UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of Notice of Proposed Rulemaking
To Amend the Telemarketing Sales Rule
FTC File No. R411001

SUPPLEMENTARY COMMENTS OF THE MAGAZINE PUBLISHERS OF AMERICA ON THE COMMISSION'S NOTICE OF PROPOSED RULEMAKING TO AMEND THE TELEMARKETING SALES RULE

I. INTRODUCTION

On behalf of the membership of the Magazine Publishers of America, Inc. (the "MPA"), we are pleased to submit the following Supplementary Comments to the Federal Trade Commission's proposed amendments to the Telemarketing Sales Rule.[1]

The MPA is appreciative of the fact that the Commission selected the MPA as a panel participant for its three-day Telemarketing Sales Rule Forum (the "Forum") on June 5-7, 2002. However, due to the number of new issues raised during the Forum, the complexity of the issues addressed during the Forum, and the number of stakeholders who sought to comment on each issue in the limited time available, the MPA is concerned that certain key arguments and important data may not yet have been fully communicated to the Commission. Consequently, we are submitting these Supplementary Comments in the interest of providing the Commission with a more complete regulatory record. As always, we welcome the opportunity to continue the ongoing dialogue we have maintained with the Commission in connection with the proposed changes to the TSR.

[1] Notice of Proposed Rulemaking (the "NPRM"), 67 F.R. 4492 (January 30, 2002). Hereinafter, the existing Telemarketing Sales Rule, 16 C.F.R. 310, is cited as the "TSR" or the "Existing Rule," and the Commission's proposed revised Rule as contained in the NPRM is cited as the "Proposed Rule."

A. Description of MPA Membership

The MPA is the national trade association for consumer magazine publishers. Our membership includes approximately 240 domestic magazine publishing companies that publish more than 1,500 individual magazine titles, along with more than 100 international magazine publishers and more than 120 associate members who act as suppliers to the magazine industry. MPA members' magazines include nationally distributed publications such as *Time*, *Reader's Digest*, and *Good Housekeeping* as well as smaller circulation publications.

B. Summary of Supplementary Comments

MPA remains committed to the positions set forth in our prior written submission and in our oral testimony at the Forum. During the Forum however, the Commission raised a number of new ideas and concepts in an effort to build consensus among the various stakeholders. Our Supplementary Comments are intended to focus on some of the new ideas and issues raised during the Forum and to provide additional data and information responsive to the Commission's requests in four key areas which are of significant concern to MPA members:

1. The National Do Not Call List

The MPA continues to believe, as set forth in our written comments, that the Commission's proposed national do not call list registry, (the "DNC List") is both legally and structurally flawed and that the costs of administering the DNC List will far exceed the estimates suggested by the Commission. Nonetheless, the MPA does believe that the concept of harmonizing the Commission's DNC List with state-based do-not-call list requirements may provide a constructive framework for addressing some of MPA's concerns with the

Commission's initial proposal, provided such harmonization includes not only the administrative features of the List, but the exemptions and enforcement standards as well. MPA does not agree, as had been suggested by some of the Forum participants, that the administration and enforcement aspects of DNC List requirements can be separated**. MPA would suggest that a harmonization plan similar to that outlined by the National Retail Federation, in its initial comments, whereby interstate calls would be subject to the requirements of the federal regulation (and enforceable at both the federal and state levels), while intrastate calls would be subject to the requirements of state law, may provide a useful framework for developing a harmonization plan that would provide clarity, efficiency and convenience for both marketers and consumers alike.**

In addition, we would strongly urge the Commission to (1) ensure that any national DNC List contains a rational prior business relationship exemption; (2) include an annual renewal requirement if DNC List registration is based solely or primarily upon Automatic Number Identification ("ANI") verification technology; and (3) give serious consideration to following the example set by a number of states and imposing a nominal fee upon consumers who register for the national DNC List, both for verification purposes and for cost control purposes.

2. Treatment of Upsells

MPA was pleased to learn at the Forum that the Commission does not intend to subject upsells to either the DNC List requirements or calling time restrictions otherwise applicable to outbound calls. MPA continues to believe that the Commission's concerns regarding upsells can be best and most easily addressed by creating a separate definition for

upsells and subjecting such calls to specific disclosure requirements uniquely tailored to these types of calls, such as the fact that the consumer is dealing with a separate seller and is being solicited to purchase a separate product or service. Such disclosures would enhance customer satisfaction and improve clarity.

While MPA is not opposed in concept to also requiring disclosure during upsell calls of the type of information contained in Proposed Rule Sections 310.3(a)(1) and 310.4 (d), or to applying to upsell calls other provisions of the Rule such as the requirements that will be applicable to novel payment methods under Proposed Rule Section 310.3(a)(3), MPA would caution the Commission against wholesale application of these provisions in their current form to upsell calls. MPA is concerned that, as was the case with the Commission's original proposal, simply applying provisions that were not drafted with the unique features of upsells in mind to these types of calls could lead to inadvertent drafting problems and a corresponding lack of clarity. For example, Proposed Rule Section 310.3(a)(1) requires that the relevant disclosures be made "before the consumer pays." This phrase is interpreted in the Statement of Basis and Purpose to mean before the consumer provides their billing information.[2] In the typical inbound upsell situation however, the consumer may not actually supply their billing information during the upsell portion of the call. If Section 310.3(a)(1) were merely applied to upsells without any revision, it would be unclear to the marketers when the requisite disclosures would have to be made**. Therefore, if the Commission is going to apply other provisions of the Rule to upsells, MPA would urge the Commission to pay careful attention to the language of these provisions and to their potential application to this unique type of call**. MPA has also learned from its members that application of the recordkeeping requirements to upsell calls could

[2] See Statement of Basis and Purpose and Final Rule, 60 F.R. 43842, 43846 (August 23, 1995).

prove burdensome for the industry. Since upsell calls conducted by MPA members are predominately inbound in nature, many marketers and telemarketers who currently engage in this form of marketing may not have the systems and procedures in place to comply with the specific recordkeeping requirements set forth in the Rule. For marketers and telemarketers who engage principally in inbound telemarketing, the addition of this requirement to what is essentially an inbound call could prove burdensome.

3. Preacquired Account Information

MPA remains very concerned that the Commission's proposed ban on the use of preacquired account information is overreaching and may in fact extend beyond the types of marketing activities even the Commission intended to prohibit. MPA believes that there continues to be a significant level of confusion surrounding this issue, resulting in part from a lack of a clear definition of the term "preacquired account information" and also from a lack of understanding of the various marketing models in which consumer account information is properly and appropriately shared among marketers following notice to and consent from consumers. MPA would urge the Commission to adopt a definition of preacquired account information that truly captures the type of activity the Commission has described as abusive and deceptive, which is the transfer of account billing information without the consumer's prior knowledge or consent for telemarketing purposes. This activity, however, is very different from the scenarios described during the Forum, especially a simple external upsell, in which a consumer authorizes a marketer to bill the same credit card account just provided during the same call. In this situation, MPA believes the added protections of disclosure coupled with an express verifiable authorization requirement will fully protect the consumer against potential fraud and abuse. **In striving to balance consumer protection and economic impact, we urge**

the Commission to be mindful that requiring telemarketers to obtain consumer billing information twice in one call will not only annoy consumers but will also increase the costs of telemarketing, depress response rates, and potentially decrease consumer goodwill towards the marketers involved. In these Supplemental Comments, we quantify the severe economic impact on industry of the additional time required in each call to obtain the billing information a second time. We also present evidence from a number of marketing media of how requiring consumers to take additional steps, such as repeating billing information and similar actions, has a significant demonstrable depressing effect on response rate. In some of the examples cited, response rates have decreased by as much as 30 percent.

4. Predictive Dialers

MPA believes that a five percent abandoned call standard, along with a reasonable definition of an "abandoned call," is a logical approach that takes into account the capabilities of smaller as well as larger telemarketing call centers**. If the Commission creates a workable national DNC List, then combining that list with a ban on the blocking of Caller Identification Services ("Caller ID") and a five percent abandoned call standard would, in its totality, represent a reasonable compromise that attempts to balance carefully the interests of consumers, regulators and responsible businesses.**

II. THE NATIONAL DNC LIST

On the question of a national DNC List, MPA continues to adhere to the position described in our prior written comments and in our testimony during the Forum. We remain deeply concerned about the legal foundations for, and the structural weaknesses of, the Commission's current DNC List proposal. In the event that the Commission elects to proceed

with the creation of a DNC List, then we acknowledge that the concept of a "harmonized" national DNC List incorporating the state DNC Lists may address some of our concerns about the burdens, inefficiencies and potential confusion to consumers of multiple lists, but only if there is complete harmonization, not only of the administration of the lists but of the exemptions and enforcement standards as well. Even assuming that an appropriate harmonized approach is taken, however, we also believe an annual consumer renewal requirement and the imposition of a nominal consumer registration fee are needed to ensure that the inherently unreliable ANI-based verification methodology described by the Commission during the Forum strikes the proper balance between business and consumer interests. A reasonable existing business relationship exemption is also critical to ensuring that the DNC List does not have an economically devastating impact on the ability of industry to continue to communicate with its loyal and well established customers.

A. The Substantive Harmonization of National and State DNC Lists May Provide a Workable Approach.

During the Forum, the Commission raised the concept of one unified "harmonized" list and suggested that implementing this would address industry's strong desire for preemption of state laws if a national DNC List is established. While MPA continues to believe that preemption of state laws is the best way to ensure that the national registry does not impose unnecessary burdens on the industry or create a system that is confusing, the idea of harmonization raised at the Forum is an intriguing one which does have some appeal to MPA members, as an alternative to complete separation and independence of the federal and state lists and systems. In order to be meaningful to consumers and to businesses, however, any such harmonized national-state DNC List would have to provide one consistent nationwide set of

exemptions and enforcement standards for interstate telemarketing activities. Such an approach was originally suggested by the National Retail Federation ("NRF") in its initial comments on the NPRM.

In brief, the proposal would work in the following manner: (1) state-based DNC Lists would be incorporated into the national DNC List; (2) the TSR's national DNC List regulations, including applicable exemptions and safe harbors, would apply to all interstate calls; (3) the states would have the right to enforce the national DNC List with respect to interstate calls, subject to applicable federal exemptions and safe harbors; and (4) states with state-based DNC Lists would continue to have the right to enforce their state-based DNC Lists, including any applicable state-based exemptions and safe harbors, to intrastate calls.

In supporting the concept of substantive harmonization, we must emphasize that the MPA cannot support the mere administrative centralization of the national DNC List with state-based DNC Lists. In other words, we believe that the creation of a centralized national-state DNC List registry without a corresponding harmonization of the underlying legal standards would subject magazine marketers to confusing and potentially inconsistent obligations which will severely undermine the very efficiencies the national registry is designed to create.

B. An Exemption to the DNC List for Established Business Relationships Must Be Created.

If the Commission proceeds with the creation of a national DNC List, then the establishment of a reasonable exemption for established business relationships is absolutely crucial to the membership of MPA. Telemarketing of renewals to existing customers is an important business and customer service tool for our members. While it varies from magazine to

magazine, the percent of renewals coming from telemarketing is as much as 15 percent for some magazines. Furthermore, our readers are very happy to get calls reminding them that their subscription is about to expire. For example, one of our members recently conducted a focus group with customers, some of whom did not generally want to receive telemarketing sales calls. However, when asked if they wanted to be called with a reminder that their subscriptions needed to be renewed, the response was "absolutely".

While we are sensitive to the concerns expressed by the Commission during the Forum regarding the potential for the creation of an overly broad exemption, we strongly believe that appropriate exemption language can be drafted to satisfy business imperatives and be consistent with reasonable consumer expectations. The fact that other federal regulatory agencies and state legislatures have in the great majority of cases included an established business relationship exemption in legislation and regulations imposing do-not-call, do-not-fax, and do-not-email regulations provides powerful evidence supporting the inclusion of an established business relationship exemption in the Commission's national DNC List proposal. For example, the Telephone Consumer Protection Act required the Federal Communications Commission to include a prior business relationship exemption in its regulation of unsolicited faxes. 47 U.S.C. § 227(a)(3). Similarly, the great majority of the 23 states with state-based DNC Lists have created some form of exemption for established business relationships, and we are not aware of any momentum in the state legislatures to eliminate established business relationship exemptions.[3] The prevalence of business relationship exemptions in other areas of federal regulation and in state regulations demonstrates that the inclusion of such an exemption in the

[3] We acknowledge that recent state-based DNC List laws often contain more carefully defined business relationship exemptions than did earlier state-based DNC Lists.

TSR would conform to regulatory precedent and be consistent with existing consumer expectations.

The Commission's proposed alternative to an established business relationship exemption is the company-specific verifiable consumer opt-in contained in Section 310.4(b)(1)(iii)(B) of the Proposed Rule. We do not believe that such a proposal is realistic in light of typical consumer behavior. Consumers cannot and should not be expected to remember every company with whom they have done business and from whom a telephone call will not be unwelcome. Moreover, a company should not be expected to bear the cost of obtaining verifiable opt-ins from each consumer who has chosen to do business with the company, nor do we believe such an approach is necessary. To the extent that a consumer does not wish to receive a call from a company with whom the consumer has an existing business relationship, the consumer can easily and effectively exercise this choice by asking to be placed on that company's internal do-not-call list. It is important to remember that while the Commission proposes to create a national DNC List, it is being proposed as an addition to, and not in lieu of, the requirement for company-specific lists. It would be relatively simple for the FTC to explain the existence of both the national DNC List and the company-specific lists in the educational materials it will necessarily create to promote the national DNC list. The Commission can tell consumers that the national DNC list contains an exemption allowing companies they do business with to call them and suggesting that if they do not wish to receive such calls, they can ask to be placed on the company's internal DNC list.

We would suggest that the Commission adopt the following definition of an established or prior business relationship:

> An "established or prior business relationship" shall exist when, within the 24–month period prior to the outbound telephone call, there has been a business transaction between the seller and the consumer, including:
>
> 1. a purchase transaction;
>
> 2. a transaction involving the provision, free of charge, of information, goods or services requested by the consumer;
>
> 3. the acceptance of an incentive by the consumer, or
>
> 4. the participation in a promotion by the consumer.

The language proposed above, which incorporates elements of the definitions of established or prior business relationships from recent state DNC List regulations as well as from the proposed CAN SPAM Act of 2001 [S. 630, 107 Cong., 1st Sess. § 3 (9)(2001)] on unsolicited commercial email, reflects recent regulatory developments on this topic. We urge the Commission to adopt this definition.

C. Operation of a National DNC List: Inclusion of a Nominal Consumer Fee and Annual Renewal Requirement.

During the Forum, a number of issues were discussed in connection with the operation of the proposed national DNC list. Although some additional useful information was released by the Commission during the Forum, we remain concerned about the lack of specificity regarding operational issues and the associated costs. For example, during the Forum, it was suggested that the vendor(s) operating the DNC List could call back consumers who are not able to register their numbers on the national DNC List using ANI technology. Although the vendor(s) present at the Forum stated that they could create such a call-back system, they also noted that it would be more expensive to do so. However, the magnitude of additional expense was not discussed in detail during the Forum.

In this regard, as was noted during the Forum, there are inherent flaws in the automated ANI-based verification technology that the Commission appears intent upon using in creating the national DNC List. Forum participants from the telephone industry clearly explained that ANI information is not transferred in certain parts of the country and by certain types of telephone systems. They further explained that a national DNC List database containing telephone numbers obtained through ANI capture alone would quickly become outdated because Americans relocate often, and no central "disconnect database" exists to purge outdated telephone numbers from the national DNC List.

If, perhaps to control costs, the admittedly flawed ANI-based technology is used to create and maintain a national DNC List, we strongly believe that the imposition of an annual renewal requirement is essential in order to maintain the accuracy and currency of the List. We also believe that the renewal should be consumer initiated. While the concept was raised at the Forum of having an outbound call placed to the consumer to determine if they wish to renew, we believe such an approach will significantly and unnecessarily increase the cost of administering and maintaining the List, could annoy consumers who have elected to avoid certain types of phone calls, and may potentially cause consumer confusion if the telephone number has changed hands and the operator is not speaking to the party that made the initial DNC election.

Given that the actual costs associated with the operation of a national DNC List are unknown and appear to be difficult to predict, we would also suggest that the Commission consider imposing a nominal fee upon consumers who register for the national DNC List. Such an approach would provide an additional means of verifying the accuracy of DNC elections while also more appropriately balancing the cost of the imposition of a national DNC List between consumers and businesses. In this connection, it is instructive to note that during the

Forum, representatives of state attorney general's offices from states with a consumer usage fee testified that they did not feel a nominal consumer usage fee negatively impacted consumer usage of their state-based do-not-call lists.

III. THE REGULATION OF UPSELLS

MPA is pleased that the Commission has acknowledged the concerns expressed by industry members, including MPA, regarding the Commission's initial proposal to treat "upsells" as outbound calls. Now, the Commission has asked industry members to comment further upon the possible imposition of other TSR obligations to upsells, such as the disclosure requirements set forth in Proposed Rule Sections 310.3(a)(1) and 310.4(d), specifically the ban on misrepresentations [Proposed Rule Section 310.3(a)(2)] and the recordkeeping requirements (Proposed Rule Section 310.5).

With the possible exception of recordkeeping, MPA does not oppose the concept of applying other appropriate provisions of the TSR to upsells. MPA is concerned, however, that simply applying, in wholesale fashion, provisions of the TSR that were not drafted with upsells in mind, could, as was the case with the Commission's initial proposal, lead to drafting irregularities and unintended consequences. For example, while MPA is not opposed in concept to disclosing the type of information contained in Proposed Rule Section 310.3(a)(1), we note that this provision makes it a deceptive practice to fail to make these disclosures "before a customer pays." In the Statement of Basis and Purpose for the original Rule, the Commission clarifies that "before a customer pays" means before the customer provides their billing information.[4] In the classic inbound upsell context, however, the consumer does not provide

[4] See Statement of Basis and Purpose and Final Rule, 60 F.R. 43842, 43846 (August 23, 1995).

their billing information again during the upsell portion of the call, but authorizes that the seller bill the same account the consumer just provided during the primary sale. If the language of this section were left as is, and simply applied to "upsell calls," then marketers would have no clear guidance as to when, within the call, these disclosures would need to be made. MPA would suggest that in the case of upsells, the appropriate timing for the disclosures should be "before the consumer accepts the offer" rather than "before the consumer pays." This is but one example of the unintended consequences that could result if existing provisions of the TSR are simply applied to upsells without careful consideration of how they would work within the framework of upsell calls. It is because of the somewhat unique features of upsell calls that MPA suggested it might be simpler and more efficient to create a separate definition for upsells and a unique set of disclosure requirements which would specifically communicate the type of information which the Commission has identified as being most important in these types of calls. If the Commission were to adopt such an approach, MPA would not object to adding to the list of the recommended disclosures set forth in its written comments, any additional information currently contained in either Proposed Rule Sections 310.3 or 310.4 which may not have otherwise been covered in the disclosures recommended by MPA in its initial comments.

One provision of the TSR which could prove to be problematic for industry if applied to all upsell calls is the recordkeeping provision. For MPA members, a significant percentage of upsell calls are conducted on inbound calls generated in response to mass media or direct mail advertisements, which are therefore exempt from the TSR. Accordingly, neither the sellers nor their telemarketing agents necessarily have the systems and procedures in place in connection with these calls to comply with the TSR's very specific and detailed recordkeeping provisions. For these sellers and their agents, the requirement to comply with the TSR's recordkeeping

requirements on what is essentially an inbound call will require an investment of capital and resources to develop and implement systems and software necessary for compliance. Since all of the Commission's concerns with upsells expressed in the NPRM related to disclosures, we do not believe the additional burden and cost to industry that would result from the imposition of recordkeeping requirements to inbound upsells would be offset by additional benefits to consumers. We believe the Commission should refrain from subjecting industry to this additional burden. In this regard, we note that, since MPA is proposing that express verifiable authorization be obtained from consumers prior to the transfer of billing information in an upsell call, a record of the consumer's express verifiable authorization will be required, which should adequately address both the consumer's and Commission's needs for some record of the transaction.

IV. THE TREATMENT OF PREACQUIRED ACCOUNT INFORMATION

In our original comments, MPA expressed serious concern regarding the lack of a clear definition of preacquired account information. During the Forum, it became clear that the absence of a clear working definition for preacquired account information coupled with a lack of understanding regarding the various ways in which "preacquired account information" is utilized had generated substantial confusion among Commission staff and Forum participants alike. This confusion was perhaps best highlighted by Eileen Harrington's closing comment on this session wherein she indicated that we must find a way to stop telemarketers from obtaining consumer's account billing information before the consumer is ever called and without their consent. MPA's written comments and oral testimony reflect complete agreement with this conclusion. Not a single example of actual marketing practices described by industry during the Forum involved a

situation in which the consumer's account information had been transferred either prior to or without the consumer's knowledge or consent. While there appears to be a large gap between industry and the Commission on this very critical issue, we believe the gap lies less in concept than in the drafting details. We are hopeful that we can provide useful data and constructive solutions that may help bridge the gap without compromising the Commission's consumer protection goals.

As we explained during the Forum, we believe most of the confusion stems from the fact that the Commission uses the term preacquired account information repeatedly through the NPRM, yet never defines the term. This confusion is compounded by the fact that in the Proposed Rule itself, the term preacquired account information is never used, but instead the Proposed Rule purports to ban any transfer and use of account billing information among marketers, irrespective of consumer notice and consent.

MPA recommends therefore as an initial matter that the Commission either eliminate the reference to preacquired account information in the NPRM or incorporate the term into the Rule with an appropriate definition. MPA believes that preacquired account information should properly be defined to apply precisely to the situation described by Ms. Harrington whereby a marketer has acquired a consumer's account information for telemarketing purposes before the marketer has ever contacted the consumer and accordingly without notice to, and the prior express verifiable consent of, the consumer. Given a more precisely defined prohibition, the Commission can then proceed to consider how best to handle other telemarketing arrangements, for example an external upsell situation, in which information may be transferred between marketers, but only if, and subsequent to, a consumer consents to such transfer.

We recognize that the Commission remains skeptical and has asked industry to provide further data on why consumers' should not be required in every sales transaction to provide their account information directly to the marketer. Before answering that question, it is useful to review some of the more common marketing arrangements in which the transfer of account billing information occurs with notice to, and consent from, the consumer. A review of these arrangements should help highlight for the Commission the benefits such arrangements afford to consumers and marketers alike.

For MPA members, the most significant marketing arrangement involving the sharing of consumer billing information is in the case of inbound upsells. As we indicated in our written comments, inbound upsell marketing is a significant and important source of new subscribers for the magazine industry.

In the most common upsell scenario, a consumer makes a telephone call in response to a general media advertisement, a direct mail piece, or a catalog. For example, a consumer views a television commercial for a piece of exercise equipment. The consumer calls the toll-free number on the television screen to order the exercise equipment. The sales operator at the inbound call center answers the consumer's call; obtains relevant information, including complete billing information, from the consumer; and processes the consumer's order for the exercise equipment. Upon the completion of that transaction, the sales operator asks the consumer if he or she would be interested in receiving a subscription to a fitness magazine.

As the consumer has just purchased a piece of exercise equipment, marketing logic suggests that this consumer is more likely to be interested in a fitness magazine subscription than the average consumer would be. For that reason, a fitness magazine marketer will be willing to compensate the exercise equipment marketer in order to obtain the right to present the fitness

magazine's offer to customers of the exercise equipment marketer. In doing so, the fitness magazine marketer reduces its costs of acquiring new subscribers because it will be presenting its magazine offer to consumers who are more likely to accept such an offer than the average consumer. Similarly, the exercise equipment marketer can use the funds it receives from the fitness magazine marketer to reduce its own costs of doing business. By reducing their costs through affinity marketing in this way, both marketers are better able to compete in the marketplace and to keep the prices for their respective products as low as possible.

In addition to the benefit of competitive product pricing, the consumer will benefit from the time savings of target marketing. Consumers who purchase the exercise equipment benefit because they are presented with an offer which is targeted to their interests, and which they can very conveniently accept or reject. Now, we would like to explain why requiring consumers to repeat their billing information in an upsell transaction will have very detrimental economic effects for both consumers and marketers. First, as we are sure the Commission is aware, making people repeat their billing information will add to the time of the call, and as all marketers know, time is money. In our initial comments, we tried to quantify the impact of the additional time it would take the consumer to obtain and repeat their credit card number using available data sources, most notably Commission staff assumptions contained in the NPRM. Since our initial comments, we have obtained several additional sources of data to estimate the cost increase from requiring that the credit card number be given twice. These include the DMA Statistical Fact Book from 2001 and data underlying the study presented at the Forum by Capital Economics and LECG. A spreadsheet detailing our calculations is included as Attachment 1 to these Supplementary Comments. Our revised, and we believe more accurate, estimate of the

additional costs from an absolute prohibition on the transfer of data between marketers is $90 million, a substantial sum to be borne by businesses and ultimately by their customers.

Second, making consumers repeat their credit card information a second time in the course of one call violates what marketers call the KIS principle – "keep it simple". In the parlance of marketers, requiring consumers to obtain and repeat their credit card number is referred to as adding "additional action requirements". It is also viewed by marketers as making the consumer's required response more complicated. As the Commission is no doubt aware, marketers in all media constantly test their offers and measure offers against each other in terms of response rate. We have received quite a number of examples from our members of actual mail and telephone campaigns which document clearly how requiring additional actions or making the response mechanism more complicated depress response rates, sometimes by staggering amounts.

For example, one publisher found that simply adding an option for consumers to pay by credit card dropped the response rate in a direct mail campaign by 30 percent. For another publisher, adding an option of renewing for three years (in additional to the usual one and two year renewal options) lowered the response rate by over 15 percent. Asking a demographic question and requesting an email address led to decreases for two other publishers in the 5 – 10 percent range. One publisher who switched to courtesy reply envelopes instead of business reply envelopes lost close to 10 percent in response rate.

All the marketers contacted agreed that "requiring the customer to work more reduces response". The only time that an additional request will not hurt response rate seems to be if the additional request is viewed as relevant to enhancing the product. In the case of giving the credit

card number a second time in the same phone call, none of the marketers believed the customer would view this action as "enhancing the product".

The economic consequences of these lost sales opportunities are substantial. If, as the examples given by marketers and discussed above indicate, an additional action requirement generally reduces response rates between ten percent and thirty percent, then between $290 million dollars and $870 million dollars in sales would be lost if the consumer is required to take the additional step of repeating a credit card number in an inbound upsell.[5] In fact, there have been indications that consumers' annoyance may lead not only to the loss of the upsell but potentially the loss of the original sale and/or a reduction in the consumer's goodwill towards the marketers which may impact the consumer's willingness to do business with either or both marketers in the future. All of these elements may have a devastating impact on both marketers.

Under our proposed approach to the upsell transactions described above, the sales operator would first be required to make the following upsell-related disclosures to the consumer: (1) the magazine offer is being made on behalf of a separate seller; (2) the name of the seller that will bill the consumer for the magazine subscription; (3) that the purpose of the upsell is to solicit the sale of additional goods; and (4) the material terms and conditions of the magazine sales offer (e.g., the cost of the magazine subscription, the length of the subscription period).

In addition, under our proposed approach, the upsell transaction would be subject to disclosure of material billing information and an express verifiable consent requirement. The sales operator would be required to inform the consumer of (1) the identity of the entity that will

[5] Attachment 1 describes in detail the basis for our estimate of $2.9 billion dollars in annual inbound upsell sales. The $290 million dollar estimate is based upon a ten percent impact on annual inbound upsell sales, while the $870 million dollar estimate represents a thirty percent impact.

be billing the consumer for the fitness magazine; (2) when and how much the consumer will be billed for the fitness magazine; and (3) sufficient information to allow the consumer to identify the account that will be billed., e.g. "[name of fitness magazine] will bill the annual subscription fee of $___ to the credit card you just provided for your [name of exercise equipment] purchase."

The consumer's express verifiable consent to the fitness magazine offer would be obtained by one of the three express verifiable consent methodologies contained in the existing TSR: (1) by obtaining the consumer's signature; (2) by a tape recording evidencing that the required disclosures have been made and that the consumer affirmatively consented to the magazine subscription; or (3) by a written acknowledgement which is sent prior to billing in sufficient time to allow the consumer to avoid a payment obligation, which reiterates the required disclosures, and which provides complete instructions on how the consumer can cancel to avoid a payment obligation.[6]

Under the scenario described above, the fitness magazine marketer will only obtain the consumer's billing information if the sales operator obtains the consumer's express verifiable consent to the terms of the fitness magazine offer. In other words, there is no preacquired account information because the upsell marketer (in this case, the magazine marketer) will not have access to the consumer's billing information before the consumer's verifiable authorization is obtained.

[6] We understand that the Commission has proposed the elimination of the written confirmation methodology on the theory that it is not widely used. However, the proposed Rule revisions will impose the Rule's obligations for the first time on many inbound call centers that have not previously been subject to the Rule. These inbound call centers generally do not have the taping mechanisms in place that are common in the outbound channel, so the written confirmation consent mechanism will provide them with a cost-effective compliance mechanism. For that reason, we encourage the Commission to allow any of the three existing methods of express verifiable authorization to continue to be used.

During the Forum, a number of participants, supporting the Commission's proposed ban, expressed concern regarding situations where preacquired account information is used in conjunction with a free trial offer. While MPA recognizes that combining the two features in one offer requires an evaluation of whether the proposed disclosures and express verifiable consent mechanism would need to be changed to accommodate the free trial aspect of the offer, we don't believe that the appropriate or necessary response is simply to ban the transfer of information between marketers. To the extent that the Commission has any concerns with the use of "free trial offers" in telemarketing, we would respectfully submit that the appropriate solution to this issue is not to ban the transfer of account data (with and after the customer's consent), but to require disclosures, such as those set forth in MPA's Educational Guide on Advance Consent Marketing, designed to ensure that all of the material terms of the free trial offer, including the consumer's affirmative obligation to cancel, are set forth in the solicitation to the consumer. We believe that disclosure of the material terms and conditions of the free trial offer, followed up by a written notice repeating all the information and clearly showing how the consumer can cancel before incurring a payment obligation, provides and appropriately balanced approach to this issue.[7]

V. The Use of Predictive Dialers

During the Forum, the Commission sought additional information from industry participants regarding the imposition of an abandoned call standard that is less than five percent. Although larger companies, including those who were represented at the Forum, may be able to achieve a less-than-five-percent abandoned call standard in a cost-efficient manner, we note that

[7] We also note that in the specific context of a magazine upsell offer, a consumer who accepts a free trial offer will be receiving the magazine, which is clearly an item of value, on a regular basis.

there are many smaller industry participants who would not be able to do so. In fact, many smaller market participants may be forced out of business if an abandoned-call standard of less than five percent is imposed. We believe that the combination of a national DNC List, a ban on the blocking of Caller Identification Services ("Caller ID"), and a five percent abandoned call standard would, when viewed as a whole, provide consumers with viable choices in dealing with telemarketing sales calls and abandoned calls.

We acknowledge that the productivity benefits that predictive dialers provide for businesses and consumers should be balanced against consumer dissatisfaction with abandoned calls. To that end, the MPA believes that it would be appropriate at this time to set a five percent standard for abandoned calls under the TSR, and to define an "abandoned call" in the following manner:

> An "abandoned call" occurs when an outbound telemarketing call is disconnected by a predictive dialer device because no telemarketing operator was available to respond to the call. An outbound telemarketing call which is disconnected for any other reason, such as no response from the consumer, shall not be considered an abandoned call for purposes of this Rule.

Our analysis of existing data suggests that a five percent abandoned-call standard will result in an average of less than 8 abandoned calls per household per year by the telemarketing sales industry. According to industry calculations, approximately 16 billion outbound telemarketing sales calls[8] are made annually to the approximately 105 million households in the United States.[9] If a five percent abandonment rate standard is imposed, each United States household will receive less than 8 abandoned calls per year

[8] Based on the Economic Study of the Proposed Rulemaking to Amend the Telemarketing Sales Rule by James C. Miller III, Richard Higgins, Jonathan Bowater and Robert Budd commissioned by the Consumer Choice Coalition.

on average as a result of outbound telemarketing sales calls. Moreover, to the extent that even a single abandoned call is deemed intolerable by an individual consumer, that consumer will still have the option of placing his or her name on the national DNC List. We would reiterate that a five percent abandonment rate, in combination with the creation of a national DNC list and a prohibition on blocking caller ID, should significantly reduce the problem of abandoned calls.

As part of its recommendation, MPA continues to urge the Commission to include a safe harbor provision, similar to that which currently exists in Section 310.4(b)(2) of the Existing Rule, for compliance with the recommended five percent abandonment rate. Since the abandonment rate is susceptible to technical malfunctions or errors, marketers and telemarketers must have protection from liability in the event of inadvertent errors. Accordingly, under this safe harbor approach, a seller or telemarketer would not be deemed to be liable for violating this provision if it has established and implemented procedures to comply with the five percent abandonment rate standard.

VI. CONCLUSION

We thank the Commission for providing us with the opportunity to submit the preceding Supplementary Comments on behalf of our membership. Our organization remains committed to working with the Commission to ensure that the revised Rule represents an appropriate balancing of the needs and requirements of the various stakeholders in the Rule revision process. As we indicated during our testimony at the Forum, while we appreciate the opportunity to participate in all phases of the Rulemaking process, given the magnitude of new ideas and issues

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[9] Statistical Abstract of the United States 2001, Table No. 54, "Households, Families, Subfamilies, and Married Couples: 1980-2000."

raised during the Forum and the lack of definition and clarity on certain key issues which are critical to the proposals, we believe that affected parties need an opportunity to comment further once the Commission has decided on the manner in which it intends to revise its proposals. If you have any questions or concerns regarding these comments or any other aspects of the MPA, please feel free to contact us.

Respectfully submitted,

Michael Pashby
Executive Vice President/General Manager
Magazine Publishers of America
909 Third Avenue, 22nd Floor
New York, NY 10022
(212) 872-3700

Rita D. Cohen
Senior Vice President
Legislative and Regulatory Policy
Magazine Publishers of America
1211 Connecticut Avenue, Suite 601
Washington, DC 20036
(202) 296-7277

Counsel:

Linda Goldstein, Esq.
Hall Dickler Kent Goldstein & Wood LLP
909 Third Avenue
New York, NY 10022-4731
(212) 339-5465