UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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In the Matter of Notice of Proposed Rulemaking to Amend the Telemarketing Sales Rule	Telemarketing Rulemaking -- Comment FTC File No. R411001
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ADDITIONAL COMMENTS OF THE ELECTRONIC RETAILING ASSOCIATION REGARDING THE COMMISSION'S NOTICE OF PROPOSED RULEMAKING TO AMEND THE TELEMARKETING SALES RULE

1. Introduction

The Electronic Retailing Association ("ERA") is the leading trade association representing the electronic retailing industry. Its mission is to foster the use of various forms of electronic media – television, Internet, telephone, radio – to promote goods and services to consumers. The ERA has over three hundred (300) member organizations encompassing a wide range of entities, such as advertising agencies, direct response marketers, telemarketers, Internet and "brick and mortar" retailers, fulfillment service providers and television shopping channels.

The ERA is submitting these additional comments to supplement the regulatory record in response to the Commission's Notice of Proposed Rulemaking ("NPRM"), 67 F.R. 4492 (January 30, 2002), that is part of the Commission's ongoing review of the Telemarketing Sales Rule.[1] These comments are intended to address a number of the

[1] Hereinafter, the existing Telemarketing Sales Rule shall be referred to as the "Existing Rule" or "Rule" and the Commission's proposed revision to the Rule, as contained in its NPRM, shall be referred to as the "Proposed Rule."

issues that remained open at the conclusion of the Commission's Telemarketing Sales Rule Forum on June 5-7, 2002 (the "TSR Forum" or "Forum") and to respond specifically to the Commission's request for certain additional information and data. The ERA is hopeful that these additional comments, together with its prior written submission and oral testimony, will assist the Commission in crafting regulations that will continue to advance the Commission's stated goal of protecting consumers against abusive and deceptive telemarketing practices while not unduly burdening or economically devastating legitimate telemarketing activities.

2. Executive Summary

The ERA continues to advocate the positions set forth in its prior written submissions as well as in its oral testimony at the TSR Forum. During the course of the Forum, however, a number of new ideas and issues were raised in areas of extreme importance to ERA members. In this supplemental response, we hope to provide the Commission with specific, constructive responses to certain issues raised at the Forum and build upon some of the consensus that began to develop in certain key areas. In particular, our supplemental comments are focused on the following four key issues: upsells, preacquired account information, the proposed national do not call ("DNC") list, and the issue of predictive dialers and abandoned calls.

With respect to upsells, the Commission itself acknowledged during the TSR Forum that its proposal to treat upsells as outbound calls had several unintended consequences. In this regard, the ERA continues to believe that the most appropriate approach, with the least potential for additional unintended consequences, would be to define upsells in the Rule and then create a separate regulatory category for such upsells

with specific disclosure requirements. As such disclosure requirements are not imposed by the Existing Rule, we believe that this approach would substantially address the Commission's current concerns without unduly subjecting businesses to confusing and potentially unintended regulatory consequences.

During the TSR Forum, the Commission asked industry representatives to comment upon the imposition of other Rule requirements on upsells. The ERA is not opposed, in concept, to the imposition of additional appropriate regulatory requirements on upsells. However, we note that significant drafting complexities will be involved and the potential for inadvertent drafting errors is high. Moreover, we cannot support the imposition of the Rule's record keeping requirements on inbound upsells. Inbound call centers are largely exempt from the requirements of the Existing Rule and therefore may not have invested in the technology or developed the business processes necessary for compliance with the Rule's specific and detailed record keeping requirements.

With regard to preacquired account information, the ERA believes that the TSR Forum panel discussion on this topic evidenced a significant level of confusion regarding the practices involved and, consequently, the appropriate regulation of those practices. In our view, preacquired account telemarketing describes a situation in which one marketer obtains a consumer's complete billing information from another marketer without the consumer's knowledge and consent to the transfer. The ERA would support a prohibition on that practice. In contrast, however, we believe that a transfer of billing information that occurs with the consumer's knowledge, and after the consumer's express verifiable consent to the transfer has been obtained, should not be prohibited. Instead, we believe that appropriate regulation of such billing information transfers can be achieved by

imposing specific disclosure obligations, and by requiring the marketer to obtain the consumer's express verifiable consent to the transfer. In an effort to provide useful information to the Commission on this topic, Sections 4(A)-(C) below describe three common billing information transfer situations, and explain how we would propose to regulate each such situation.

Much of the discussion at the TSR Forum regarding the proposed national DNC list revolved around the concept of "harmonization" with existing state maintained DNC lists. In this regard, the ERA continues to adhere to the position taken in its earlier written submission that a national DNC list is unnecessary. Nevertheless, if a national DNC list were to be implemented, we believe that harmonization in the manner described by the National Retail Federation ("NRF") in its written comments would be appropriate. Moreover, the ERA believes that any national DNC list must contain an exemption for calls placed to consumers with whom the seller has an established business relationship. In order to ensure the integrity and accuracy of the proposed list, we also suggest that the Commission impose a nominal fee on consumers for placing their telephone numbers on the list, and further, that it require list registrations to be renewed annually. Finally, we support the comments filed by the Direct Marketing Association ("DMA") in response to the separate Notice of Proposed Rulemaking and Request for Public Comments on the Telemarketing Sales Rule User Fees (the "DMA User Fee Comments").

With respect to the use of predictive dialers, the ERA continues to believe that five percent (5%) is an appropriate abandonment rate standard. While there was testimony at the TSR Forum suggesting that larger call center operations might be able to cost effectively comply with a lower standard, we are concerned that this would not be

the case for smaller call centers. We believe that the imposition of an abandonment rate requirement of under five percent would have a disproportionate negative impact on smaller call centers and their ability to compete in the marketplace. Nevertheless, in the event that the Commission does mandate a particular rate of abandonment, we suggest that it clarify what it means by an abandoned call by adopting the proposed definition set forth herein.

Finally, given the complexities and magnitude of issues that remain unresolved and the significance of issues that were raised for the first time at the Forum, the ERA would strongly suggest that the Commission issue a revised proposal regarding its plans to amend the Rule. We would further suggest that the Commission then allow the public time to review and comment upon such a proposal before moving forward.

3. Application of the Rule to Upsells

The ERA was pleased to learn during the Forum that the Commission did not intend to cause inbound upsells to be subject to either the calling time restrictions contained in Proposed Rule Section 310.4(c) or to the DNC list restrictions contained in Proposed Rule Section 310.4(b)(1)(iii). The ERA believes that the simplest and most efficient way to address the Commission's concerns with upsells is to separately define upsells as a distinct category of calls and to subject such calls to appropriate disclosure requirements designed to address the Commission's disclosure related objectives. During the Forum, however, the Commission specifically asked industry participants to provide further comment on whether upsells should be subject to other provisions of the Proposed Rule, such as the disclosures required in Sections 310.3(a)(1) and 310.4(d), the

prohibition on misrepresentations contained in Section 310.3(a)(2) and the recordkeeping provisions of Section 310.5

While the ERA is not conceptually opposed to subjecting upsells to other appropriate provisions of the TSR, we are concerned that, as was the case with the Commission's original proposal, applying provisions to upsells that were not drafted with this somewhat unique, hybrid call in mind may result in drafting irregularities and lead to unintended consequences. For example, we note that Section 310.3(a)(1) requires that the specified disclosures be made "before the consumer pays" for the goods or services at issue The statement of basis and purpose of the Rule clarifies that a customer will be deemed to "have paid" when he or she supplies billing information for the transaction. In a typical upsell, however, the consumer does not supply his or her billing information again during the upsell portion of the call but rather authorizes the seller to charge the same account that was used to make the purchase that preceded the upsell. If the language of Section 310(3)(a)(1) were left unchanged, marketers would have no clear guidance as to when the relevant disclosures would need to be made. We would suggest that, in the context of upsells, it may be appropriate to clarify that the consumer will be deemed to "have paid" when he or she consents to the offer.

This is but one example of a potential drafting problem. However, we are concerned that the wholesale importation of other requirements of the Rule to upsells -- without careful consideration of how each of the provisions would apply in the inbound context -- could create other unintended or illogical consequences similar to those which resulted from the Commission's original proposal to treat upsells as outbound calls. For this reason, we continue to believe that the safest and most efficient approach is to

specifically define upsells in the Rule and to set forth the specific disclosure requirements that would apply to such calls, consistent with our written comments. To the extent that the Commission feels that the disclosures recommended in our written comments do not include any of the specific information required under Sections 310 (3)(a)(1) and 310.4(d), the ERA would not oppose mandating those disclosures as well.

One aspect of the Proposed Rule which may prove problematic to our members would be the application of the Rule's record keeping requirements to upsell calls. As the Commission is aware, a large percentage of upsell calls occur in the inbound channel. Many marketers and telemarketing agents who engage primarily in inbound telemarketing may not have the systems and procedures in place necessary to comply with the very detailed record keeping requirements of the Rule. We understand from certain of our members that imposing the recording keeping requirement on inbound calls may require substantial investments of money and resources to develop the systems necessary to comply with these requirements. Moreover, it would appear from the comments contained in the NPRM that the Commission's primary concern with upsells stems from a lack of disclosure of the fact that a separate sales transaction with a separate seller is taking place. We would urge the Commission to confine its regulation of upsells to disclosure-related provisions which will directly advance the Commission's objectives in this regard.

4. **Preacquired Account Information**

The ERA would respectfully urge the Commission to reconsider the proposed ban on all uses of preacquired account information. Based upon the discussion of this topic at the TSR Forum, the ERA remains particularly concerned that there remains considerable

confusion regarding the definition of preacquired account information and a lack of understanding as to the many forms of legitimate marketing activities that would be impacted by the proposed ban.

In these supplementary comments, ERA hopes to provide the Commission with a better understanding of the different types of marketing arrangements that would be prohibited if the proposed ban were to take effect and of the benefits such marketing arrangements afford to consumers and industry alike. We believe that upon review of the spectrum of marketing practices at stake, it will become clear to the Commission that the proposed ban is over-reaching and that the Commission's goals can be fully achieved through (1) a more narrowly tailored ban limited to those situations where account information truly is preacquired (e.g., acquired prior to and without the consent of the consumer); and (2) disclosure and express verifiable authorization requirements applicable to all other situations where account information is transferred with the consent and pursuant to the wishes of the consumer.

A. The Inbound Upsell with One Telesales Representative

At the far end of the spectrum is what is perhaps the most popular and most benign marketing practice, the inbound upsell with a single operator. In this scenario, a consumer sees a general media advertisement for an airline fare and calls to book a round-trip flight from New York to San Francisco. The telesales representative who answers the consumer's call interacts with the consumer, obtains relevant information from the consumer regarding preferred flight dates and times, and quotes a price to the consumer. The consumer accepts the price, and provides the telesales representative with complete billing information so that the airline can book the ticket and charge the

consumer. After the flight transaction is completed, the telesales representative mentions that a rental car is also available from a particular rental car company and informs the consumer of the material terms of the rental car offer. The telesales representative then obtains the consumer's verifiable consent for the car rental company to charge $X for the car rental on [date] to the same card you just used for your airline purchase."

The transaction described above is a legitimate and responsible business transaction which is essential to the economic viability of both the direct response and telemarketing segments of the industry. As noted in our initial written comments, it is estimated that inbound upsells account for approximately 1.5 billion dollars in sales per year. The efficiencies and benefits to both marketers and consumers that result from these targeted affinity marketing programs are detailed in our earlier written comments.[2]

During the Forum, the Commission asked industry to comment specifically on the benefits of not having the consumer repeat his or her credit card number. When one thinks of the transaction in light of the example provided above, the benefits are obvious -- convenience and cost. From the consumer's standpoint, there is the inherent convenience of not having to retrieve the credit card again, and not having to re-supply the billing information he or she provided only seconds before. The inconvenience to a consumer of having to retrieve his or her credit card a second time and repeat the billing information might be sufficiently annoying or frustrating to cause the consumer to forego the transaction -- not because the consumer does not want the rental car, but because it is

[2] We wish to note that we believe it is unclear whether the Commission would view the example described above as constituting "preacquired account telemarketing." The consumer's billing information is not transferred to the rental car company until after the consumer's verifiable consent to the rental car offer is obtained. For that reason, we believe that a reasonable argument can be made that no "preacquired account" telemarketing is conducted, because the consumer's

too much trouble to complete the transaction. In addition, forcing a consumer to retrieve and repeat the same information that was just provided seconds earlier will increase the cost of the call by an average of 60 seconds which equates to approximately twenty five cents (25¢) per call. When one considers that approximately 100 million upsell transactions are conducted each year, the cost to the industry from the increased length of the call alone is approximately $25 million per year.

We would respectfully submit that there is nothing inherently deceptive or abusive in the marketing arrangement described above. The consumer's account information is not transferred to the upsell marketer unless and until the consumer has consented. During the Forum, a number of participants suggested that a ban is necessary because the potential for abuse exists in that the telesales representative could theoretically transfer the consumer's account information even if the consumer had not consented. Such activity would be outright fraud and is prohibited even under current law.

Moreover, we would urge the Commission not to regulate to the lowest common denominator but, as it has consistently done in the context of this and other rulemaking proceedings, to strike a balance that does not unduly restrict legitimate marketing practices where less restrictive alternatives exist. To the extent that the Commission believes that additional safeguards are necessary in these types of transactions, we respectfully submit that the disclosure and express verifiable authorization requirements set forth in our written submission will truly accomplish this goal. Under the ERA's proposal, the telesales representative will be required to disclose the following

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billing information is transferred only with the consent of and at the direction of the consumer. A clarification from the Commission with respect to this issue would be useful to our members.

information regarding the upsell offer: (i) that the upsell offer is being made on behalf of a separate seller (i.e., that the car rental company is separate from the airline); (ii) the identity of the separate seller in a manner that will reasonably allow the consumer to identify the company that will be charging the consumer for the upsell product or service (i.e., the car rental company's name); and (iii) that the purpose of the upsell offer is to solicit another purchase (i.e., "a special offer from the car rental company").

A second component of our proposal would involve requiring the telesales representative to disclose material billing information regarding the upsell prior to obtaining the consumer's consent to the offer. Material billing information would include: (i) the name of the entity that will be charging the account (i.e., the name of the car rental company); (ii) the amount and date or the frequency of the charge (i.e., "$X on [date]"); and (iii) information sufficient to enable the consumer to identify the account that will be charged (i.e., "to the same card you just used for your airline purchase.").

The third component of a reasonable regulation would be to require that the telesales representative obtain the consumer's express verifiable consent to the upsell transaction by using one of four verifiable consent methodologies: (i) express written authorization including the consumer's signature (including a verifiable electronic or digital signature); (ii) express oral authorization verified by an independent third party; (iii) express oral authorization that is tape recorded; or (iv) written confirmation of the transaction sent to the consumer prior to the submission of the consumer's billing information for payment. In our view, all four of these consent verification methodologies would be appropriate. In particular, we encourage the Commission to retain the written verification consent methodology in the context of inbound upsells.

Many inbound call centers have not previously been subject to the Rule, and therefore, have not invested in taping technology to the same extent as outbound call centers.

Finally, the ERA believes that the Commission should make clear that upsell offers made by affiliated entities will not be considered to have been made by a "separate seller" for purposes of the revised Rule, and that the disclosure of the name of the entity that will be billing the consumer for the upsell purchase will be sufficient to prevent deception. To that end, we urge the Commission to adopt a definition of "affiliate" which covers any company that controls, is controlled by, or is under common control with any other company. The definition of a "separate seller" for purposes of the upsell disclosure requirements could then be defined as the corporate, brand or trade name of entity that will be billing or charging the consumer for the upsell.

B. The Inbound Upsell with Two Telesales Representatives

A slight variation of the foregoing scenario is an inbound upsell involving two telesales representatives. This situation is almost identical to the first example provided above. The only difference would be that at the conclusion of the airline transaction, the telesales representative would not directly present the consumer with an offer on behalf of the car rental company. Instead, the telesales representative would ask the consumer if he or she were interested in hearing an offer from the car rental company and, if the consumer responded affirmatively, transfer the consumer to a second telesales representative who would present the car rental offer to the consumer. In some cases, the second telesales representative may be employed by the same call center that employs the first telesales representative. In most cases, however, the two telesales representatives are employed by different call centers.

We believe that this scenario is functionally equivalent to the inbound upsell situation described above in Section 4(A). In both cases, the consumer is presented with an upsell offer immediately upon the conclusion of the primary transaction in connection with which the consumer has just provided his or her billing information. The consumer may find it inconvenient to retrieve and repeat this account number and will certainly know which account is going to be charged. As long as the upsell offeror and material billing term disclosures are made, and the consumer provides express verifiable consent to the upsell transaction through one of the four methodologies discussed above, the ERA believes that this upsell transaction is a legitimate one and should not be prohibited by the Proposed Rule.

C. The Joint Marketing Arrangement

A third scenario involves what we referred to in our previous submission as the joint marketing arrangement. In this scenario, the airline provides the car rental company with a list of names, telephone numbers and, possibly, encrypted numbers of consumers who have recently purchased tickets from the airline. The car rental company then places outbound calls to those consumers and asks if they would be interested in renting cars during their trips. The outbound call disclosures required by Proposed Rule Section 310.4(d) are made during the call, and the material billing terms of the car rental offer are clearly disclosed to the consumer. If the consumer's express verifiable consent to the transaction is obtained, the car rental company submits that information to the airline. The airline then provides the car rental company with the consumer's complete billing information so the car rental company can charge the consumer in accordance with the consumer's instructions. This scenario affords the same cost and convenience benefits

described in the preceding two scenarios and, in addition, provides the additional benefit of protection against identity theft. Specifically, for the consumer who is concerned about providing his or her credit card information over the telephone to the telesales representative, this marketing arrangement allows the consumer the convenience and security of facilitating the transaction without having to provide his or her credit card information over the telephone.

In this third scenario, as with the previous two, the car rental company does not "preacquire" the consumer's billing information and does not have the ability to charge the consumer for the car rental until after the consumer's verifiable consent to the offer is obtained. We acknowledge, however, that in this type of outbound upsell transaction, the consumer has not just provided his or her billing information to a telesales representative. Consequently, it may be necessary to require the telesales representative to identify the account that will be charged with greater specificity than would be necessary in the two sample inbound upsell situations described in Sections 4(A) and (B) above. For example, the telesales representative may have to identify the account that will be billed as "your Visa Card ending in 1234" rather than as "your Visa Card" or as "the Visa Card you provided to the airline."[3]

We further acknowledge that the fact that the consumer has not initiated the call in this scenario may affect the analysis of the types of verifiable consumer consent that are appropriate. Unlike the inbound call centers discussed earlier, most outbound call centers are already equipped to, and in fact do, tape verifications. For that reason, a

[3] We would not recommend requiring the telesales representative to repeat the consumer's complete account information as that would necessitate providing the full account number to the telesales representative.

reasonable compromise, as opposed to a complete ban, may be to require taping or written consent in outbound calls involving the third party transfer of consumer billing information with consumer consent. While the ERA would not oppose the elimination of the written confirmation method of express verifiable consent in this outbound context, we must reiterate that we would strongly oppose eliminating the written confirmation method of express verifiable authorization either in the inbound upsell context or in connection with novel payment methods.

D. True Preaquired Account Information

The last scenario is what we would consider to involve the true use of preacquired account information. This scenario is similar to the joint marketing program described above. However, in this case, the airline transfers to the car rental company for purposes of conducting the telemarketing campaign not only the names and telephone numbers of its customers, but their full account information as well. We believe that it is this situation that Ms. Harrington was referring to at the end of the Forum session on preacquired account information, when she indicated that it is deceptive and abusive for a marketer to acquire a consumer's account information before the consumer has been contacted much less consented. We agree with this conclusion and we believe that this is the appropriate place to draw the bright line distinction between abusive and deceptive telemarketing practices and legitimate ones. Indeed, it is this scenario that existed in most of the cases referenced by the Attorneys General during the Forum as well. Accordingly, the ERA would fully support the prohibition on the use of preacquired account information, if preacquried account information is defined narrowly to mean complete billing information acquired prior to and without the consent of the consumer.

As to the remaining marketing practices discussed above, we would respectfully submit that they cannot be deemed abusive or deceptive per se, because when legitimately and properly conducted, they are simply facilitating a transaction authorized, consented to and desired by the consumer. The concern here, we would submit, is to ensure that the consent is informed, expressed and verifiable. We believe that the ERA's proposal, which incorporates affirmative disclosure and express verifiable authorization requirements, is an appropriate and effective means of accomplishing that goal.

5. **National DNC List**

As noted in our written comments, we believe that the Commission's proposal for a national DNC list is flawed in many respects and unnecessary in light of the proliferation of state-maintained DNC lists, the DMA's Telephone Preference Service ("TPS"), and the requirement – found in both the Existing Rule and the Telephone Consumer Protection Act ("TCPA") – that sellers honor specific do not call requests from particular consumers. Nevertheless, the ERA appreciates the Commission's efforts at the TSR Forum to engage in a dialogue with industry on this matter by suggesting the concept of "harmonization" with respect to the interplay between the proposed national DNC list and the existing body of state-maintained lists.

While harmonization would, on its face, appear to be a reasonable and balanced approach, and one that our members could support, the ERA believes that the Commission must better clarify what harmonization means in practical terms. In addition, we continue to have specific concerns regarding the manner in which such a harmonized list might be implemented. For example, in order to be supportable by our members, any harmonized list would have to contain an exemption for calls placed to

consumers with whom the seller has an established business relationship. Moreover, in order to ensure the integrity of any proposed national DNC list, while being cognizant of the astronomical costs associated with its administration and enforcement, the ERA believes that Commission should impose a nominal fee on consumers for appearance on the list and require that registration on the list be renewed annually.

A. Harmonization of National and State DNC Lists Must Include Uniform Exemptions and Enforcement Standards

At the TSR Forum, there appeared to be some uncertainty regarding the extent to which the proposed national DNC list and existing state lists would be harmonized. In our view, the creation of a single, centralized database containing the names and/or telephone numbers of consumers who do not wish to receive telemarketing calls – without a corresponding harmonization of the myriad different requirements, exemptions, enforcement mechanisms and other legal requirements contained within these various DNC schemes – would do little, if anything, to address the concerns raised in our initial comments. There are now twenty three (23) states that have enacted do not call legislation; each with varying requirements concerning the applicability of their DNC list to particular entities or transactions and each with differing enforcement standards. The administrative costs associated with attempting to comply with these varying and often inconsistent requirements are enormous and would not be alleviated by merely storing the names and telephone numbers at issue in a single, centralized database.

Instead, the ERA agrees with the approach to harmonization articulated by the NRF in its initials comments to the NPRM. Like NRF, the ERA believes that a workable harmonization scheme would involve the incorporation of state-maintained DNC lists into the national DNC list, with uniform federal exemptions, safe harbors and regulations

applicable to all interstate telemarketing calls. States with more or less restrictive requirements and enforcement schemes would remain able to apply those standards to intrastate calls conducted within their states and would also have the ability to enforce the national DNC list and federal standards with respect to interstate calls made into or out of their states.

In this regard, we note that the ERA does not believe that the states have the legal authority to enforce their state-based DNC list requirements against interstate telemarketing calls. Rather, we believe that the jurisdiction of the state-based DNC lists is legally limited to intrastate calls. We are aware that many responsible marketers, including our members, have taken an extra-conservative approach and implemented compliance programs that assume that state-based DNC lists apply to interstate as well as intrastate calls. We do not believe, however, that such an approach is required as a matter of law. It would be extremely beneficial if the Commission would clarify its views on this issue.

B. Harmonized List Must Include Established Business Relationship Exemption

During the TSR Forum, the Commission expressed concerns that an existing business relationship exemption had the potential to be harmful to consumers by "swallowing the rule" and rendering the DNC list requirement meaningless. While the ERA acknowledges the Commission's concerns regarding the breadth and scope of the exemption, it is critical to our members that they be able to contact their existing and prior customers. We believe that a clearly delineated established business relationship exemption can be defined and included in the Rule in a manner that balances the reasonable needs and expectations of both consumers and marketers.

This approach is consistent with that taken by the majority of state and federal legislatures and agencies that have enacted statutes and regulations relating to the making of unsolicited telephone solicitation calls and the sending of unsolicited facsimile and e-mail advertisements. For example, virtually all of the states that have enacted DNC list legislation – including Kentucky, Minnesota, Oklahoma and Pennsylvania, which have each adopted or amended such legislation within the past few months – recognize some form of prior or existing business relationship exemption. See Ky. Rev. Stat. Ann. § 367.46951; Minn. Stat. Ann. § 325E.311; Okla. Stat. Ann. tit. 15, § 775B.2(3); 73 Pa. Cons. Stat. Ann. § 2242. Similar exemptions are also contained in the TCPA, with respect to the transmission of unsolicited facsimile advertisements, and the proposed Can Spam Act, with respect to the sending of unsolicited commercial e-mail advertisements. See 47 U.S.C. § 227(a)(3); S. 630, 107th Cong. § 3 (2001).

In our view, the following would be an appropriate definition of an established business relationship:

> A "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, and the relationship has not been previously terminated by either party.

The Commission's current proposed alternative – allowing consumers to "opt-in" to receive calls from particular sellers – is impractical. It is simply unrealistic to believe that a consumer would take the time and effort (or even be able) to identify each marketer from which he or she would be willing to receive a telemarketing call. In contrast, the

inclusion in the Proposed Rule of the established business relationship exemption defined above, coupled with the company specific do not call requirement of the Existing Rule, would represent a reasonable compromise and balancing of consumer expectations and the needs of businesses to contact their customers. Consumers placing their names on the national DNC list would be able, in the first instance, to prevent calls from all parties subject to the Rule other than those with which they have established business relationships. In the event that a consumer subsequently determines that he or she does not wish to receive telemarketing calls from one of these entities, the consumer need only notify the company of that fact that either prior to or upon receipt of a telemarketing call. Thus, under the worst case scenario, a consumer need only receive a single telemarketing call from a particular seller with which it has an established relationship in order to prevent the receipt of future solicitation calls from that company.

C. Commission Should Require Annual Registration and Payment of a Nominal Registration Fee

As noted at the TSR Forum, the ERA has deep reservations regarding the Commission's proposal to allow consumers to sign up for the national DNC list via a dial-up system using automatic number identification ("ANI") technology. While we recognize that the use of an automated dial-in system with ANI data may be the most cost effective way to allow consumers to register for the list, the reliance on ANI data as a means of verification is inherently flawed. For example, as noted both at the TSR Forum and in our initial comments, ANI data is not transmitted in all areas of the country and, even where it is transmitted, there is no way to determine whether the person placing the

call is the authorized subscriber for the telephone number at issue.[4] Moreover, as further noted at the TSR Forum, a national DNC list based solely on telephone numbers captured through ANI data would quickly become outdated due to the frequency with which Americans relocate and change telephone numbers. As such, in order to preserve the integrity of the data contained within the list and minimize the costs associated with its maintenance, the ERA believes that consumers should be required to register with the list annually, and further, that the Commission should impose a nominal fee for such registration.[5]

D. The ERA Supports the DMA User Fee Comments

As noted in the DMA User Fee Comments, the Commission's proposal to collect user fees from telemarketers for administration of its proposed national DNC list is not authorized under the Independent Offices Appropriation Act (the "IOAA"). 31 U.S.C. § 9701. While the IOAA permits agencies to establish regulations to collect charges for providing users with some "service" or "thing of value," there is nothing to suggest that the establishment of a national DNC List confers any real benefit or thing of value upon

[4] It was suggested at the TSR Forum that the operator of the proposed national DNC list might be able to call back those consumers who were unable to register their telephone numbers on the list due to an inability to transmit ANI data. The implementation of such a call back system – which is not currently in place and is not encompassed within the Commission's current cost estimates – would significantly increase the administrative costs associated with operating the list. As noted in our initial comments, the ERA believes that the Commission has already greatly underestimated the costs of maintaining a national DNC list.

[5] The Commission's current proposal calls for the cost of the national DNC list to be borne solely by telemarketers. This approach is inequitable in light of the high costs of compliance already imposed upon telemarketers and the less onerous alternative available under the Existing Rule (i.e., having consumers inform telemarketers of their desire not to receive telemarketing calls in the future). This approach also penalizes those consumers who do not place their names on the national list, as the costs imposed upon telemarketers will ultimately be passed on to them. It is also instructive to note the comments at the TSR Forum of representatives of various state agencies who observed that the imposition of nominal registration fees in their states did not appear to pose any material obstacle to consumers' ability to place their names on the state's DNC list.

telemarketers. Moreover, even if the Commission had the authority to collect user fees from telemarketers for administration of the national DNC list, its proposal to do so is flawed in that it fails to allocate the costs of administration according to the percentage of benefit the list would confer upon consumers and the percentage of list value that would inure to the benefit of telemarketers. The Commission has also failed to specify who would bear the burden of additional costs in the likely event that its cost estimates for administration of the DNC list prove inadequate. As such, the ERA supports the conclusion reached in the DMA User Fee Comments that the Commission must fund any proposed national DNC list entirely from federal appropriations or consumer fees.

6. **Predictive Dialers and Abandoned Calls**

At the TSR Forum, the Commission requested that industry provide additional information and commentary regarding the imposition of a mandatory abandoned call rate below the current industry standard of five percent (5%). At the prompting of a request for clarification from the American Teleservices Association ("ATA"), the Commission also sought input from industry regarding an appropriate definition of an abandoned call.

With respect to the imposition of a mandatory abandonment rate, the ERA continues to believe that five percent (5%) is an appropriate standard. Industry estimates suggest that approximately 16 billion outbound telemarketing sales calls are made to approximately 115 million United States households each year (or, roughly 2.67 calls per household per week).[6] Assuming a five percent (5%) abandonment rate, this equates to

[6] Estimates taken from 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 (the "Miller Study") commissioned by the Consumer Choice Coalition.

0.13 abandoned calls per household per week as a result of outbound telemarketing sales calls. When viewed in conjunction with the proposed national DNC list and the ban against the blocking of Caller ID signals, we believe that this level of abandonment represents an appropriate balancing of the concerns of consumers and the productivity and efficiency gains that predictive dialers provide to businesses. [7]

We recognize that there was testimony at the TSR Forum from representatives of larger call center operations suggesting that they would be able to cost-effectively implement an abandoned call rate below five percent. We are concerned, however, that this view is not reflective of the entire telemarketing industry and, in particular, that it does not account for the impact of a lower abandonment rate requirement on the smaller call center operations that compete with the larger entities represented at the TSR Forum. These smaller call centers typically have older and less sophisticated equipment, and fewer financial resources to upgrade their equipment, than the large national call center operations. The ERA is are concerned that the implementation of a lower abandonment rate would have a disproportionate negative impact on these smaller call centers and their ability to compete in the marketplace.

Finally, in the event that a mandatory abandonment rate is established, the ERA recommends that the Commission adopt the following definition of an abandoned call:

[7] As noted by the ATA at the TSR Forum, many entities not subject to the Commission's jurisdiction, such as political fundraisers, routinely employ abandonment rates well above five percent. The imposition of a mandatory abandonment rate by the Commission will do nothing to reduce the number of abandoned calls that consumers receive from such entities.

> 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.

We would further encourage the Commission to take into account the fact that abandonment rates vary significantly based on the time of the call, type of campaign, number of operators available, number of telephone lines employed by the call center and other factors. As such, any measurement of abandonment rates must be over a sufficiently long period of time (e.g., monthly) to account for these short-term fluctuations.

7. **Conclusion**

The ERA continues to support the Commission's goal of strengthening the Rule where necessary to combat abusive and deceptive telemarketing practices. However, the ERA remains concerned that several of the Commission's proposals are broader than necessary to achieve the Commission's goals. The ERA urges the Commission to consider narrowly tailored alternatives such as those being proposed by the ERA which will be equally, if not more effective, in achieving the Commission's goals and more properly balancing the needs of consumers and industry alike. Moreover, the ERA would again urge the Commission to issue a revised proposal, and provide the public with an

opportunity to review and comment upon this revised proposal, before moving forward with any amendments to the Existing Rule.

Respectfully Submitted:

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