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April 15, 2002

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

Re: Comments for Telemarketing Rulemaking
FTC File No. R411001
Telemarketing Sales Rule (16 CFR Part 310)

The Mortgage Bankers Association of America ("MBA") appreciates the opportunity to submit comments on the Federal Trade Commission's (the 'Commission" or "FTC") proposed amendments to the Telemarketing Sales Rule ("TSR"). The MBA is a trade association representing approximately 3,000 members involved in all aspects of real estate finance. Our members include national and regional lenders, mortgage brokers, mortgage conduits, and service providers. MBA encompasses residential mortgage lenders, both single-family and multifamily, and commercial mortgage lenders.

MBA applauds the Commission's objective of protecting consumers from deceptive sales practices. We also understand the Commission's desire to help consumers reduce the number of unwanted solicitations. However, the proposed rule as drafted raises urgent concerns for the mortgage lending industry. Overall, MBA believes the proposed revisions are unnecessary in light of the ample consumer protection measures that exist today. In addition, the proposals would impose significant market distortion problems that the Commission needs to address in the deliberation process. Our comments are set forth below. We hope they are helpful.

"Do Not Call" Registry

The centerpiece of the FTC proposed revisions entails the creation of a national "Do Not Call" registry that envisions a system whereby consumers could be allowed to block most telemarketing calls with one single request to a central registry maintained by the

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federal government. We submit that, if adopted, this proposal would impose an overwhelming burden on the marketing operations of our members. Without question, any institution that relies on telemarketing to generate business will be forced to change its systems and operations. The certain and indisputable impact of the proposal mandates that the Commission tread with caution as it deliberates the creation of the proposed registry.

Our most fundamental observation on the FTC "registry" proposal is that it is clearly excessive in light of existing telemarketing protections for consumers that are, in all respects, working adequately. Under the current TSR, sellers and telemarketers are prohibited from initiating outbound telephone calls to persons who have stated they do not wish to receive calls from the seller whose goods or services are being offered. The protections afforded by the current TSR are well designed and carefully measured to balance legitimate consumer concerns and business needs. Under the current scheme, a consumer that does not wish to speak to a telemarketer can simply state that fact and will immediately be taken off the list for any future calls. This rule does not impede the legitimate marketing activities of service providers or set up massive bureaucracies. Quite simply, "no" means "no," and the consumer's wish to be left alone must, by law, be respected.

Our members support this rule and believe its restrictions to be necessary in protecting the privacy of all consumers. The mortgage lending industry has very strict standards in place to ensure that our telemarketing operations are in full compliance with current legal requirements.

The Commission claims, however, that it is proposing a nationwide "Do Not Call" registry because the current company-specific approach is "cumbersome and burdensome" for consumers who would prefer to receive no calls whatsoever. The Commission goes on to clarify that the current rule does not fulfill the law's mandate that the FTC prohibit telemarketers from undertaking a "pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy." We submit that this assertion inaccurately magnifies the "burdens" allegedly borne by consumers under the current rules and incorrectly describes current telemarketing practices. MBA is in accord with the FTC's good intentions to protect consumers from abuse or coercion. The Commission should take into consideration, however, that "coercive or abusive" calls are already proscribed today, and more importantly, such calls can be quickly and effectively stopped under existing rules and regulations--a clear statement by the consumer to halt the calls will enjoin the "abusive" telemarketer to stop all further communications under penalty of law.

In light of the effectiveness of current laws, the FTC's proposal is simply disproportionate to the stated problem. The creation of a massive registry is an

undertaking that is expensive and certain to generate a sundry of compliance difficulties. These proposals would require sizeable systems changes, new operational procedures, and high retraining expenditures. As is always the case with the establishment of new systems, the registry will have to advance through long periods of "experimental" runs and troubleshooting to ensure accuracy. Affected industry members will be required to do the same. MBA believes that this is all needless and unnecessary. As stated above, the current legal system effectively achieves its protective objectives. Rather than enacting new laws, the Commission should concentrate on adequate enforcement of existing rules while ensuring that consumers understand the potent rights they are afforded under current law.

Uneven “Playing Field"

MBA also requests that the Commission carefully weigh the market effects of this proposed rulemaking. Specifically, in the context of the mortgage lending industry, MBA is concerned that certain entities will not be covered by the proposed “registry” provisions. Certain types of lenders, including banks, credit unions, and savings and loan institutions, are not subject to the FTC's regulatory authority, and would, therefore, not be covered by the proposed changes to the TSR. This coverage would place those lenders that do fall subject to the registry provisions at a very steep competitive disadvantage.

This is significant because, in effect, the largest part of the mortgage lending and mortgage origination industry--independent mortgage lenders and mortgage brokers--would be covered and would be significantly hampered in their marketing operations. Importantly, however, the banks and depository institutions that are not subject to this rule perform the exact same function vis-a-vis mortgage loans as do independent mortgage lenders. The registry proposal thus draws a distinction that is wholly artificial, but in the end, very significant in terms of competitive disadvantage.

We urge the Commission to consider this inequity and duly weigh the negative market impact that arises from this proposal.

Expansion of the Rule to Include Certain Inbound Calls

In addition to the industry’s concerns with the proposed “Do Not Call” registry, MBA urges the FTC to reconsider its proposed expansion of the scope of the TSA to include certain consumer-initiated inbound calls. According to the proposal, an inbound call from the consumer will be considered an “outbound telephone call” and subject to the restrictions of the TSA if it is “transferred to a telemarketer other than the original telemarketer or involves a single telemarketer soliciting on behalf of more than one seller or charitable organization.” 67 Fed. Reg. 4541 (to be codified as 15 CFR 310.2(t))(2002). A telemarketer is defined as “any person who, in connection with telemarketing, initiates or receives telephone calls to or from a customer or donor.” Id.

(to be re-codified as 15 CFR 310.2(z)). These broad definitions if adopted will cover many unintended business situations and may prove to be a disservice to consumers.

For example, the transfer of a consumer from the mortgage division to the home equity division could be interpreted as an "outbound telephone call" subject to the restrictions of the TSA, including the "Do Not Call" restrictions, calling time restrictions and disclosure requirements.

Theoretically, if the customer placed his or her name on an applicable "Do Not Call" registry, the lender would have to obtain an "expressed verifiable authorization" from the consumer prior to the transfer. Under proposed section 310.4(b)(1)(iii), an "expressed verifiable authorization" is deemed acceptable if it is (1) a written authorization from the consumer or (2) a recorded authorization that is verified as "being made from the telephone number to which the consumer is authorizing access." Both options are extremely impractical and in the end will only serve to frustrate the consumer. Equally problematic is a situation where the borrower's inbound call is transferred (thus creating an outbound call) during prohibited calling hours. While these cases may be rare, it is unclear what level of consent would be required and what documentation would be necessary to proceed with such a transfer. Significant obstacles will serve to discourage legitimate business that may be useful or desired by the consumer.

Section 310.6 provides certain exemptions from the TSA for consumer initiated calls. For example, "telephone calls initiated by a customer...in response to an advertisement...other than direct mail solicitation" are generally exempt. 310.6 (d). Other exemptions exist for certain inbound calls from consumers. Unfortunately, the expanded definition of an "outbound telephone call" seems to conflict with these exemptions, making it unclear which provision governs. It appears that the exemptions apply only to the *initial* inbound customer call, but not to the subsequent transfer. Ironically, the exemptions would apply to both telemarketers if the borrower made two separate calls.

The purpose of the Act and implementing regulation is to curb abusive telemarketing practices. It is difficult to see how a consumer will be harmed when he or she initiates the call and requests the transfer. We urge the FTC to retain the current the definition of "outbound telephone call" so as not to add additional burden on legitimate businesses or create unnecessary obstacles for consumers to obtain the goods and services they seek.

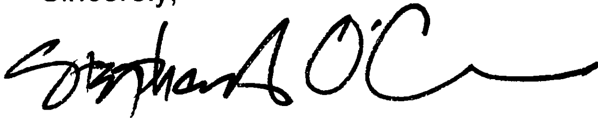
Conclusion

MBA appreciates the opportunity to comment on this very important matter. MBA applauds the FTC's efforts to protect consumers from abusive and coercive telemarketing practices. However, the implementation of a national "Do Not Call" registry is superfluous in light of existing protections and is tremendously burdensome

and costly to those entities that must comply with it. The FTC should focus greater attention on informing consumers of their rights under existing laws and enforce current protections. Such a system of disclosure and enforcement would meet the FTC's objective without imposing significant additional burden and expense on legitimate businesses. We also urge the FTC not to expand its definition of an outbound call to include inbound calls that are subsequently transferred to another "telemarketer." Such expansion will only serve to frustrate consumers that seek multiple products and services from the same business entity. We would welcome the opportunity to discuss these comments further or answer any questions the FTC staff may have on our members' views on this issue. Any questions about the foregoing should be addressed to Rod J. Alba, Director, Regulatory Affairs, at 202/557-2930.

Thank you for your consideration.

Sincerely,



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