important opportunity for financial services providers to provide consumers with information on products that consumer may qualify for or need, that may save them money, and that they may not have otherwise heard about. Examples of products that are "up-sold" include – consolidation loans to reduce higher rate debt, automatic payment plans that may qualify customers for savings on their loan payments, debt cancellation programs that may protect a borrower in the event of unemployment or disability, and reduced rate loan products for customers of affiliated financial institutions. Many of these products, as well as many other financial products, are sold by separate companies that are either commonly owned or that have agreed to offer products to each other's customers. Unduly restricting the financial services industry from offering such products to callers who have, of their own volition, contacted them, is wholly beyond the scope of the Act and unrelated to the "up-selling" threat described by the Commission.

Restrictions on Submitting Billing Information (§ 310.3(a)(3)

As it is currently drafted, the Rule requires telemarketers to obtain the "express verifiable consent" of the consumer before submitting the consumer's "demand draft or similar negotiable paper" as payment in a sales transaction. The Commission seeks to expand the express verifiable authorization requirement to cover any other method of payment where such method does not have the protections available to consumers under the Fair Credit Billing Act ("FCBA") and the Truth in Lending Act ("TILA), as amended. We agree that consumers are well protected under the provisions of the FCBA and TILA, and that when using payment methods covered under the FCBA and TILA, the express verifiable authorization requirements should not apply.

The Supplementary Information to the Proposal provides that methods of payment having protections "comparable to those available under" the FCBA and TILA would also be exempt from the express verifiable authorization requirements (67 Fed. Reg. 4492, 4506). Based on this language, we believe the Commission would also consider exempt from the express authorization requirements payment transactions which are subject to the Electronic Fund Transfer Act (15 U.S.C. §§ 1693 et seq.) ("EFTA"). We suggest that the Commission clarify that payment transactions covered by the EFTA would also be excluded from the express verifiable authorization provisions of this section.

The Commission also proposes to expand the list of information that must be received, in order to deem a consumer's express oral authorization "verifiable," to include the consumer's account number. According to the Supplementary Information to the Proposal, the account number "must be recited by either the consumer or the telemarketer" (67 Fed. Reg. 4492, 4506). On the one hand, this requirement is not workable when the account number pertains to an account held by a financial institution that is subject to GLBA. Under the Commission's own rules implementing GLBA, financial institutions are prohibited from disclosing account numbers to non-affiliated third parties for marketing purposes (16 C.F.R. § 313.12). Consequently, in most instances, a telemarketer will not have an account number to recite. And, in those situations where the GLBA restrictions do not apply, it is difficult to envision under what circumstances a telemarketer would come to possess an account number in the first place, given the Proposal's definition of "billing information" and the restrictions in proposed section 310.4(a)(5). The result is that the consumer, in most if not all cases, would be required to disclose her account number.

Consumers are best protected where the financial institution, and not the telemarketer, controls access to the consumer's account. With this control, it is the financial institution that initiates charges to the consumer's account after it is satisfied that the telemarketer received the requisite authorization from the consumer to do so. This control, and the consumer protections that go along with it, are compromised by this provision of the Proposal. Therefore, we strongly urge the Commission to remove the consumer's account number from the list of information necessary to verify oral authorization. If for some reason the Commission decides to retain the account number requirement, then we respectfully request that it be eliminated for telemarketing situations where GLBA applies.

Restrictions on Sharing Billing Information (§ 310.4(a)(5))

The Commission proposes to regulate the sharing of information which is clearly outside the scope of its authority under the Act. Congress directed the Commission to enact rules prohibiting abusive, deceptive, and fraudulent *telemarketing acts* (emphasis added). According to the Supplementary Information to the Proposal, the practice that lead the Commission to propose this section is the misuse by telemarketers of billing information. Clearly, the abusive telemarketing act is not the sharing of billing information in the first instance, but the misuse of that information by unscrupulous telemarketers. Rather than specifically addressing that abusive act, however, the Proposal effectively prohibits any sharing of billing information at the expense of legitimate businesses and, ultimately, the consumer. Not only does this approach exceed the Commission's statutory authority, it is also directly conflicts with GLBA and the Commission's GLBA regulations. This provision may actually increase the incidence of fraud against consumers who may now be encouraged to provide their account number over the telephone. For these reasons, the Commission delete this section of the Proposal.

National Do-Not-Call Registry (§ 310.4(b)(1)(iii)(B)

A. *Outbound Telephone Calls Made to Existing Customers*

As a general matter, we support the concept of a national do-not-call list. We believe that when there is no existing business relationship between the consumer and the business making the telemarketing call, the interests of both can best be served by a simplified and centralized method to record and communicate a consumer's telemarketing preferences. However, where there is an existing business relationship, we believe the least burdensome and most efficient method for the consumer to communicate and the company to honor her wishes in this regard continues to be the company specific approach as provided in the original Rule and the TCPA (47 U.S.C. *227* et seq.). For this reason and those set forth below, outbound telephone calls made by a company to its existing customers should be excluded from the prohibitions of proposed section 310.4(b)(1)(iii)(B). We also suggest that the Commission define an existing "customer" consistently with the definition of that term in the Commission's GLBA regulation (16 C.F.R. §313.3(h) and (i)) in order to provide clear guidance on who is and is not a "customer."

According to the Supplementary Information to the Proposal, the company-specific approach has been criticized by consumers and state law enforcement agencies as being unduly burdensome on consumers and ineffective in preventing unwanted telemarketing calls. The Commission cites isolated instances in which consumers have had to make do-not-call requests

repeatedly, as well as some cases in which consumers' do-not-call requests were ignored. Unfortunately, we do not doubt that these practices may occur. Nevertheless, it is highly unlikely that this is happening in cases where the business making the telemarketing call has an existing relationship with the consumer. A company risks losing both by failing to honor its customers' requests not to receive outbound telephone calls. Therefore, it would be acting contrary to its own interests to do so. Additionally, from a cost perspective, a company has no need to waste resources by telemarketing customers who have indicated their desire not to receive calls. But, for customers who do want to receive offers of special products and services, a company should be able to make offers available by using the most cost efficient and convenient means. Without any justification, the Proposal would severely restrict the ability to reach its customers.

Moreover, the states that have adopted do-not-call lists have acknowledged the value in preserving the relationship between customer and business in this regard as calls to existing customers are generally exempt from the state calling restrictions.[1] Because of this inherent conflict between the Proposal and the states, a company that complies with all twenty state do-not-call laws would nevertheless be out of compliance with the Proposal. This is contrary to the concept of a simplified and centralized do-not-call list method. We, therefore, strongly urge the Commission to exclude outbound telephone calls made to existing customers from proposed section 310.4(b)(1)(iii)(B).

In addition, the Proposal conflicts with the TCPA with respect to telemarketing calls made to existing customers. While the TCPA allows a company to telemarket its own customers unless the customer directs it not to, the Proposal takes the exact opposite approach by prohibiting a company from telemarketing its own customers unless and until the company receives "express verifiable authorization" from the customer to do so. The TCPA, as well as the Rule, preserve the business relationship and properly leave it to the consumer and company to determine the course taken with respect the company's ability to make and the consumer's decision to receive offers for existing products and services over the telephone. On the other hand, the Proposal interferes with the business relationship between the consumer and the company and requires both to go through time consuming, costly, and burdensome steps in order to return the relationship to its current state.

Consequently, the consumer who places her name on the proposed do-not-call registry ("Registry") intending to prevent unwanted telemarketing calls from companies with which she has no relationship, but not intending to prevent telemarketing calls from the companies with which she does have a relationship, finds herself in the position of having to write or call (and, based on proposed section 310.4(b)(1)(iii)(B)(2), call only from the telephone number at which she will accept telemarketing calls) each and every company with whom she has a relationship in order to continue to receive offers for additional products and services by telephone.

Likewise, the company with the business relationship would have to establish and implement costly procedures in order to obtain and retain written or tape-recorded evidence of all express verifiable authorizations received from its own customers. In this regard, many companies would also have to make significant capital expenditure just in order to purchase equipment that enables them to determine the telephone number from which the consumer is calling and to

[1] See e.g., Alaska Stat. §45-50-475(g)(3)(B)(v); California Senate Bill 771 (2001), effective January 1, 2003; Colorado House Bill 1405 (2001), effective July 1, 2002; FL. Stat. Ann. 501.604(21); GA Code Ann. §46-5-27(b)(3)(B); ID Code §48-1002(12); LSA-R.S. §45:844.12(4)(c); Missouri Stat. Ann. $407.1095(3)(b); OR Rev. Stat. §646.569(2)(b); TN Code Ann. §65-5-401(6)(B)(iii).

tape record authorizations, as the Proposal would require. The imposition of these burdens will have the unfortunate effect of eliminating the telephone as the most cost efficient and convenient method available to companies in making offers of goods and services to their own customers. This loss of efficiency and convenience will lead to higher costs and fewer choices to the ultimate detriment of the consumer.

Outbound telephone calls made to former customers should also be exempted from proposed section 310.4(b)(1)(iii)(B) for some period of time after the customer relationship has ended. A number of states have adopted this approach. For example, in Louisiana[2], calls made to former customers are permissible where the customer relationship ended no more than six months prior to the call. In Colorado[3], this exemption is extended to calls made to former customers up to eighteen (18) months after the relationship ends. In both Texas[4] and Tennessee', a former customer can be contacted up to twelve (12) months after the relationship ends. And, some states allow calls to be made to former customers regardless of when the prior relationship ended.[6]

Consequently, these and other state legislatures have recognized that even though an account that gives rise to an existing relationship may have been paid in full, it does not necessarily follow that the relationship between the company and the consumer is likewise completely over. Many consumers will choose one particular company as the provider of a product or service that they want or need from time to time. Also, the approach taken by these and other states allows companies to continue to offer goods and services to the consumers they have served before, which is to the benefit of both the consumer and the company. Of course, should the consumer at any time not wish to receive further offers, she can simply ask the company to discontinue calling. Therefore, we suggest that the Commission adopt the approach taken by these and other states by exempting from the restrictions of proposed section 310.4(b)(1)(iii)(B) calls made to former customers for at least twelve (12) months after the existing customer relationship ends.

The Commission's rationale for this section of the Proposal – that it would provide consumers with a wider range of choices than the original Rule – is flawed. Rather, the Proposal would have quite the opposite effect in terms of any existing business relationship by making it so difficult for the consumer to exercise her choice, and for the company to honor it, that the consumer will actually forfeit some choices. The Commission should exclude outbound telephone calls made to existing customers, as well as former customers, from proposed section 310.4(b)(1)(iii)(B). In addition, in order to preserve the synergies that the financial modernization provisions of GLBA were designed to create, this exemption should extend to all affiliates of the financial institution.

B. *Proposed National Do-Not-Call Registry*

We believe that a centralized and simplified method to record and communicate a consumer's telemarketing preferences is a good approach in theory. While the Commission has taken a step in the right direction toward this end, our concern is that the Registry would simply be layered on top of an already complicated and inconsistent patchwork of existing state do-not-call

[2] LSA-R.S. §45:844.12(4)(c)
[3] House Bill 1405 (2001); July 1, 2002 effective date
[4] TX Bus. & Com. Code §43.003(b)(2)
[5] TN Code Ann. §65-4-401(6)(B)(iii)
[6] See e.g., FL Stat. Ann. §501.604(21); GA Code Ann. 46-5-27(b)(3)(B); OR Rev. Stat. §646.569(2)(b)

lists. We commend the Commission for appreciating the importance of the economic burdens of compliance with a myriad of state do-not-call lists. Clearly, these burdens would continue to grow when more and more states adopt their own do-not-call lists. Certainly a nationwide "one-stop shopping" approach is beneficial to both consumers and the industry. Therefore, if and when a Registry is established, it should either preempt or incorporate all state do-not-call lists so that a company's compliance with the Registry will constitute compliance with all state do-not-call lists.

Before the Registry can even be considered by consumers and the industry, however, there are a number of issues that must be addressed. First, how much will the Registry cost to establish and maintain, and how will it be funded? Who will have access to it and how will it be accessible? Will consumers have to pay a fee to be on the Registry? What will the cost be to obtain the Registry? The States are all over the board on this last question, with some lists available for as little as $10.00 and others costing as much as $800.00. We believe the cost for the Registry should not exceed $500.00 per year per corporate family (not per subsidiary), including updates. This suggested amount is based on an average of the amounts charged by the states and the Direct Marketing Association for their respective lists.

Another important item that must be more clearly addressed in the Proposal is what information will be on the Registry. As the Proposal currently reads, only a consumer's "name and/or telephone number" would be included. Does this mean the consumer would have the option of placing either her name or her telephone number on the Registry, but would not be required to include both? The industry is already dealing with inconsistent state requirements in this regard which increase the risk of error. Some state do-not-call lists include the consumer's name and telephone number, some include the consumer's zip code and telephone number, and some only include the consumer's telephone number (without any name). The less information on a do-not-call list, the more chance for error, given the fact that so many consumers have the same name, and a single telephone number can belong to or be transferred *to* more than one consumer. The more information that is on a do-not-call list, the more efficiently and accurately it can be used to honor the wishes of the consumers thereon. Consequently, at a minimum, the Registry should include the name, address, and telephone number of each consumer who chooses to be included.

The Proposal provides that the Registry would be updated on a monthly basis. We believe this update schedule is too frequent and not workable given the fact that each monthly update would include information on consumers living in all 50 states and the District of Columbia. This would create a substantial burden on the industry that would find itself spending more and more time and resources continually updating its own do-not-call databases. A more cost effective and reasonable approach, and that which has been adopted by many of the states having do-not-call lists, is an annual list that is updated on a quarterly basis. This approach would also be less burdensome on the Commission.

The Commission correctly raises the question of what procedures should be in place with respect to updating the Registry when consumers change their telephone numbers or when area codes associated with those numbers change. Most states are silent in this regard, but we commend the Commission for recognizing that this issue is central to the establishment and delivery to the industry of an accurate Registry. Aside from impressing upon the Commission the importance of this issue, we would like to suggest that this situation is best addressed between the Commission, the local exchange carriers, and other telecommunications entities.

To answer the Commission's question of how long a consumer should remain on the Registry, we consulted U.S. Postal Service and U.S. Census Bureau data. According to the U.S. Postal Service, over 40 million Americans move every year. The U.S. Census Bureau reports that there were 284.7 million United States residents as of July 1, 2001. Consequently, between 15% and 20% of consumers move each year. Therefore, we recommend that consumers remain on the Registry for no more than five or six years. At the expiration of that time period, those consumers who wish to remain on the Registry should be required to re-register and update any information that may have changed.

Another question posed by the Commission is whether third parties should be able to place a consumer's name on the Registry. We believe the answer to that question is no. Allowing third parties to opt consumers out of receiving outbound telephone calls will likely lead to inaccuracies and increase the potential for fraud and abuse. The Commission and the industry should not be put in the position of having to second guess the intentions of someone purportedly acting on behalf of a consumer in this regard. To protect the integrity and reliability of the Registry, the only person who should be able to place the consumer's name on the Registry is the consumer. Any other approach is a disservice to the consumers and the industry who rely on the Registry.

We support the Commission's retention of the current calling time restrictions which represent a workable balance between the privacy of consumers and the regulatory burden on interstate commerce. Any approach that would allow consumers to pick the dates and times they can receive outbound telephone calls would simply be impossible to implement. Beyond the fact that this would completely overload any internal do-not-call database maintained by a company, consumers can change their minds. The time and day that works for a consumer during one month, or even one week, may not work the following week or month based on a variety of ever changing facts and circumstances impacting their daily lives. While well-intentioned, we believe this approach is not cost effective, would complicate and frustrate the compliance efforts of the industry, and would ultimately provide no additional benefit to the consumer.

We believe the restriction imposed by section 310.4(b)(1)(iv) on selling, purchasing or using the Registry for any purpose other than compliance with proposed do-not-call provisions is adequate to protect consumers. Our concern, however, is that this section not be so broadly construed as to prohibit affiliated companies from sharing the same list for purposes of compliance. While some states having do-not-call lists allow affiliated companies to purchase and share one list, other states have required each affiliated company to purchase its own list. The ludicrous result of this requirement is that a family of companies must purchase the same list over and over again at significant cost to those companies without corresponding benefit to consumers. This is especially absurd when that family of companies utilizes a central do-not-call database for cost and efficiency purposes.

The other issue raised by proposed section 310.4(b)(1)(iv) is with respect to a company's use of the information contained on the Registry. In many instances the consumers on the Registry will already be customers of the company that obtained the Registry. So, that company already has in its possession the information on that list (e.g., name, address, and telephone number) and should not be restricted from using it for any other lawful purposes. Similarly, a company may already have information with respect to consumers on the Registry who are not yet customers, but are potential customers. Again, companies should not be restricted from using this information for other lawful purposes merely because it is also contained on the Registry.

C. *Express Verifiable Authorization*

The Commission asks whether the Proposal provides adequate guidance with respect to what information is sufficient to evidence a consumer's "express verifiable authorization" to receive outbound telephone calls from a particular company. Because the burden will be on the company to establish that it has received express verifiable authorization to place an outbound telephone call to a consumer on the Registry, we would suggest that the company should have the flexibility to determine what constitutes such authorization. The Commission's proposed methods to establish express verifiable authorization (one for oral and the other for written authorization) raise considerable burdens for both consumers and businesses. A more workable approach would be for the Commission to provide a non-exclusive list of examples that would constitute express verifiable authorization. The ultimate decision of whether to use one of the examples provided, or to develop another method based on the guidance those examples provide, should be left to the individual company, as it is in the best position to know its capabilities in this regard.

D. *Safe Harbor*

We generally support the safe harbor provisions in section 310.4(b)(2). We agree with and commend the Commission's determination that strict liability is inappropriate where a company **has** made a good faith effort to comply with applicable do-not-call laws and a call that would otherwise violate section 310.4(b)(1)(iii)(B) is the result of bona fide error. For the reasons discussed above, however, the provision requiring companies to obtain and reconcile the Registry on not less than a monthly basis in order to take advantage of this safe harbor should be changed to instead require a quarterly update. In addition, a company's ability to timely reconcile an updated list depends on the format it is in and when it is made available. In order to give companies a reasonable opportunity to ensure that their own internal databases can be updated accurately, the safe harbor provisions should provide that an outbound call to a consumer on the Registry is not a violation of proposed section 310.4(b)(1)(iii)(B) if it is made no more than thirty (30) days after the most recent updated Registry becomes available. Many states have also adopted this approach.[7] A company should also be entitled to the safe harbor provisions to the extent any of the information contained in the most recent version of the Registry becomes inaccurate, such as a consumer's change of name or telephone number.

Finally, we are concerned with the proposed changes to section 310.4(b)(2)(ii) which would require a company to train its employees and "any entity assisting in its compliance". This change would appear to require a company to provide compliance training with respect to the Rule to any telemarketing vendor it engages. We strongly urge the Commission to reconsider this proposal. Companies that engage telemarketing vendors to perform services on their behalf do so primarily for efficiency and cost savings purposes. To require the company to train the telemarketer in the first instance negates any savings that could have been realized. In addition, because vendors perform services for a multitude of companies, they could not continue to operate if required to change their procedures every time they perform services for a different company.

[7] See e.g., NY Gen. Bus. §399-z 3. (provides for 30 days); TX Bus. & Com. Code §43.102(a) (provides for 60 days).

Blocking Caller ID (§ 310.4(a)(6))

Caller identification services provide consumers with an important mechanism to exercise their choice with respect to who is contacting them. We agree that blocking, circumventing, or altering transmission of the name and telephone number ("Caller ID information") of the calling party for caller identification purposes is an abusive telemarketing act or practice. While we support the Proposal in this regard, if it is adopted in the final Rule, we strongly urge the Commission to expressly clarify that the use of telephone equipment that is incapable of displaying the name and telephone number of the calling party does not constitute "blocking" of Caller ID information in violation of the final Rule.

The Commission correctly notes in the Supplementary Information to the Proposal that it is technologically impossible for many telemarketers to transmit Caller ID information because of the type of telephone system they use. Telemarketers use this type of equipment because of the cost efficiency it provides, and it would be beyond the scope and authority of the Act for the Commission to affirmatively require telemarketers to purchase and use only telephone equipment that is capable of transmitting Caller ID information. One of the questions the Commission poses is how telemarketers currently comply with the requirements of those states that have passed legislation "requiring the transmission of full caller identification information". 67 Fed. Reg. 4492, 4538. While a number of states have enacted Caller ID legislation, these laws prohibit the use of devices and methods to intentionally block Caller ID information, but do not affirmatively require the transmission of Caller ID information. For example, in Illinois the law specifically provides that it is a violation to "impede[s] the function of any caller id *when the telephone solicitor's service or equipment is capable of allowing the display of the solicitor's telephone number.*"[8] (emphasis added).

For the foregoing reasons, we urge the Commission to clarify that the Proposal does not affirmatively obligate telemarketers to purchase and use telephone equipment that is capable of transmitting Caller ID information and that use of technology that is not capable of transmitting Caller ID information is acceptable.

Predictive Dialers

The Commission seeks recommendations on alternative approaches to the use of predictive dialers. In response to comments it reports to have received from consumers expressing frustration over "dead air" calls, the Commission asks whether it should establish a maximum abandon rate when predictive dialers are used, limit the use of predictive dialers to only those telemarketers that use equipment capable of transmitting Caller ID information, or allow telemarketers to play a tape recorded message until a live telemarketer is available to speak to the consumer. 67 Fed. Reg. 4492,4539.

It is undisputed that the proper use *of* predictive dialers increases the efficiency with which

[8] §815 ILCS 413/15(c). Also see FL Stat. Ann. §501.616(7) (". . . unlawful . . . to prevent transmission . . . when equipment or service used by the telephone solicitor is capable of creating and transmitting the telephone solicitor's name or telephone number."); Utah Code Ann. §13-25a-103(6) ("A telephone solicitor may not withhold the display of . . . telephone number from a caller identification service . . . when the telephone solicitor's service or equipment is capable of allowing the display of the number."); K.S.A. 50-670(c) ("A telephone solicitor shall not withhold the display of the telephone solicitor's telephone number. . . when the telephone solicitor's service or equipment is capable of allowing the display of such number.").

products and services can be made available to consumers over the telephone. While it is true that the misuse of predictive dialers can lead to consumer frustration, any regulation of call abandonment rates must be carefully weighed against the potential loss of the cost efficiencies provided by predictive dialers. For example, while requiring a zero percent call abandonment rate would effectively render illegal the use of predictive dialers, a low abandonment rate may limit the impact on consumers while preserving the cost benefits predictive dialers provide to the industry. With this in mind, we believe the Commission should conduct further study into current industry practices to determine what would be an acceptable call abandonment rate.

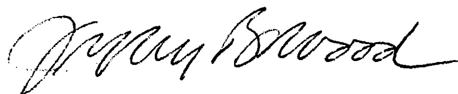
We do not believe that the use of predictive dialers should be limited to only those telemarketers that use technology capable of displaying Caller ID information. Such a rule would unfairly penalize and disadvantage telemarketers that choose to purchase and use more cost effective telephone equipment. Further, any cost savings realized by being able to use a predictive dialer under such circumstances would be lost on the purchase and use of more expensive telephone technology.

Since it appears that the primary issue with “hang ups” and “dead air” calls is that consumers don’t know who **is** calling and why they are being called, the most logical approach may be to allow telemarketers to play a recorded message until a live telemarketer is available to speak to the consumer. This approach strikes a balance between the interests of consumers who want to know who is calling and the interests of telemarketers that wish to use the most cost efficient method of reaching consumers. If the Commission adopts this approach, however, the industry will need guidance as to the interplay of the final Rule with the TCPA’s conflicting provision prohibiting the initiation of a call using a “prerecorded voice”. 47 C.F.R. § 64.1200(a)(2).

Conclusion

We appreciate the opportunity to comment on the Proposal. If you should have any questions on the information contained in this letter, please feel free to contact either me at 847/564-6490, or Martha Pampel, Associate General Counsel, at 847/564-7941.

Sincerely yours,



Jeffrey B. Wood
Associate General Counsel