June 28, 2002

VIA HAND DELIVERY

Mr. Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: Telemarketing Rulemaking—FTC File No. R411001

Dear Secretary Clark:

The signatories to this letter include trade associations ("Associations") that participated in the Commission's workshop on June 5-7, 2002 regarding the proposed changes to the Telemarketing Sales Rule ("TSR" or "Rule").[1] Telemarketing Sales Rule; Proposed Rule, 67 Fed. Reg. 4492 (proposed January 30, 2002) (to be codified at 16 C.F.R. pt. 310). Some of these Associations have previously submitted comments in this proceeding. The purpose of this letter is to follow up on specific issues that were raised in the workshop that either the Commission asked for specific comment on or the Associations believe will be informative as the Commission continues to consider its proposals. This letter is not intended to supersede the much broader comments submitted by the signatories, but rather to supplement those comments. The Associations believe that the suggestions set forth herein represent reasonable approaches that address the Commission's concerns, without interfering with legitimate business practices.

---

[1] The National Retail Federation joins in support of this letter with the exception of the discussions relating to Predictive Dialers and *Agents of Charities*, as these issues do not have a primary effect on its membership.

In this light, we provide below specific suggestions with respect to the proposed do-not-call list, the treatment of "preacquired account information," predictive dialers and caller identification, upselling, and several of the exemptions. The Associations also respectfully request that the Commission set forth another proposal for comment addressing some of the new definitional issues and new proposals that were raised in the workshop, so that there exists an opportunity for interested parties to comment on the specific new proposals from the Commission not contained in the January Notice of Proposed Rulemaking.

I. IF A DO-NOT-CALL LIST ULTIMATELY IS ESTABLISHED, MEASURES SHOULD BE TAKEN TO NOT INTERFERE WITH LEGITIMATE TELEMARKETING.

The Associations continue to oppose the creation of a national do-not-call list, as currently proposed by the FTC, as part of the proposed changes to the TSR. As explained in more detail in our earlier comments, we are concerned that the FTC does not have authority under the Telemarketing and Consumer Fraud and Abuse Prevention Act ("Telemarketing Act") to create a national do-not-call list and that the list as proposed will limit legitimate telemarketing activities that are not "fraudulent or abusive." With this understanding, we set forth the following specific comments in response to discussions at the workshop should the Commission ultimately decide to proceed with its proposal.

A. Any National Do-Not-Call List Should Be Harmonized with State Do-Not-Call Lists.

If a national list is created, it should be harmonized with state do-not-call lists for simplification for business, consumers, and regulators. Compliance with such a list should result in businesses not having to also comply with the more than 20 state lists. The harmonization must extend beyond compilation and administration of the list to include exemptions and enforcement standards as well for interstate calls. However, the exemptions found in the relevant state laws would apply to intrastate telemarketing calls to individuals residing in the respective states.

B. An Exemption to the National Do-Not-Call List to Allow Contacting Individuals with whom an Established Business Relationship Exists Must be Created.

The Associations continue to believe that if a national do-not-call list is implemented, it is essential that the rules contain an exemption to the do-not-call list that would allow businesses to contact those individuals with whom they have an established business relationship. A similar exemption for businesses to contact their customers exists in the great majority of the states that have do-not-call lists. Representatives of the state attorneys general stated at the workshop that there was no problem from their experience with the existence of an established business relationship exemption. The representative from the New York Attorney General's office indicated that even in instances where a complaint was received, and it was ultimately determined that an established business relationship existed between the consumer and the business, that the consumer was satisfied with such an explanation.

The Associations offer the following as a definition of "established or prior business relationship." Calls to individuals where such a relationship exists would be exempt from the proposed do-not-call list:

> "An 'established or prior business relationship' shall exist between a seller and a consumer when, within the 36-month period prior to the outbound telephone call, there has been:
>
> 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."[2]

C. Steps Should Be Taken to Help Ensure the Accuracy of a Do-Not-Call List.

It is evident from the workshop discussions that the Commission must take additional steps toward ensuring the accuracy of the list. This could be done, as was discussed at the workshop, through using the Commission's ANI means of authentication coupled with a renewal process. The renewal period should be annual, given estimates that at least 16% of phone numbers are reassigned annually. Alternatively, the Commission could collect additional information such as name and address. As discussed, significant costs will likely result from the collection of additional information necessary to have an accurate list. If the Commission chooses this alternative, any additional costs that result should not be imposed solely on businesses. Consumers could pay a minimal fee for being placed on the list to help cover such additional costs. Such a fee on consumers also would provide a means of authenticating an individual's request to be on the list.

Additionally, several commenters asked at the workshop whether there is a change of telephone number list that the Commission could use to remove numbers that have changed from the do-not-call list. To our knowledge, no such list exists. Information solely with respect to change of phone numbers is maintained by the several hundred different information and telecommunications providers around the country with respect to their customers. No comprehensive list is available for use for accuracy purposes.

---

[2] Member companies of the Associations contact those consumers with whom they have established business relationships for differing durations of time depending on the nature of the business. For this reason several of the Associations in their individual comments suggest different time frames. Similarly, the Associations recognize that in instances where there is no purchase transaction a period of less than 36 months may be appropriate.

D. Agents of Charities Should Not Be Subject to the Do-Not-Call List.

The Commission should not extend the do-not-call list to nonprofit organizations or their agents. Such an extension would have devastating economic effects on charities' ability to raise money as the number of individuals whom they could contact would be severely limited.

E. Business-to-Business Calls Should Be Exempt from the Do Not Call List.

It is not clear that business-to-business telemarketing calls would be exempt from the do-not-call list. The effect of not having such an exemption would be to limit business-to-business marketing where businesses are run out of individuals' homes. This is particularly problematic for small office/home office "SOHO" businesses, where more than 50% of businesses are working from residential phone numbers.

II. TRANSFER OF PREACQUIRED ACCOUNT INFORMATION SHOULD BE PERMITTED FOR LEGITIMATE BUSINESS PRACTICES.

The Commission proposes a flat ban on the transfer of a consumer's account information. The Commission should narrow such a limitation to situations in which there exists a perceived or real problem rather than impact legitimate business practices. The Commission bases its proposed prohibition on the transfer of preacquired billing information on the belief that "the sharing of consumers' pre-acquired billing information is likely to cause unauthorized charges to consumers." As was reflected in the discussion at the workshop, the Commission's proposal fails to evaluate the numerous legitimate practices by which information is transferred. Set forth below are two significant categories where the Associations believe the Commission could require informed consent prior to transfer and/or use of an individual's account information, rather than prohibiting such transfer. Additional useful and legitimate practices that should not be eliminated through a broad prohibition of the transfer of account information are addressed in individual business or association supplemental comments.

First, transfer of account information is a practical and important practice in an inbound upsell with one telesales representative. For example, if a consumer calls and orders outdoor clothing from a merchant and is offered by the same sales agent another merchant's fly-fishing magazine, transfer of information should not be prohibited if the customer agrees to the transfer.

Likewise, it is a significant benefit to consumers in an inbound upsell with two telesales representatives for the second seller to be able to obtain and use information such as address and credit card information generated from the first sale. This eliminates the need for a consumer to restate to the second sales representative information that was just provided to the first sales representative. Transfer and/or use of account information in such scenarios with disclosure to and express verifiable consent from the consumer is inherently more efficient for both the merchant and consumer.

Similarly, legitimate marketers may elect to conduct a joint affinity marketing program pursuant to which one marketer, e.g. an airline, may provide its customers names and telephone numbers to a hotel chain so that the hotel can solicit that customer to book hotel space. Allowing the marketers to share consumer billing information with the consumer's informed and express verifiable consent again makes the transaction easy, convenient, and efficient for marketers and consumers alike.

III. IF THE COMMISSION SETS AN ABANDONED CALL RATE, IT SHOULD BE NO LESS THAN 5 PERCENT.

Commission staff indicated during the workshop that perhaps the Caller ID and abandoned call issues are less problematic if a do-not-call list is established. We believe this to be the case and, if a do-not-call list is established, that the Commission should evaluate its impact on concerns about predictive dialers and caller identification prior to further regulation in these areas. If the Commission does proceed and sets an abandoned call rate, it should be no less than 5%, which is the industry standard. This 5% standard balances the need for efficiency with consumer interest. Requiring abandoned call rates of even 4% or 3% would result in significant costs to businesses. Such costs ultimately would be passed on to consumers. Moreover, an

abandoned call rate of less than 5% would significantly harm small businesses, because the number of telemarketing stations would need to be increased in order to obtain the efficiency benefits of predictive dialers.

IV. THERE ARE TECHNICAL LIMITATIONS ON PROVIDING CALLER IDENTIFICATION.

There was discussion at the workshop as to the technical feasibility of requiring Caller ID information. To the extent that it is technically possible to provide Caller ID, we believe such a practice is important for accountability of telemarketers. In the workshop, several participants expressed their belief that it is technically possible to require Caller ID. We take this opportunity to reiterate the limitations on providing this information as we understand them. The Commission should not require Caller ID if technical limitations exist that would prevent telemarketers from complying with such a requirement. As the Commission correctly cites in the commentary to the proposed rule, it is technically impossible given the current architecture of the public switched telephone network for many telemarketers to transmit Caller ID information because of the type of telephone system that they use.

As emphasized by the Commission in the Notice, many telemarketers use a large "trunk side" connection (also known as a trunk or T-1 line) because it is cost effective for making many calls. However, this type of connection is not capable of transmitting Caller ID information. Likewise, in many instances, the Caller ID information is not of any use to the consumer because it shows the number of a telemarketer's central switchboard or trunk exchange. In fact, in many cases, even if the telemarketer were to disclose Caller ID, the information would not be transmitted over the network, never ultimately reaching the consumer, if the local carrier's network is not capable of passing Caller ID. These are some examples of the technical limitations of consumers' ability to identify the caller.

V. FURTHER OBLIGATIONS ON UPSELLING SHOULD BE LIMITED TO APPROPRIATE DISCLOSURES.

The Commission indicated in its workshop that it had not intended in its proposed rule to subject inbound calls resulting in upselling to such requirements as a do-not-call list and time-of-day restrictions. The Associations believe subjecting upsells to any of the other provisions of the Rule must be carefully evaluated. For example, a recordkeeping requirement for inbound upsells could create significant additional burdens on telemarketers that go beyond steps that are necessary to establish the Commission's goal of an informed consumer. Additional obligations on telemarketers in an upsell situation should be limited to disclosures, such that individuals are provided information sufficient for them to understand that they are dealing with a different merchant and are being solicited for a separate sales transaction.

VI. EXEMPTIONS

Disclosures for e-mail and fax communications that fall within the direct mail exemption should occur on the telemarketing call. The Associations support the addition of e-mail and fax to the direct mail exemption; however, we believe that the Commission should not require that the disclosure occur within the text of the e-mail or fax. Questions arose at the workshop regarding what the additional cost would be to include the disclosure in the text of the e-mail. Requiring such disclosures in the e-mail, much of which may never result in inbound telephone calls, imposes significant costs on businesses. Particularly on e-mail communications, "real estate" and location have significant financial value. As long as the consumer will ultimately receive the disclosure, the Commission should be flexible as to where it occurs.

In addition, business-to-business calls involving the sale of Internet services and all nonprofit calls should fall within the exemptions to the TSR. There is no record that justifies treating such calls as exceptions to the exemption, thus subject to the TSR.

* * *

The undersigned Associations thank the Commission for its consideration of these additional comments. Please contact Ronald Plesser or Stuart Ingis of Piper Rudnick LLP at 202/861-3969 for further information.

Sincerely,

American Teleservices Association
Direct Marketing Association, Inc.
Electronic Retail Association
Magazine Publishers of America
National Retail Federation
Promotion Marketing Association