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PUBLISHING

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

Re: Telemarketing Rule Making-Comment. FTC File No: R411001
Comments on proposed Amendments to Telemarketing Sales Rule

Dear Commissioners:

On behalf of the Tribune Publishing Company ("Tribune"), I am writing to express the Tribune's comments and objections to the Federal Trade Commission's ("FTC") Notice of Proposed Rule Making to amend the FTC's Telemarketing Sales Rule, 16 C.F.R. part 310.

The Tribune operates eleven (11) leading English language daily newspapers, both small and large, throughout the United States including the Los Angeles Times, Chicago Tribune, Newsday, Baltimore Sun, Orlando Sentinel, The Advocate (Stamford, Conn.), and the Greenwich Time. It is the leading US major market newspaper group, and enjoys the third-largest total circulation of newspapers. Tribune newspapers employ thousands of people to sell newspaper subscriptions either through in-house phone solicitations to the public or third-party telemarketers. Increasingly, the Tribune falls within the jurisdiction of the Telemarketing Sales Rule ("TSR") by employing telemarketers, either its own in-house services or through third parties, to solicit customers in other states.

The Tribune certainly appreciates a number of the proposed changes to the Telemarketing Sales Rule, and it supports the FTC's efforts to stamp out abusive and deceptive telemarketing practices. At the same time, the Tribune strongly believes that a handful of proposed amendments would interfere with its reasonable and lawful methods in selling newspapers and other products and add unnecessary and burdensome expense in making such sales.

As set forth below, the Tribune requests that the FTC modify the following three proposed amendments to the TSR: (1) Do Not Call Proposal, §310.4(b)(1)(iii); (2)

Express Verifiable Authorization, §310.3(a)(3); and (3) Pre-acquired Account Telemarketing, §310.4(a)(5). In addition, the Tribune wishes to comment on appropriate rules regulating the use of predictive dialers, the need for a newspaper exemption for multi-purpose and follow up calls to established customers, and contemplated changes to caller id requirements.

1. The FTC Should Exempt Newspapers From The Proposed National "Do Not Call" Obligation.

As proposed, §310.4(b)(1)(iii) provides that it is an abusive telemarketing practice for the telemarketer or seller to initiate any outbound telephone call to a person when that person has placed his or her name and/or telephone number on the Do Not Call Registry maintained by the FTC. Proposed amendments to the Telemarketing Sales Rule further provide "safe harbor" provisions whereby the seller or telemarketer will not be liable for violating §310.4(b)(1)(iii) if the seller or telemarketer can demonstrate that it has among other things, employed a version of the Do Not Call Registry obtained from the Commission not more than 30 days before the calls are made and maintains records documenting this process. *See* §310.4(b)(2)(iii). Finally the proposed rule regarding the Do Not Call list prohibits the sale or purchase of the registry list for any purpose except for compliance with the rule. *See* §310.4(b)(1)(iv).

As newspapers occupy a unique position in our society, the Tribune requests that the FTC exempt telemarketing by a newspaper to a person who has registered on the national Do Not Call List, even if the newspaper has not received the express, verifiable authorization of the person to place such a call.

First, the sale of newspapers should be distinguished from the sale of almost all other commercial items; government should impose minimal restrictions on the sale of newspapers. The right to a press free from governmental interference is protected by the First Amendment. Newspapers are important instruments for communicating news and vital information, both civic and governmental, to the community. Newspapers promote an informed and active citizenry. Clearly, Newspapers as a class are quite different from the kinds of telemarketers against whom the FTC's Do Not Call proposal is aimed.

For example, several states have recognized that phone solicitations for newspaper sales should be treated differently from other commercial telemarketing. At least six states exempt newspapers from state Do Not Call lists.[1]

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[1] Newspapers in Arkansas, Florida, Idaho, and Oklahoma are exempt from state Do Not Call restrictions. Indiana exempts newspapers from Do Not Call restrictions if the newspapers use their

Second, unless exempted, complying with the FTC's proposed Do Not Call obligation would unfairly impact the ability of some newspapers to reach local customers. The local and regional markets of newspapers often fall in more than one state. For example, the Chicago Tribune markets its paper not only to Chicago readers, but also to readers in surrounding states such as Indiana, Wisconsin, Michigan, and Iowa. To market its newspapers, the Chicago Tribune will have to comply with the FTC's Do Not Call obligations depending on if it makes phone solicitations to readers in nearby Indiana or calls just over the border to Wisconsin. If the Chicago Tribune utilized telemarketers in Wisconsin or any other state to call local customers in Illinois, the paper would have to comply with the national Do Not Call list for calls to its most "local" market. By contrast, other "local" newspapers that are not located near state borders or whose markets do not cross state lines will not have to comply with the FTC's Do Not Call list.

Thus, given newspapers' unique position and mission in our society and the fact that many newspapers market across state lines, the Tribune requests that the FTC exempt newspapers from complying with the national Do Not Call list obligations.

2. At Minimum, The FTC Should Clarify How The "Do Not Call" Proposal Will Be Set Up And Maintained; Provide That Phone Numbers To Drop Off After One Year; And Allow Companies To Apply The Do Not Call List On A Quarterly Basis.

The FTC should modify its Do Not Call proposal to clarify how names and telephone numbers will be placed on the list. At present, the FTC's Do Not Call proposal does not explain how the public will go about having their names and telephone numbers placed on the list or exactly what information a consumer must provide to be on the list. In a publication entitled "Q&A: FTC's Proposed Changes to the Telemarketing Sales Rule," the FTC explains that consumers will be able to call a toll free number to place their phone number on a national Do Not Call registry. The proposed amendment, however, does not reflect this plan. Consequently, to avoid confusion, the FTC needs to modify the proposed Do Not Call rule to explain how customers will get on the list.

Under no circumstance should the FTC consider requiring the telemarketers or sellers to place the name of customers who object to receiving telephone solicitations on the national Do Not Call registry. Sellers and telemarketers, such as the Tribune, already have a substantial administrative burden of coordinating with state Do Not

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own employees or volunteers to make calls. The states of Nevada and Washington exempt newspapers generally from telemarketing regulations.

Call lists and the company-specific Do Not Call lists required by 47 U.S.C. §227 and the present version of 16 C.F.R. §310.4(b)(1)(ii).

The FTC should require that a consumer's request to be placed on the Do Not Call list be made in writing or electronically such as by email. Requiring a written authorization to be placed on the list will eliminate any confusion as to whether an individual requested that their name be placed on such a list and when that request occurred. In addition, to avoid confusion as to whether a person is in fact on the list, the FTC should require the consumer provide their name, telephone number, and address to be on the list.

The FTC should require that phone numbers on the Do Not Call list be removed after one year unless the consumer notifies the FTC that the number should remain on the list. Presently, the FTC's Do Not Call list proposal makes no provision for periodically cleansing the list of obsolete numbers. The United States Postal Service, however, reports that over 40 million Americans change address annually. Accordingly, it is unusual for consumers to keep the same telephone number year after year. Moreover, more and more consumers are switching to cell phone use alone and are abandoning their telephone numbers. As a result, if the FTC does not provide for a periodic purge of the Do Not Call list, then the list will likely contain a substantial amount of telephone numbers that are no longer associated with the consumer who originally placed that number on the list. Consequently, if the FTC does not scrub the call list of abandoned and reassigned numbers, then the persons provided with reassigned numbers that remain on the Do Not Call list will be denied the ability to choose the information they want to receive in their home.

Requiring that the telemarketers update their call lists every thirty (30) days with the FTC's Do Not Call list represents a substantial and unfair burden to Tribune newspapers. As noted above, companies such as the Tribune, already have to maintain at least two Do Not Call lists as required by state and federal law. State lists are usually provided once a year, and the Do Not Call lists required by 47 U.S.C. §227 and the present version of the Telemarketing Sales Rule are added to periodically during telemarketing campaigns. Under the FTC's proposed amendments, a company like the Tribune that engages in year-round phone solicitations would have to reconcile its prospect list with the Do Not Call list at least twelve (12) times per year. Updating telemarketing lists every thirty (30) days would be time consuming, and impose a substantial administrative burden and expense on the Tribune, especially when combined with having to maintain company-specific lists as well as the state lists.

Finally, the Tribune urges the FTC to charge a de minimis fee for the Do Not Call list. Small newspapers are especially sensitive to any additional costs or regulatory requirements. The FTC, therefore, should avoid imposing any fees that would represent a significant cost burden to small businesses.

To avoid the administrative burden and expense, the Tribune recommends that the proposed minimum thirty (30) day reconciliation period be modified to allow a telemarketer to reconcile its prospect list and the Do Not Call list on a quarterly basis. Furthermore, to avoid the burdensome expense associated with Do Not Call lists, the Tribune requests that the Do Not Call lists be priced inexpensively, $10 or less as is the case currently with many states.

3. The FTC Should Modify Proposed Rule §310.3(a)(3) Requiring The Telemarketer Obtain Expressed Verifiable Authorization To Clarify That It Does Not Apply To Payments Made In Response To An Invoice And, Where §310.3(a)(3) Applies, To Allow The Telemarketer To Estimate The Date Of The Charge.

In §310.3(a)(3), the FTC proposes to amend the TSR by prohibiting any seller or telemarketer from

> [s]ubmitting billing information for payment or collecting or attempting to collect payment for goods . . . without the customers . . . express verifiable authorization when the method of payment used to collect the payment does not impose a limitation on the customer's . . . liability for unauthorized charges nor provide for dispute resolution procedures to, or compatible to those available under, the Fair Credit Billing Act and the Truth in Lending Act.

Section 310.3(a)(3) further provides that the telemarketer obtain express verifiable authorization either by "express written authorization," including a customer's signature or "express oral authorization." If express oral authorization is provided, the customer must be informed and information recorded which includes, among other things: the date of the charge or payment; the amount of the charge or payment; and the customer's specific billing information, including the name of the account and account number, that will be used to collect payment for goods.

Currently, Tribune newspapers use telephone solicitations, either in-house or through use of third-party telemarketers both of which sometimes operate out of state, to sell newspapers to customers. The Tribune contacts prospective customers by phone, explains the material terms related to obtaining a subscription for the newspaper, and solicits the customer to purchase a subscription such as a daily subscription or even just the Sunday paper. The Tribune sends an invoice to the majority of customers who express a desire to purchase a newspaper subscription. The invoice repeats the material terms of the purchase agreement as expressed previously on the phone, and requests that the customer submit payment either by check, credit card or money order. In only a minority of sales does the Tribune collect credit card information from customers for newspaper subscription sales.

As it is presently written, §310.3(a)(3) is ambiguous and appears to apply to sellers such as the Tribune who do not collect "billing information" over the phone but only send mail invoices. At first glance, §310.3(a)(3) appears to be directed only at protecting customer "billing information" or "that data whereby a telemarketer can obtain access to the consumer's account such as a credit card." Section 310.3(a)(3), however, contains language that apparently broadens its coverage to invoices as it also prohibits a seller or telemarketer from "<u>collecting or attempting to collect payment for goods or services</u> . . . without the customer's . . . express verifiable information" when the method of payment used to collect payment does not limit the customer's liability for unauthorized charges or provide dispute resolution procedures.

Before addressing the Tribune's objections to the rule, the Tribune first observes that it is not at all clear that the FTC intended for proposed amendment §310.3(a)(3) to apply to sellers, such as the Tribune, who invoice their customers after a sales call. As noted above, proposed rule §310.3(a)(3) appears to focus solely on the protecting the customer's billing information (e.g. credit card data) which may already be in the possession of the seller, having been pre-acquired. Section 310.3(a)(3) explicitly references "billing information" and the need for express verifiable authorization to transfer such information. Section 310.2(c) defines "billing information" as mainly private data whereby a telemarketer can obtain access to the consumer's account, such as credit card, checking, savings, [and] utility bill." In turn, the FTC's commentary on the Proposed Rule Marking (at p. 19) states that the FTC's intent was to expand the requirement of express verifiable authorization <u>to other payment methods involving billing information</u>. Given these expressions of intent, the proposed rule's application to invoice billing appears to be unintended and unnecessary.

Moreover, applying the rule to sellers such as the Tribune who invoice customers imposes unwarranted and expensive burdens on sellers who do not collect customer billing information.

First, as provided for in §310.3(a)(3), allowing the customer to provide express written authorization of a purchase to serve as the customer's express verifiable authorization creates particular problems for the Tribune and its invoice billing. For example, the proposed rule requires that express written authorization include the customer's signature. When an invoice is used, the customer does not normally sign the invoice. In addition, while the customer might sign the check that is returned with the invoice, it is not at all clear that such a signature would satisfy the express written authorization to collect payment for goods as the language of the proposed amendment is presently written. Finally, if the customer uses a money order or a check signed by a third party, then the fact that the customer returned the invoice and a check would still not satisfy the express written authorization requiring a customer's signature.

Second, when invoices are used to collect or attempt to collect payment for goods, the proposed amendment's option of allowing express oral authorization to satisfy the requirement of express verifiable authorization results in unnecessary recording costs and presents particular problems in providing the customer with information on billing dates and amounts. For example, when the customer agrees on the phone to purchase a newspaper subscription, the Tribune cannot always specify the date of the charge or even in some instances the amount of the charge. For example, as it often takes several days to process a newspaper subscription before delivery actually begins, the date of the actual charge for the newspaper subscription may not arise for several days. In addition, vacations and suspensions of service while a customer is out of town also affect the commencement of service and billing. If the newspaper subscription does not begin for several days or service is temporarily suspended for a period, those common events affect the amount of the charge or payment due. The Tribune, therefore, would not be able to specify either the amount of the charge or the charge date on the phone at the time of the sale, and thus could be in violation of the proposed provisions in §310.3(a)(3)(ii)(B)(&)(C).

In addition, the proposed amendments' requirement that the seller or telemarketer inform the customer of the name of the account and account number when obtaining express oral authorization also appears ambiguous. See §310.3(a)(3)(ii)(E). Specifically, the references in §310.3(a)(3)(ii)(E) that reference the "name of the account and account number" are unclear. These references could easily be mistaken as referring to the seller's account and account number for that customer, neither of which are usually known at the time of the call.

Overall, protections afforded consumers by requiring express verifiable authorization for collecting payment on the phone should not apply when mailed invoices are utilized to collect payment. When an invoice is used, the telemarketer does not collect billing information on the phone or automatically debit the customer's account. To the extent that the FTC does require some form of express verifiable authorization when invoices are used, then the FTC should modify the provision to allow the customer's return of the invoice and a check or other method of payment to satisfy the requirement of express written authorization

4. The FTC Should Modify The Proposed Restriction On Pre-Acquired Account Telemarketing To Allow Sellers To Convey Billing Information To Third Parties That Conduct Telemarketing On Behalf Of The Seller And To Allow Parent And Subsidiary Companies To Share Billing Information.

In §310.4(a)(5), the FTC proposes to make it an abusive telemarketing practice for any "seller or telemarketer" to receive from any person other than the consumer for use in telemarketing any customer's billing information or disclose any consumer's billing information to any person for use in telemarketing.

As currently written the FTC's prohibition against providing customer billing information to third-parties would unfairly prevent a seller from providing billing information to a third-party telemarketer who is acting on behalf of (and under contract to) the seller. For example, the Tribune sometimes utilizes third-party telemarketers to solicit its customers to see if they would like to expand their limited Sunday coverage of the newspaper to weekly coverage. Under the plain language of the proposed rule, however, the Tribune would be prohibited from providing its customer billing information (including credit card information) to its agent for use in making the calls. When Tribune telemarketing agents have billing information available to them, they are often able to conduct the sales call more efficiently by reading aloud and verifying the customer billing information to the customer when obtaining the customer's express oral authorization to bill. Such efficiencies are very important in the sale of low cost items such as a newspaper subscription.

In addition, the prohibition against sharing customer billing information would unfairly prevent subsidiary and parent companies from sharing or utilizing the billing information of a person who is a customer of what is essentially a single entity. For example, Tribune newspapers often operate through affiliate or subsidiary companies either wholly owned or controlled by the newspaper and essentially operating as one company. The FTC's proposed prohibition against disclosing customer billing information to a third party would prevent the Tribune's subsidiaries from receiving customer billing information originally conveyed to the parent and vice versa. While the Tribune can understand the FTC wanting to restrict the disclosure of customer billing information and loose "joint marketing" arrangements, such a rationale does not apply equally to parent-subsidiary or affiliate relationships where there is a common owner and/or substantial control by the parent.

5. The FTC Should Allow A Maximum Setting Of Up To 10% For Abandoned Calls from Predictive Dialers.

Initially, the Tribune disagrees with the FTC's interpretation that abandoned calls violate §310.4(d) requiring that a telemarketer promptly and clearly disclose specified information to the person called. Such a interpretation appears strained given that the telephone conference in an abandoned call never takes place. If a party is not reached, we do not see how the caller has an obligation to "promptly" inform the listener of the call's purpose. Moreover, if a consumer refuses to wait a few seconds for a caller to come on the line, we do not understand how the FTC can consider that consumer "abused" if they did not wait to hear the initial disclosures.

The Tribune acknowledges, however, that consumers are annoyed when predictive dialers cause excessive operator hang-ups or abandoned calls. In turn, the Tribune supports the FTC and its effort to limit the rates of abandoned calls to consumers. Accordingly, the Tribune urges the FTC to adopt a maximum setting of abandoned calls of up to 10% for abandoned calls from predictive dialers. Abandonment rates less than that will begin to impose substantial financial burdens on the Tribune and other sellers who engage in telemarketing for the sale of small item or low profit margin sales. For example, predictive dialers allow sellers and telemarketers, such as the Tribune, efficiently to utilize their labor and avoid substantial labor costs associated with selling a low cost item. Without a predictive dialer or with low abandoned call settings, telemarketers often have a significant amount of time in-between calls. When that time is aggregated with the other telemarketers, the "down time" between sales calls is substantial. Such down time may not have an impact when "big ticket" or expensive items are sold over the phone. But for the sale of less expensive items such as newspapers, the costs associated with down time and less efficient telemarketing could lead to the increased cost of newspapers. The Tribune estimates that having a zero abandonment rate could lead to an increase in telemarketing costs as high as 20%. Predictive dialers, however, allow the time to be used more efficiently, and thus save on labor costs, in turn lowering the cost of the product. With labor being more expensive, companies might take their telemarketing jobs oversees where labor is much cheaper and more cost efficient.

6. The FTC Should Create An Exception To §310.4(d) For Multi-Purpose And Subsequent Calls From A Newspaper Seller To An Established Customer.

In the "Notice of Proposed Rulemaking" explaining the proposed amendments to the Telemarketing Sales Rule, the FTC states that the prompt initial disclosures required by §310.4(d) apply to "multi-purpose" calls.

The Tribune requests that the FTC provide for an "established customer" exception for newspapers who conduct multi-purpose or subsequent calls to established customers that relate, in part, to the sale of newspapers. The Tribune's newspapers frequently contact their subscribers for the purpose of establishing that the customer is receiving the paper and that delivery is timely and in the right location. In addition, customers who receive only Sunday subscriptions are sometimes asked if they would like to expand their subscriptions and receive their paper on a daily basis. Such calls are unobtrusive and there is no hard sell; customers who receive only the Sunday paper often later welcome the opportunity to obtain daily coverage.

The Tribune is concerned that many customers will not take its calls if it must alert them in the call's initial phase that the call may be, in part, for the purpose of offering them daily newspaper service. They may associate such a "prompt" disclosure with a hard sell when the chief purpose of the call is really to determine the level of service and in fact may not (but in some instances could) lead to solicitation for daily service.

As noted above, newspapers are an important part of our civic life, and the promotion of newspapers and an informed citizenry enhances our communities. The FTC, therefore, should account for the unique role of newspapers and provide for exemptions for newspapers that contact their established customers for subsequent sales or multi-purpose calls.

7. Requiring The Tribune To Substitute The Newspaper's Actual Name Or Customer Service Number For Caller Id Would Add Unreasonable Expense To Sales Calls.

In §310.4(a)(5), the FTC proposes to prohibit telemarketers from intentionally blocking a consumer's caller id system or intentionally concealing calling information from the "caller id" system. The FTC recognizes, however, that some telemarketing systems use "T-1"lines for telemarketing which often cannot transmit caller id information. While such lines would not violate the proposed rule, the FTC has requested comment on a proposal that telemarketers be required to display the seller's name and/or customer service phone number on caller id systems.

The Tribune supports the FTC's efforts to prevent telemarketers from purposefully concealing or blocking caller id information. The Tribune, however, opposes any proposal that requires Tribune papers to modify their systems to display the seller's name and/or phone number. At present, some Tribune telemarketing systems employ the "T-1" lines referenced above. Those systems cannot be modified to display the proposed information without incurring considerable expense.

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Thus, the Tribune appreciates your consideration of our proposed modifications to the FTC's proposed amendments.

Sincerely,

Jack Fuller