March 28, 2002

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

Re: **Telemarketing Rulemaking-Comment. FTC File No. R41101**

Ladies and Gentlemen:

This letter is in response to the Commission's request for public comments regarding its review of the Telemarketing Sales Rule ("TSR") as published in the Federal Register on January 30, 2002.

The American Resort Development Association ("ARDA") is the Washington, D.C. based trade association representing the vacation ownership industry. Established in 1969, ARDA today has over 800 members, ranging from small, privately held firms to publicly traded companies and international corporations. ARDA's diverse membership includes companies with vacation timeshare resorts, private residence clubs, land development, lots sales, second homes and resort communities. However, the majority of ARDA's membership is related to the timeshare industry

ARDA submitted comments during the first round of review, pursuant to the Notice issued February 28, 2000.[1] ARDA appreciates the Commission's references to those comments in the most recent Notice and hopes that our input has been helpful. These comments supplement our prior submission, which may also provide relevant background information and help clarify our position on pertinent issues if questions arise in connection with this submission. ARDA appreciates the opportunity to comment upon the FTC's proposed modification of the Telemarketing Sales Rule to create a national "do-not-call" registry, as a substantial number of ARDA's members would be affected.

[1] Consistent with the Commission's format, any references to ARDA's previous comments are identified by "ARDA" and the page number.

Summary

Provided the amended Telemarketing Sales Rule ("Rule" or "TSR") includes certain elements, ARDA would not oppose a national do-not-call registry or certain revisions to the Rule. Accordingly, the Rule should meet the following criteria:

1. Preempt state laws establishing or requiring compliance with do-not-call lists (either in the Rule or in the implementing law);

2. Provide an exemption for "established business relationships," including other special relationships with customers;

3. Limit the application of "outbound telephone call" in upsell marketing;

4. Provide a minimum five percent error rate for "dead air" calls from predictive dialers;

5. Limit who has the authority to place a number on the list; and

6. Set a limited retention period for do-not-call requests.

These and other concerns are more thoroughly discussed herein.

Responses to Specific Proposals

These comments (the "Response") are organized by section in the order and with the headings set forth in the Commission's Notice of Proposed Rulemaking dated January 30, 2002, with additional information provided in response to the Commission's specific questions within those sections.[2] Although there are many aspects of the Notice that affect our members individually, we have responded only to those questions that most substantially affect our industry as a whole.

A. Section 310.1—Scope of Regulations

Our members have found that telemarketing and the Internet compliment each other on many levels. For example, sellers and telemarketers[3] can direct consumers to Web sites that provide additional information about the marketed goods or services during the call or shortly thereafter. The consumer with Internet service has almost immediate access to the components of an offer, material disclosures, and FAQ's.

[2] References to the Commission's Notice of Proposed Rulemaking ("Notice") are to the page numbers in the .pdf format, at www.ftc.gov/bcp/conline/edcams/donotcall/pubs/NDNCR_therule.pdf.

[3] "Sellers" and "telemarketers," while defined separately in the Rule, are used together or interchangeably in this Response for brevity without regard to distinctions between the terms. However, ARDA has no objection to the current or proposed definition of either term.

However, the Internet is neither akin to nor a substitute for telemarketing.[4] Telemarketing allows the seller to speak with the consumer, as they would in a face-to-face transaction, when that type of interaction is not practical. As marketers use these two divergent methods of contact, the mutual benefits to both consumers and businesses will continue to be demonstrated and only grow as a result. ARDA agrees with the Commission that regulation of the Internet is still developing and that separate rules are appropriate.[5]

B. Section 310.2--Definitions

Section 310.2(c)—"Billing information."

The proposed definition of "billing information" is overly broad. This overbreadth results in a potentially lengthy authorization process, as addressed herein. As set forth in the Commission's Notice, "billing information" is defined, in part, as "any data that provides access to a consumer's or donor's account." This information, as intended by the Commission, would include the catchall category of "any other information used as proof of authorization to effect a charge against a person's account."[6]

According to the Commission's Notice, the definition would include a "customer's or donor's date of birth."[7] The date of birth is often used for other purposes, for example, eligibility to enter a contest or drawing, eligibility to enter a contract, company policy (e.g., attendance on some cruise ships), or for demographic purposes. While this information may not be gathered during a call in which a billing occurs, it could be obtained in the instances noted and passed along to other parties for marketing or other purposes. To prohibit the disclosure of information gained outside the context of the billing process would go beyond the necessary intent of this section.

If the information is obtained during the billing process, and for that specific purpose, it would be appropriate to limit the use of that information under section 310.4(a)(5). However, if the information is obtained in some other context, the information should be freely shared, possibly subject to other laws or regulations.[8] Accordingly, the Commission should modify the definition of "billing information" or add an exception in section 310.4(a)(5) for information that is not gathered as part of the billing process.

[4] The Commission notes the distinction between issues related to online advertising and those related to telemarketing. (Notice at 18). Further, proposed § 310.6(f) would deem email solicitations comparable to mail and facsimile advertising.

[5] Notice at 18.

[6] Notice at 20.

[7] Id.

[8] E.g., the Gramm-Leach-Bliley Act (Pub. L. 106-102, 15 U.S.C. 6801 et seq.) and the Commission's (and other agencies') rule promulgated thereunder protect the privacy of "personally identifiable financial information," including permitting agreements for the sharing of this information between "financial institutions" and with other parties which limit the use of the information.

Either revision would clarify the Commission's intent to limit disclosure of information obtained only through the billing process.

Section 310.2(d)—"Caller identification service."

Consistent with other comments made herein, ARDA would suggest that the definition of "caller identification service" be expanded. The term should include not only "the telephone number and, where available, the name of the *calling* party" (emphasis supplied), but the telephone number and name of "any party whom the telephone subscriber may contact," with a reference to the do-not-call provisions. Expansion of this term would provide the seller with flexibility in dedicating a number specifically for do-not-call purposes. In turn, customers would have confidence that their privacy preferences are being handled appropriately.

Section 310.2(n)—"Express verifiable authorization."

ARDA does not object to the proposed definition. However, the use of the term "express verifiable authorization" in two different contexts may create some confusion. The Commission proposes to broaden the application of the definition to cover two situations. One is "requiring the express verifiable authorization of a customer or donor to a charge when certain payment methods are used," pursuant to revised section 310.3(a)(3). The other is under proposed section 310.4(b)(1)(iii)(b), "which makes it a violation of the Rule to call any consumer or donor who has placed himself or herself on the national "do-not-call" list absent that consumer's or donor's express verifiable authorization."[9] As the term is already present in the Rule in the former context, ARDA suggests using a different term in relation to "opting-in" to the national do-not-call registry. One possible alternative would be "express opt-in," borrowing from the Internet world. ARDA provides additional comments related to specific application of the term under sections 310.3(a)(3) and 310.4(b)(1)(iii)(b), below.

Section 310.2(r)—"Outbound telephone call."

The Commission's proposal to expand the definition of "outbound telephone call" causes ARDA's members some concern. ARDA agrees that certain disclosures would need to be repeated for each new product offered or, possibly, a change in telemarketers. Yet, the Rule should include a provision that allows sellers and telemarketers to refrain from repeating any duplicative information, as so doing adds unnecessarily to the length of calls and may even detract from the impact of other required disclosures.

Expanding the definition may have other negative consequences. ARDA addresses these concerns further in the "Do-Not-Call" section of this Response, in discussion of section 310.4(b)(1)(iii)(b), below.

[9] Notice at 21-22.

C. Section 310.3—Deceptive Telemarketing Acts or Practices

Generally, the members of ARDA are pleased with the current level of disclosures required under the Rule. The disclosures are not overly burdensome and provide sufficient information to the consumer.

Section 310.3(a)(1)(iv)—Disclosures regarding prize promotions.

The additional disclosure proposed under section 310.3(a)(1)(iv) alone does not result in a significant additional burden. While it is inconvenient to include additional verbiage in a brief telephone call, adding language that informs the consumer that any purchase or payment will not increase their chances of winning (given the limited context in which such language would be necessary) by itself should not impose undue hardship upon the telemarketer.[10]

Section 310.3(a)(3)—Express verifiable authorization

As noted earlier, the proposed changes to the requirements under section 310.3(a)(3), related to "express verifiable authorization", raise some concern with our members.

First, the Commission proposes to delete section 310.3(a)(3)(iii), which allows a seller to obtain express verifiable authorization by written confirmation of the transaction, provided the confirmation is sent to the customer prior to the submission of the customer's billing information for payment. As the Commission notes from previous comments, this method is not widely used.

Tape-recorded verification is used much more often, under the current scheme of regulation, and is certainly preferred to written authorization. However, the addition of requirements during the oral verification, as proposed by the Commission, may increase the time and, logically, the cost of taking oral verifications. Written confirmation sent to the customer prior to submitting the customer's information for billing could become amore attractive alternative. Thus, keeping the requirements on taped verifications to a minimum is important.

Second, the proposed revisions to section 310.3(a)(3)(ii) appear to only rearrange the current requirements, with a couple of exceptions. The "number of debits, charges or payments" in (ii)(A) deletes the "(if more than one)" qualifier. ARDA would suggest that this previous language, which presumes that there will be only one payment unless identified otherwise, should remain. Maintaining this language would remove the burden of the telemarketer to specifically confirm that the charge is for only one payment and thus unnecessarily add more time to the call.

[10] See discussion of § 310.4(d)(4), infra.

Finally, the added requirement of obtaining the "billing information" is not really a concern, since ARDA believes that most telemarketers are obtaining this information anyway. The information is necessary in order to process the transaction. Thus, it makes sense to require this information to verify the payment.

Section 310.3(b)—Assisting and facilitating.

With regard to section 310.3(b), ARDA agrees with the Commission that the current "knew or consciously avoided standard" is appropriate. Since the Rule creates potential liability for penalties based on another party's violation of the Rule, as duly noted by the Commission, the standard should not be lowered to a "knew or should have known" standard.

D. Section 310.4—Abusive Telemarketing Acts or Practices

Section 310.4(5)—Third-party sharing of preacquired billing information.

Please see comment regarding "billing information," above.

Section 310.4(a)(6)—Blocking Caller ID information.

ARDA supports the use of Caller ID and the suggested prohibitions against deliberately blocking Caller ID information, when the technology used by the telemarketer is capable of passing along that information. Even with technology advancing at a fast pace, there are still sellers and telemarketers with older equipment and insufficient funds to update their technology. Once these telemarketers obtain Caller ID technology, the prohibition against deliberate blocking of information would sufficiently regulate their activities by preventing them from masking their new capabilities. Therefore, no additional restrictions on Caller ID information are necessary.

The information that is provided to the called party should be meaningful. ARDA appreciates the Commission's proposal to permit flexibility in the Caller ID information displayed.[11] If the telephone subscriber can call the displayed number to inform the caller they do not wish to be called, , then mutual concerns over opt-out protection have been sufficiently addressed in this context. Whether the number displayed indicates the number the caller is calling from or the number of the party the caller is calling on behalf of would be irrelevant.

Section 310.4(b)(1)(ii)—Denying or Interfering with Rights.

ARDA supports the prohibition against denying or interfering with the ability of a person, who has the right to list a number on the do-not-call registry (i.e., the "residential subscriber"), to have their number placed in the registry.

[11] Proposed § 310.4(a)(6); Notice at 63.

Section 310.4(b)(1)(iii)(B)—"Do-Not-Call."

The establishment of a national do-not-call registry, while generally supported by our members, is certainly the focus of their greatest concern. They and other telemarketers are required not only to comply with the federal standards under the Commission's TSR, and the requirements related to company-specific do-not-call lists pursuant to FCC regulations, but also with the duplicative, inconsistent, varied, and often more restrictive state regulations. A do-not-call list at the national level, if not implemented correctly, could result in unwarranted economic and compliance burdens for our members.

The majority of ARDA's members rely on telemarketing as a low-cost means of contacting both current and prospective customers. However, the costs of compliance with additional regulations on the national level, unless offset to some extent, will decrease much of the economic benefit of this method without necessarily providing the desired results for those consumers who wish to receive fewer calls or no calls.

ARDA members call both interstate and intrastate. The juxtaposition of the various state laws already causes difficulties in compliance, which has prompted members to seek assistance from outside companies to manage their do-not-call lists, thus incurring additional costs. ARDA recognizes the unique situation that a national do-not-call registry creates and offers some suggestions for integrating a national registry into the current regulatory scheme.

- Preemption.

There are several interesting options with regard to the application of the national list and preemption (or "nonpreemption") of state lists. Preferably, the national registry would preempt all state lists and all phone subscribers would be able to submit their request to one national contact point.[12] This would be the path of least resistance for both telephone subscribers and telemarketers. However, given early indications that the national registry may not preempt state lists (and the states presumably would not want to

[12] Neither the Telemarketing and Consumer Fraud and Abuse Prevention Act (15 U.S.C. § 6101 et seq., the "TCFAPA") nor the Rule addresses preemption of state do-not-call laws. The only affirmative statement related to preemption is in the TCPA, falling under the auspices of the Federal Communications Commission (FCC). 47 USC s. 227(e)(1); 27 U.S.C. § 154 (defining "Commission" as the FCC). In passing the TCFAPA, Congress found that interstate telemarketing fraud was a problem and, therefore, legislation should be enacted to stem the tide of such fraud. 15 U.S.C. § 6101. This does not mean the states have exclusive authority over intrastate phone calls. In fact, Congress continues to have the authority to regulate both *inter*state and *intra*state telemarketing. See Texas v. American Blastfax, Inc., 121 F. Supp. 2d 1085, 1088 (W.D. Tex. 2000) (holding that "Congress necessarily intended the TCPA to cover both interstate and intrastate communications.") Even if an argument can be made that any one of the federal laws or regulations governing telemarketing specifically does not preempt *more restrictive* state laws, the Commission should consider that simply because a state has a do-not-call list does not mean that the list itself is more restrictive than the proposed national list. Thus, preemption of state lists would not be barred.

forego the revenue of generating the lists),[13] here is one possible alternative that would allow some preemption but still maintain the viability of the state lists:

> An interstate seller or telemarketer would only be required to "scrub" their database of telephone numbers against the national list and suppress any numbers on the list. The telemarketer would not be required to obtain and scrub against individual state lists. On the other hand, a purely *intra*state telemarketer would only be required to scrub against that state's list. The state lists would be merged into the national list on a set periodic basis. For states without lists at the time the rule establishing the national registry becomes effective, states would be required to defer to their state's portion of the national list and refrain from collecting any telephone numbers at the state level.[14] If a state has a list at the time the federal rule becomes effective, its residents would be required to continue to submit any requests to that state. Alternatively, residents of all states would be required to use only a single nationwide number and any requests would be filtered down to the states, thus preserving any federal standards for the list, e.g., maintenance of names for a certain number of years. Finally, the federal rule would recognize many of the same exemptions the states have allowed, with some consolidation, so that the calling process is minimally disrupted.

The Commission may find support for preempting similar state do-not-call requirements in the Privacy Act of 1974.[15] The Commission proposes to establish a national do-not-call registry to collect information from individuals at the federal level. In order to meet the necessary requisites of the Privacy Act, the Commission likely would need to impose consistent standards for the collection, maintenance, and dissemination of consumer information.

State laws vary in the types of information collected from consumers, the manner of collection, retention periods, and requirements upon sellers for obtaining and using that information. It would seem that this difference in state requirements would pose a problem for compliance under the Privacy Act by the Commission if it accepts consumer information from the states or dispenses that information to the states. ARDA admits that it is not fully aware of all of the implications of the Privacy Act. However, ARDA asks that the Commission consider the effect of inconsistent state laws upon the maintenance and use of the information obtained from individuals in determining whether or not the national do-not-call registry should preempt state requirements.

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[13] The Commission at least recognizes preemption as a possible alternative in seeking comment on the subject. (Notice at 124, Question 6).

[14] This requirement would be consistent with the mandate in the TCPA. 47 U.S.C. § 227(e)(2). A few states recently have adopted or have legislation pending that directs the federal government to strengthen the TSR. See, e.g., S. Res. 143 (Mich. 2001) ("memorializ[ing] the Congress of the United States to enact legislation to provide a convenient means for consumers to choose not to receive unsolicited telemarketing calls . . .."); A. Res. 100 (N.J., introduced 3/04/2002) (memorializing the FTC to adopt the Notice of Proposed Rulemaking amending the TSR to, among other things, establish a national "do-not-call" registry).

[15] 5 U.S.C. § 552a; 16 C.F.R. § 4.13 (2002).

ARDA's position is not that state law should yield to potentially less restrictive federal regulations, or that federal law should be more restrictive, inviting states to "up the ante" by increasing their current level of requirements. ARDA members, and presumably other companies that rely on telemarketing, support a standard for compliance that is consistent, uniform, and relatively easy to understand and comply with. If the proposed Rule meets these goals, it will save covered entities time and money , while allowing telephone subscribers the ease and security of a simple method for having their privacy wishes implemented. Further, to maximize the likelihood of compliance, revisions to the TSR, particularly in relation to do-not-call issues, should not be unduly complex or trigger inadvertent violations.

Absent uniformity in the collection and maintenance of numbers on a do-not-call registry (as an example of one area of telemarketing regulation), the national list loses some of its effectiveness in curbing unwanted telemarketing calls. Instead, it may allow many subscribers to slip through the web of laws for technical reasons and lead to unintended violations by telemarketers. Consistency, ease of compliance, and uniformity do not equate to preemption at the cost of well-intentioned state restrictions. A complete or partial preemption of state do-not-call laws, either as outlined above or in some other fashion, would, however, provide a viable means of reaching the goals of all concerned.

- "Up-selling"

Any application of the do-not-call registry to "up-selling," by expanding the definition of "outbound telephone call" in section 310.2(r), would be difficult to administer. It would require the telemarketer to check lists during a call, particularly if the call is inbound. Further, the main argument for curbing telemarketing calls is the dreaded telephone ring during dinner. In an up-sell situation, where the inbound call is transferred to another telemarketer or the telemarketer offers another product, there is no telephone ring. The consumer—who initiated the call--is in the position to say, "NO, I AM NOT INTERESTED." At that point, a rule similar to that in some states that requires a telemarketer to disconnect once the consumer has stated their desire to end the call would make more sense.[16] Therefore, ARDA suggests that the Commission refrain from expanding the definition of "outbound telephone call" to avoid invoking requirements under the do-not-call provisions.

- Additional caller preferences.

The addition of a one-stop opt-in for specific companies, under proposed section 310.4(b)(1)(iii)(B), could also create a host of problems for both subscribers and telemarketers. While the ability of subscribers to have all of their do-not-call preferences logged in one place may seem to make sense from a practical standpoint, how specific opt-ins will be processed appropriately and timely for each company should give the

[16] See, e.g., Kan. St. Ann. § 50-670(b)(4) (" . . . promptly discontinue the solicitation if the person being solicited gives a negative response at any time during the consumer telephone call.")

Commission pause. The more appropriate and reasonable method of allowing the consumer to provide a written opt-in directly to the company, which could be any of several formats, would seem to be less of a leap of faith. Accordingly, ARDA would oppose the one-stop format for opt-ins in favor of the written notification method.

- Who may place a number in the registry.

Essential to the effectiveness of the do-not-call registry is defining who shall have the ability to place a number on the list. In proposed section 310.4(b)(ii) and (iii), the term "person" should be replaced by a term that more clearly defines the individual who may not only have the right to place a number on the list, but who may seek remedies in case of a violation. ARDA proposes the use of "residential subscriber," meaning "a person who has subscribed to either residential telephone service from a local exchange company or public mobile services or the person's spouse, or the legal guardian of the person or of the person's spouse."[17] This term affords parameters that could be easily interpreted, rather than attempting to establish rights under the Rule by whether a person resides in a particular dwelling (since, more particularly at the national level, the link to the list is by telephone number) or age of the person (since a person 18 and over, for example, in the home may not be the person who subscribes to the telephone service or even makes decisions regarding that service).[18]

- Removal of numbers from the registry.

While the primary goal of a do-not-call list is to prevent customers who do not want to receive telemarketing calls from receiving them, a natural consequence is the ability of telemarketers to call individuals who do want to be contacted. Telemarketers may be needlessly prevented from calling some customers because their phone numbers are on a do-not-call list, when they did not place the number on that list. The listed number may be carried over from the previous subscriber. A telephone number that remains on the registry indefinitely is beneficial neither to the telemarketer nor to the customer.

[17] See Ill. Senate Bill 1830 (Intro. Feb. 6, 2002). This definition assumes that the Commission also intends to include cellular phone numbers on the list. If that is not the Commission's intent, then that language could be deleted. The proposed Illinois definition also includes "any agent of the subscriber." However, ARDA is concerned this language would invite an onslaught of third-party listing services, e.g., for an upfront fee, a company would place the subscriber's phone number on the national list, state lists, or any other privacy-related opt-out registries, even contacting sellers directly on behalf of the subscriber. Alternatively, the Commission could expressly prohibit these types of businesses. Conversely, ARDA would have no objection to the Commission contracting with a reliable third-party to maintain the national registry.

[18] The Commission could also use "telephone subscriber," the term used under proposed § 310.2(d) for consistency, but with the same definition in the note above.

A telephone number should remain in the registry for a set period of time.[19] Near the end of the appointed time period, the subscriber would be required to renew their listing, perhaps for a small fee. This would bring in revenue to offset the cost of maintenance and would effectively cleanse the list of outdated numbers. Thus, if a number were reassigned to a new subscriber, there would at least be a limit on the time the number would be on the list. ARDA supposes that it would be unlikely that phone companies will be required to notify the Commission or any other governmental entity that a subscriber has changed their number and that the number should be removed from the list. This process undoubtedly would impose a costly burden on the phone companies. Further, this process may be unmanageable.

Ideally, however, phone companies would be required to give notice as subscribers to particular phone numbers change. Perhaps the Commission can seek appropriate assistance and coordination from the FCC in promulgating necessary rules, pursuant to the TCPA or otherwise, in this regard, so that the FTC receives this information promptly and provides it to telemarketers. Once the subscriber to that number has changed, the number should be automatically released from the registry.

In determining a reasonable time period a telephone number may remain on the registry before being renewed, the Commission should solicit information from various telephone service providers. The information should include at least the percentage of telephone numbers that are "turned over" annually. If the percentage is 20 percent or more, for example, the Commission should strongly consider limiting the period to no more than 1 year. However, if the turnover is a lower percentage, e.g. 2 percent, then the Commission may find no more than 3 years acceptable. In either case, any numbers on the list more than 3 years would most likely have turned over and the former subscribers, who placed their number on the registry, would likely have added their new phone number to the registry. This would needlessly limit the available customer base for sellers and forever bar telemarketers from contacting some otherwise viable phone numbers. Accordingly, ARDA asks the Commission to set a retention period within the stated parameters, preferably for a shorter (one year) rather than a longer time.[20] The Commission equally should consider whether an automatic removal from the list upon a change in subscriber is possible.

[19] However, any set retention period should not bar a subscriber from removing their listing at any time. This can be accomplished through the same method, e.g. a toll-free number, as required for initiating the listing.

[20] The renewal and retention periods vary widely among the states, thus strengthening the argument for a uniform federal standard. Colorado, e.g., requires numbers that are reassigned or disconnected must be removed **at least** annually. Col. Rev. Stat. Ann. § 6-1-905(b)(VII) (2001). California, however, allows a listed number to remain on the state registry for three years. Cal. Bus. & Prof. Code § 17591 (2001).

- Express verifiable authorization.

As noted above, in the discussion of sections 310.2(n) and 310.3(a)(3), it may be helpful to use an alternative term to describe an "express verifiable authorization." Doing so would be to differentiate the application of the term to the do-not-call registry as opposed to the use of preacquired account information.

There would be some concern, not with the requirement of an "express verifiable authorization," but with the possible requisites that would constitute such authorization. In most instances, at least for ARDA members, it should not be too difficult to obtain an express verifiable authorization, either in writing or orally. It would be simple enough to include some "opt-in" within a direct mail solicitation or on an Internet site, for example. The seller could obtain the customer's phone number without difficulty, and is likely obtaining this information already. However, the requirement to obtain a signature may prove difficult and costly through currently available media.

In this new age of Internet technology, the use of E-signatures is only in its infancy.[21] The simple "click" of an "I ACCEPT" button to agree to the terms of a "Terms of Use" for a Web site, or to finalize an online purchase by clicking a "SUBMIT ORDER" button, for example, has become common practice. However, the ability to obtain an actual signature is not without hazards and is still developing.[22] While adding to the burden upon the seller, this alternative method of opting in to be contacted by phone could be accomplished as long as both the seller and customer have Internet access (and there is some avenue to drive the customer to a particular Web site).

For direct mail, in the traditional paper form, the seller could obtain an actual signature. However, given the varied size and composition of direct mail, sellers would have to be even more efficient in their use of the expensive space they may have allotted to offering their product. Another potential limit on the use of direct mail from a consumer in response to, or in connection with a call, would be the disruptions in service and delays since the events of fall 2001. Even in light of these obstacles, ARDA members are not opposed to obtaining customer opt-ins through direct mail or through other written forms. As customers return response cards, for example, their opt-in would be in an easily verifiable and retainable format. Yet, the requirement of a "signature" should not be construed literally.

The opt-in could be something as simple as a check-off (which could be used in an online opt-in) or even the customer's initials. This is not to say that the customer cannot provide a full signature, if he or she so desires, but there should be some flexibility given that the document does not have the same implications or financial impact as a will or a financing

[21] See, generally, Electronic Signatures in Global and National Commerce Act ("E-SIGN"), codified at 15 U.S.C. 7001, et seq. (2000).

[22] Michael H. Dessent, "Digital Handshakes in Cyberspace Under E-Sign: 'There's a New Sheriff in Town!'," 35 U. Rich. L. Rev. 943 (Jan. 2002) (discussing, in part, encryption requirements for digital signatures).

or purchase agreement. ARDA would ask the Commission to allow for a broad definition of "signature" in light of the challenges and costs of obtaining a full signature.

Section 310.4(b)(2)—"Do-Not-Call Safe Harbor"

The safe harbor for do-not-call is the friend of the seller or telemarketer that strives to comply with the myriad of regulations in this area. For the occasional instance when a call goes through to a subscriber who has registered, the safe harbor provides a modicum of comfort. An extension of the safe harbor to any provisions added in this Rule revision process, like the interference with a consumer's right to be placed on the DNC list, is welcome. The additional requirements to train employees and punish those who do not comply are reasonable.

As an essential element of the safe harbor provision, the proposed Rule requires the telemarketer to "obtain and reconcile on not less than a monthly basis the names and/or telephone numbers of persons who have been placed on the Commission's national registry." Section 310.4(b)(2)(iii). ARDA believes that the Commission should require that sellers or telemarketers reconcile their DNC lists on a *quarterly* basis instead of on a monthly basis. Using this frequency would minimize the opportunity for error and the burden on sellers and telemarketers (with respect to cost and time spent) that will result from the implementation of this provision.

It may take several weeks for a usable list to be disseminated among a company's telemarketers as the company scrubs its list of potential contacts against the national registry. By the time a list of viable numbers reaches telemarketers, it would likely be time for the company to download the next list. Fewer downloads of the national registry would allow for more time for proper implementation of the list, thus reducing downtime. With less frequency of downloading, the quantity of phone numbers on the DNC list may be greater, but telemarketers would at least have the most current required list, lessening the chance that a telemarketer would call someone on that list.

Section 310.4(c)—Calling Time Restrictions.

As the Commission has noted that it does not intend to change the calling time restrictions, which would create a conflict at the federal level, ARDA feels that it does not need to address this issue.[23] However, answering the Commission's call for comments regarding the ability of consumers to choose which days and hours they wish to receive calls, ARDA is compelled to provide input.

As with the concept of the "one-stop opt-in," ARDA believes that an attempt to make the national registry more than simply a registry for either receiving or not receiving calls is asking for the logistical problems that the Commission recognizes in its remarks in the

[23] ARDA would object to any application of calling time restrictions to transferred calls or "upsells," as discussed in comments to §§ 310.2(r) and 310.4(b)(1)(iii)(B). Placing such restrictions on an "outbound telephone call," under the Commission's new definition, would be impossible to manage.

Notice. Even on the company level, a variance in preferences among a multitude of subscribers would create a backlash from unhappy customers, as the resulting inability to comply with each and every preferred calling time is not realized. ARDA would urge the Commission to avoid any enlargement of the preferences maintained in the national registry.

Section 310.4(d)(4)—Sweepstakes Disclosure [24]

A growing number of ARDA members utilize sweepstakes promotions. Therefore, any change in the required disclosures is of great interest. The Commission's proposed change, which would add a disclosure that "any purchase will not increase the person's chance of winning," is of concern for both substantive and procedural reasons.

First, the proposed change to this section raises the same concerns as any other disclosure in a telemarketing call—it lengthens the time of the call. This can incrementally raise both the cost of telemarketing and the ire of the party called. However, the disclosure (at least in written form) is required by the Deceptive Mail Prevention and Enforcement Act.[25] Therefore, the proposed disclosure is neither surprising nor unnecessarily warranted. ARDA would only ask that the Commission take into account the number of additional disclosures added to telemarketing calls and attempt to maintain these at a reasonable and workable level for the sake of both consumers and telemarketers.[26]

Second, the proposed placement of the disclosure, or at least the Commission's commentary on the placement in the Notice, may be of concern. This may only require some clarification. Section 310.4(d)(4) currently requires that the "no purchase necessary" language be made "promptly," with the further condition that the disclosure "must be made before or in conjunction with the description of the prize to the person called." The proposed amendment would also fall under the same placement requirements. While it may be logical for disclosures about identity of the caller to be placed at the forefront of the call, the sweepstakes aspect could come later in the call. Thus, it would be more appropriate to apply the "before or in conjunction with" standard to this disclosure.

ARDA believes this to be the intent of the Rule, both in its current form and as it may be amended, but feels some concern over the Commission's emphasis on "promptly" in the Notice.[27] When the telemarketer discusses the sweepstakes promotion, which may only

[24] The same comments would be applicable to § 310.3(a)(1)(iv).

[25] 39 U.S.C. § 3001(k)(3)(A)(II).

[26] The Commission has obviously considered the impact of multiple disclosures. In declining to adopt NASAA's recommendation for disclosing the telephone number and address at which the telemarketer can be contacted, the Commission notes that "the initial oral disclosures should be succinct in order to avoid confusing consumers with an overload of information." (Notice at 93).

[27] Notice at 79.

be a portion of the call, the disclosure that a purchase will not increase their chance of winning should be made "in conjunction with" that description of the sweepstakes. This timing of the disclosure would satisfy the intended effect. If the Commission agrees with this interpretation, then ARDA's concerns as to placement are satisfied.

Other Recommendations

Predictive dialers

Predictive dialers are an efficient and cost-effective method of processing telemarketing calls. These systems allow the seller to cue-up calls while a seller or telemarketer is completing a previous call. Admittedly, this process may create some lag between the time the call is answered by the consumer and the time the telemarketer picks up the connected call ("dead air"). However, there are some reasonable alternatives to deal with this issue.

Dead air is often the result of inefficient time settings in predictive dialers. This could be addressed in one of two ways: either by only transmitting Caller ID information or by requiring the outbound caller to provide a recorded message that the consumer would hear and that would identify the seller or telemarketer.

For those companies with the requisite capability, the transmission of Caller ID information, while not "filling" the dead air, would at least be an alternative to the consumer who does not wish to receive these types of calls. They can contact the caller directly, if the information transmitted is meaningful, and have the caller place them on the company's do-not-call list. As the company would be required to transmit Caller ID information under other provisions of the Rule, provided they have Caller ID capability, this alternative does not really add anything new. However, it may provide impetus to a company without Caller ID capabilities to obtain the necessary systems rather than being totally barred from using predictive dialers as the Commission suggests.[28]

A more attractive alternative would be the use of a prerecorded message during the dead air time. It could actually provide concurrent benefits to consumers, by providing some or all required disclosures, and to sellers or telemarketers by filling the dead air. The message would be required to contain information about the calling party and the purpose of the call, e.g., "This is a call from XYZ Company in St. Cloud, Florida, and we are excited about having the opportunity to talk with you about our great vacation package offer to Orlando. We will be with you in just a moment, so please hold."

[28] In the first review of the TSR, Bell Atlantic mentioned the introduction of a new calling feature, "Call Intercept." (Bell Atlantic at 8). As described, this service would intercept some calls from unidentified numbers, prompt the caller to identify itself, and play a message asking the caller to place the subscriber on their do-not-call list. ARDA understands this service is now available in some markets and could provide yet another alternative to the "dead air" conundrum.

The use of this latter method may require the FTC to assist in relaxing the provisions under the purview of the FCC within the TCPA (specifically, 27 U.S.C. 227(d)(3)(A)) related to the use of prerecorded messages. ARDA would argue that there is no conflict with the FCC requirements. However, further study and use of prerecorded messages in this context could reveal potentially undesirable effects. Further, the use of the prerecorded message as a vehicle to provide disclosures required during the live telemarketing call actually may be favored in some instances. ARDA would appreciate the Commission's flexibility in enforcement when considering the use of a prerecorded message in the calling process, to avoid dead-air and thereby assist consumers and telemarketers.

While consumers must expend some effort and cost to block calls they do not wish to receive, telemarketers must also pay some costs. The use of a prerecorded message should lead to only minimal costs for most telemarketers. Some telemarketers may be required to upgrade their equipment in order to transmit the prerecorded message, which would increase the costs associated with compliance.

However, the balance achieved is that the telemarketer is not automatically and completely barred from calling the customer, giving the telemarketer at least some opportunity to offer its wares, and the customer can screen calls and speak only to those companies it may be interested in dealing with.[29] Alternatively, if a national, non-preemptive do-not-call list is implemented, in addition to the already established state and company-specific lists, the additional burden of having to comply with more stringent requirements related to dialers and Caller ID could prove damaging to companies attempting to recover from recent downturns in the economy.

- Abandoned call rate.

The California Legislature recently passed a law imposing a "zero rate" for abandoned calls.[30] However, the Legislature directed the PUC to set an acceptable error rate. As most telemarketers can set their equipment to a predetermined abandonment rate, it would not be overly burdensome to set a reasonable rate, if the telemarketers have the technology. In California, the maximum error rate discussed most often is five (5) percent, which is consistent with the rate recommended by the Direct Marketing Association (DMA).[31] Therefore, the Commission should consider a five-percent abandonment rate as a reasonable standard.

[29] Enhancing technological requirements of telemarketing would obviate the need for a national "opt-in," as proposed by the Commission.

[30] Cal. Pub. Util. Code § 2875.5 (West 2002).

[31] "DMA Guidelines for Ethical Business Practice," Art. #38 (Sept. 2000) (available at http://www.the-dma.org/library/guidelines/ethicalguidelines.shtml). ARDA is not aware of what research went into determining five percent as a reasonable error rate, but would invite the Commission to consider the DMA's position as a widely-accepted benchmark in the telemarketing industry.

E. Section 310.5—Recordkeeping.

ARDA agrees with the Commission and feels that the current provisions are adequate. However, as ARDA has noted in the past,[32] overlapping, inconsistent, and conflicting state laws create a substantial burden. Compliance will rise, and unintentional violations will drop, if this problem can be diminished.

F. Section 310.6—Exemptions.

Section 310.6(f)—Direct Mail Exemption.

ARDA supports the Commission's decision to include facsimiles and electronic mail in the definition of "direct mail" for the purpose of exempting calls from a customer or donor in response to these media from the Rule, if these forms of direct mail contain the requisite disclosures.

Other Exemptions.

- Prior business or personal relationship.

ARDA recognizes the Commission's concerns with fraudulent telemarketers taking advantage of a prior business or personal relationship to perpetrate more fraud upon past customers. However, many legitimate sellers rely on this exemption in states, in which the exemption is available, to contact those persons with whom the business has a relationship to offer them products or services similar to those the customer had previously purchased. The seller may engage the consumer in a more intimate fashion, without having to be overly mindful of the requisites under the Rule, particularly a do-not-call list. These customers are already familiar with the products and services offered by the seller and their reputation, so the level of disclosures would not need to be near the level required of an initial encounter.

--"Established business relationship."

Most important is the unhindered ability to contact customers with whom a seller has an ongoing or "established" relationship, as may be distinguished from a "prior business relationship." The relationship could be in the form of a membership or an accountholder, for example. That special relationship with the customer often includes authorization, express or implied, that the seller may continue to contact the customer as an integral part of their membership. This may become an issue if a customer, with an established business relationship, subsequently submits his or her telephone number to the do-not-call registry.

[32] ARDA at 4.

If the customer has agreed to allow a specific seller to contact him or her through their membership or account relationship in some form, then the seller should be able to contact that customer as long as their relationship is intact. Once the relationship has terminated, either at the customer's or the seller's direction, then a general no-contact instruction, such as the national do-not-call registry, may be applicable.[33]

Actually, at that point, it should be incumbent upon the customer to ask the seller to no longer call him or her. Even if one of the parties terminates the relationship, which may have been based on a single product or service, the seller may offer other products or services the customer may wish to know about. If a customer desires to have no further dealings with the seller, he or she could simply ask the seller to place them on the company's do-not-call list. The former customer would then be treated as any other potential customer not possessing a special relationship with the seller. As the privacy concerns of the customer would be addressed in either instance, an exception from at least the coverage of the national do-not-call list would be reasonable. Accordingly, ARDA asks the Commission to reconsider its position on this exemption, as it specifically relates to an ongoing relationship, to permit sustained contact with a current customer.

Another special type of relationship arises in the context of "affinity marketing." This type of association is one step removed from the direct customer relationship with the seller, but is still part of the "established business relationship." In an affinity relationship, the seller and another business contract[34] to offer each other's products or services to their respective customers. For example, Airline ABC may provide frequent flyer benefits through Credit Card Company XYZ. It is clear to the customer that these are separate companies, but the ability to receive special offers (travel and purchase discounts, "double miles," etc.) from the affinity partner is a benefit of their being a customer of the seller or vice versa. In light of this special relationship, sellers would prefer to have the ability to call these customers regardless of the customer's posting on a general do-not-call list and leave it to the customer to "opt-out" specifically with the partner.[35]

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[33] See Charvat v. Dispatch Consumer Services, 2000 WL 1180258 (Ohio App. 10th 2000) (unpublished; copy attached), appeal allowed 740 N.E. 2d (Ohio 2001), motion denied 755 N.E. 2d 353 (2001) (holding that under the TCPA "established business relationship" exemption, a newspaper may continue to call a subscriber who does not cancel his subscription, even though the subscriber requested that the newspaper place his number on the company's do-not-call list).

[34] A "joint marketing agreement," similar to that permitted under Gramm-Leach-Bliley, may satisfy the Commission's concerns regarding further dissemination of the customer's contact information. The seller can condition the sharing of information to specified uses of that information.

[35] In the vacation ownership industry, ARDA's members often have special arrangements with cruise lines, hotels, and attractions. The ability of ARDA's members to offer these products and services to their owners/members is a benefit of the established business relationship with their owners/members and is an integral part of the vacation ownership product and more responsive owner/member service.

While not reaching the level of the direct relationship, there is still an established business relationship between the affinity partner and the customer through the original seller. If a credit card company offers miles or points to frequent flyer program members who are also their accountholders, that credit card company should be able to promote that specific benefit or other benefits particularly related to the customer's frequent flyer program membership without having to first check the customer's name against a do-not-call list. Certainly, the credit card company, when offering its product, would have to meet the disclosure requirements in the Rule. The concern from the consumer, as the Commission notes,[36] is their possible confusion as to who is providing an offer. If the seller and the affinity partner make it clear in the call that the customer is receiving the call because of the special arrangement with the seller and make the other disclosures in the Rule, then the customer should have sufficient information to determine whether or not they wish to accept the benefit offered or to receive additional calls from that business.[37]

--"Prior business relationship."

Closely related to the "established business relationship" exception is the concept of a "prior business relationship."[38] A prior business relationship would likely involve a customer who makes a single purchase (or separate, multiple purchases) from a seller. The seller then wishes to contact that customer by telephone to offer them other products or services. Under the exception recognized in many states, the seller could contact the prior customer, even though the customer's number is listed on the state do-not-call list.

As discussed in relation to the former "ongoing" or "established" customer, above, the customer who then wishes not to be contacted could inform the caller to place their number on their company-specific list. The challenge in this instance, however, is in determining the parameters of the "prior business relationship."

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[36] Notice at 23.

[37] The same reasoning would apply to the concept of "upselling" and the proposed definition of "outbound telephone call." (Response at 3, 7). In the frequent flyer example, if a program member calls Airline ABC to make a reservation, the reservation agent could ask the customer if they wish to hear about a credit card that would permit them to receive miles for their everyday purchases without having to check a do-not-call list. If they accepted, the customer would be transferred to a telemarketer with Credit Card Company XYZ, who would then make any necessary disclosures.

[38] These terms are confusing, especially since many states include them in a single definition and use them interchangeably. See, e.g., Wy. St. § 40-12-301(a)(vi) (2001) (defining "established business relationship" as "a **prior** or existing relationship . . . which relationship has not been previously terminated." (emphasis supplied). Cf. Col. Rev. St. Ann. §6-1-903(7(a) (2001) ("'Established business relationship' means a relationship that: (I) Was formed, prior to the telephone solicitation . . .; and (II) Has not been previously terminated by either party; and (III) Currently exists **or has existed within the immediately preceding eighteen months**." (emphasis supplied). The point, again, is that inconsistency between the various states makes compliance a challenge.

The time span of a "prior business relationship" varies among the states. In many cases, there is no set time period. However, in the states with set time frames, the period between the current solicitation and the prior contact could be from 18 months[39] to 36 months.[40] In Arkansas, for example, "prior or existing business relationship" means "a relationship in which some financial transaction has transpired between the consumer and telephone solicitor or its affiliates within the thirty-six (36) months immediately preceding the contemplated telephone solicitation." However, this exception does not apply where "the consumer has merely been subject to a telephone solicitation by or at the behest of the telephone solicitor."[41]

ARDA members, as well as other companies, often sell products to a consumer more than once. If the customer was satisfied, he or she will be happy to hear from the company again about other offers. If he or she was dissatisfied, the customer can ask the company to place them on their do-not-call list. ARDA members wish to continue to have the opportunity to contact customers with whom they have a special relationship.

The Commission should consider a limitation, such as in Arkansas, on a "prior business relationship" exemption, with a set time parameter. An exception with reasonable limitations is preferable to no exception. ARDA asks the Commission to consider including an exception, at least from the requirements of the do-not-call registry, for calls made to prior customers. If the Commission does not provide exemptions at least at the same level of the various states, then the federal Rule will actually be more stringent than some state laws. In that situation, telemarketers will be even more confused as to which laws are applicable and may unwittingly fail to comply with the proper standards.

Conclusion

ARDA appreciates this opportunity to comment on the revisions to the Telemarketing Sales Rule. ARDA hopes the comments it is providing and the other comments the Commission will receive from the multitude of individuals, interest groups, and businesses will be helpful. However, given the complexity and potential impact of the proposed changes, and the varying opinions from divergently interested groups, ARDA suggests that further study may be necessary. A committee format, similar to the that adopted by the Commission for the analysis of online access and security, may be beneficial. ARDA would be willing to participate in such a committee.

[39] Cal. Bus. & Prof. Code § 6-1-903(7)(a)(III) (West 2001); Alaska Stat. § 45.50.475(g)(3)(B)(v) (West 2001).(24 months).

[40] Ark. Code Ann. § 4-99-403(5)(A) (West 2001).

[41] Ark. Code Ann. § 4-99-403(5)(B) (West 2001).

We hope the Commission will consider our positions on the various issues as it integrates changes into the current Rule.

Sincerely,

Sandra Yartin DePoy
Director
Federal Relations