

**Before the  
FEDERAL TRADE COMMISSION  
Washington, DC 20580**

**COMMENTS OF  
DIALAMERICA MARKETING, INC.**

**TELEMARKETING RULEMAKING – COMMENT**

**FTC File No. R411001**

**(Proposed Amendments to the Telemarketing Sales Rule)**

Arthur W. Conway  
President & CEO  
DialAmerica Marketing, Inc.  
960 Macarthur Boulevard  
Mahwah, New Jersey 07495  
(201) 327-0200

Counsel:  
Errol Copilevitz  
Copilevitz & Canter, LLC  
423 W. Eighth Street, Suite 400  
Kansas City, Missouri 64105  
(816) 472-9000

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**I. INTRODUCTION**

DialAmerica Marketing, Inc. (DialAmerica) welcomes the opportunity to comment on the Notice of Proposed Rulemaking (NPRM) to amend the Telemarketing Sales Rule (TSR).

DialAmerica's comments focus on the telemarketing industry, particularly the outbound portion. The comments are based on DialAmerica's long history as a leader in providing outbound telemarketing services. While there are many legal issues related to the proposed amendments to the TSR, DialAmerica only touches on these briefly, understanding that others will comment on legal issues much more extensively.

DialAmerica opposes the establishment of a national do-not-call registry (see Section IV), but concedes there are other issues worthy of the Commission's concerns. DialAmerica would ask that the Commission focus on the issues (Section V) of: (A) "Dead Air"; (B) Call Abandonment; (C) Caller ID / Call Accountability; (D) Fraudulent Telemarketing; (E) Prisoner Telemarketing; and (F) Privacy.

Meaningful solutions to these primary areas of consumer concerns would increase consumer confidence in the industry, but such solutions can only be accomplished by building a consensus through effective dialogue with industry leaders. Therefore, the implementation of the proposed amendments should be delayed in order to provide an adequate opportunity to obtain the best possible result.

## **II. ABOUT DIALAMERICA**

DialAmerica, headquartered in Mahwah, New Jersey, is one of the largest outbound telemarketing service bureaus (TSB) in the United States and employs more than 11,000 persons nationwide in 54 locations. In the preparation of these comments, DialAmerica conducted a survey of its own work force with the following results: Twenty percent of the work force are single working mothers; twenty-six percent are students; minorities represent thirty-six percent; one percent are handicapped; and ten percent are participants in a “welfare to work” program. Like many other telemarketing service bureaus, DialAmerica provides employment to a wide variety of individuals, who might otherwise find it difficult to find employment, with the opportunity to earn a good wage while working in a positive environment with flexible work hours.

DialAmerica has been providing inbound and outbound telemarketing services for more than 44 years for a large number of clients in a variety of industries including banking, telecommunications, cable, book publishing, magazine publishing, as well as other industries.

DialAmerica telemarkets a wide range of products and services for these clients. DialAmerica believes that these products and services offer significant value to the consuming public.

DialAmerica has built a reputation of integrity in the direct marketing industry. DialAmerica's executives have long been involved with major trade associations, and have been leaders in the development and promotion of higher ethical standards in the industry.

DialAmerica has been a model corporate citizen devoting resources to community involvement and support to many nonprofit organizations. Through the DialAmerica "Sponsor Program", the company has contributed more than \$185 million to such organizations as Mothers Against Drunk Driving, The Leukemia and Lymphoma Society, various Special Olympic chapters, The National Children's Cancer Society, and many others. In each of the past ten years, DialAmerica has contributed over ten million dollars annually to charities in its Sponsor Program. In addition, over the past ten years, eleven million consumers participated by purchasing and paying for a magazine subscription through our Sponsor Program. Currently there are over six million active customers. DialAmerica believes the impact of its Sponsor Program through monies contributed, as well as the public awareness created for these charities, has a significant positive social impact.

Over 400 magazines are represented in the Sponsor Program, including Time, Sports Illustrated, Reader's Digest, Better Homes and Gardens, and most other leading titles. Sales are for a

subscription to one magazine payable in four installments and are offered at very good rates. DialAmerica believes its Sponsor Program is one of the highest, if not the highest, quality agency sources of subscriptions for the magazine industry.

DialAmerica uses the most advanced telecommunications and data technology to maintain an efficient and effective operation. DialAmerica designs, builds and uses its own proprietary predictive dialing equipment. As a result, DialAmerica considers itself to be an expert in the intricacies of a predictive dialing environment.

DialAmerica conducts its business in a proper and ethical manner. When new laws, rules, or regulations governing telemarketing have been put into effect at the federal and state level, DialAmerica has found itself either already in compliance or exceeding the standards contained therein. DialAmerica believes it has an exemplary record at both the state and national level. DialAmerica is unaware of any issues, either past or present, with the Federal Trade Commission (FTC).

### **III. THE INDUSTRY**

The outbound telemarketing industry is very diverse. There are outside telemarketing service bureaus, such as DialAmerica, that provide outbound telemarketing services to a variety of clients. These service bureaus range in size from under 100 positions to over 5,000 positions.

These firms are typically compensated on an hourly rate, a per sale rate, or a per call rate. This segment is also one of the principal users of predictive dialing technology.

Another segment represents the outbound telemarketing groups that are operated internally by large sellers of goods and services. Their size range is similar to outside service bureaus, and they are also major users of predictive dialing technology. Examples of this segment would include MBNA, AOL-Time Warner, MCI, Grolier and Capital One.

A third segment comprises small businesses that do internal outbound telemarketing. They are different from the large in-house users in that the number of positions is much smaller (some may only be one position) and this segment does not use sophisticated predictive dialing equipment. Additionally, its ability to process data, such as calling lists, including do-not-call lists is limited. Examples of these businesses would include chimney sweeps, landscapers, home cleaning services, and dry cleaners.

DialAmerica believes that substantially all outbound telemarketing is done by companies that can be classified in one of these three categories.

It is estimated that more than 2.5 million people are employed in the outbound telemarketing industry (*The DMA Report: Economic Impact – U.S. Direct & Interactive Marketing Today, 2000. Data from this analysis purchased from the DRI/WEFA Group*). According to published reports (*Economic Report, U.S. Direct, and the Interactive Marketing Today 1999 Forecast*),

consumer outbound telephone marketing reached \$230 billion in 1999, and is expected to grow to more than \$328 billion by 2004. The proposed amendments will have a profound effect on a major portion of America's economy. The ripple effect will reach manufacturers and distributors of consumer goods and services, as well as charitable organizations that have historically been dependent on grass roots support.

Telemarketing creates jobs and is often an entry level position offering individuals the opportunity to develop important business and communication skills. The Commission estimates that more than forty percent (*FTC, Fiscal year 2003 Congressional Justification Budget Summary*) of all telephone numbers will ultimately reach the proposed national do-not-call registry, which will result in a significant loss of jobs.

#### **IV. THE NATIONAL DO-NOT-CALL REGISTRY**

##### **A. Overview**

DialAmerica strongly opposes the Commission's proposed amendment to the TSR to create a national do-not-call registry.

DialAmerica subscribes to the Direct Marketing Association's (DMA) Telephone Preference Service (TPS), as well as to the do-not-call lists published by more than twenty states. It is estimated that this number will increase to thirty by the end of calendar year 2002. DialAmerica maintains its own do-not-call policy consistent with the Telephone Consumer Protection Act of

1991 (TCPA) and places the names of all persons who ask not to be called again on its do-not-call list.

State laws creating do-not-call restrictions exclude some calls by definition and exempt others from coverage. For example, the do-not-call law passed by the state of Indiana specifically exempts calls made on behalf of newspapers of general circulation using their own employees, insurance agents, debt collectors, and charities using their own employees. The definition of a telemarketing call under the Indiana law excludes calls made by politicians, political parties, surveys, religious organizations and charities using employees.

Likewise, the proposed amendments to the Telemarketing Sales Rule will create a do-not-call registry that exempts a wide class of callers, and excludes still others by definition and jurisdiction. The exceptions to the proposed do-not-call registry would appear to include the sellers of long distance services, credit cards and charities using their own employees, politicians, political parties, religious organizations, surveys and advocacy organizations that call to raise money to support lobbying efforts. All intrastate calls are excluded by definition.

## **B. “Coercive or Abusive”**

The reason for the proposed national do-not-call registry is to “prohibit telemarketers from undertaking ‘a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer’s right to privacy’ ” (*as stated on page 72 of the*



*NPRM*). The Commission, based on its comments in the *NPRM*, has concluded that telemarketing is, in general, abusive or coercive, and thus, an extreme measure must be taken, namely, the establishment of a national do-not-call registry.

These conclusions are based in large part, if not entirely, on comments received from 92 commenters (*page 6 of NPRM*). For example, the Commission notes on page 69 that “consumer commenters unanimously expressed their strong dislike of telemarketing and their desire to be free of telemarketing calls... .” DialAmerica notes that, based on a review of the list of commenters on pages 143 – 145 of the *NPRM*, only 72 consumers submitted comments. DialAmerica believes that if telemarketing were so coercive or abusive as to require the creation of a national do-not-call registry, many more consumers would have submitted comments. As to the observation that “Not a single consumer commenter championed telemarketing” (*page 69 of the NPRM*), if consumers are not bothered with something, they tend not to comment to that effect. It is also of interest to note that in the NCL study cited in footnote 246 of the *NPRM*, “dialing a company and being answered with ‘Press 1 for...’ ranked ahead of telemarketing.” This obviously relates to consumers using the telephone and could well come under the TSR, but was not considered anywhere in the *NPRM*. The comments received from law enforcement agencies and consumer advocacy groups are biased in the sense that they deal with problems that consumers have. Very few, if any, consumers are going to call such agencies and groups to report positive experiences.

The outbound telemarketing industry accounts for over \$276 billion in sales in 2001 (*The DMA Report: Economic Impact – U.S. Direct & Interactive Marketing Today, 2000. Data from this analysis purchased from the DRI/WEFA Group*). Obviously consumers are very responsive to the medium. DialAmerica has difficulty reconciling the position of the Commission that a significant number of consumers consider telemarketing abusive or coercive with the fact that consumers purchase so many goods and services through telemarketing.

The outbound telemarketing industry employs over 2.5 million people (*The DMA Report: Economic Impact – U.S. Direct & Interactive Marketing Today, 2000. Data from this analysis purchased from the DRI/WEFA Group*). The Commission's position would indicate that a significant portion of these people are abusive or coercive. DialAmerica takes strong exception to characterizing the people that work in telemarketing, including DialAmerica employees, in such a fashion. DialAmerica employees are not abusive or coercive, nor would DialAmerica tolerate such behavior.

DialAmerica believes that the amount of sales accounted for by telemarketing and the number of people employed in telemarketing (who are also consumers), are strong indications that many consumers feel that telemarketing is a convenient, honest and acceptable way for them to purchase goods and services. DialAmerica finds no mention of the amount of sales accounted for by telemarketing nor the number of people (consumers themselves) employed in telemarketing anywhere in the NPRM and concludes that economic impact was not considered by the Commission in making its proposal for a national do-not-call registry.

DialAmerica sales representatives have sales conversations with approximately 2.5 million consumers a week. Between one and two percent of these calls result in consumers requesting not to be called again. The other 98 – 99% are calls where the consumer either accepts or declines the offer. DialAmerica, as part of its quality assurance procedures, conducts thousands of monitoring sessions a week, each of which covers an average of 10 sales conversations. Based on these monitoring sessions, DialAmerica believes the vast majority of consumers called are receptive to DialAmerica’s telemarketing calls.

DialAmerica does not believe there is sufficient evidence on the record to support the contention that “a pattern of unsolicited telephone calls which a reasonable consumer would consider coercive or abusive of such consumer’s right to privacy” exists. Quite to the contrary, based on industry statistics and its own observations, DialAmerica believes the “ordinary consumer” to be receptive to telemarketing calls.

### **C. Failure to Exclude Past Customers and Donors**

Any national do-not-call registry should provide an express exclusion (as many states do) for past customers or donors. It is reasonable to believe that when individuals sign up on a do-not-call list, they are not attempting to sever their relationship with businesses from which they have previously purchased goods or services or charities they have supported. The failure to provide

an exemption for the same will increase the cost of marketing, create confusion and reduce the level of service to which consumers have become accustomed.

The problem with the lack of exclusion can be illustrated by an individual on the do-not-call registry who takes her car in for service at an automobile dealership across the state line. The mechanic finds a flaw in the carburetor that could damage the engine. The service manager calls the car owner to sell a new carburetor because of the threat of damage. The automobile dealership has violated the proposed national do-not-call amendment. Is the consumer better served by receiving that telephone call at a point in the day when the problem can be addressed, or by having to wait until the end of the day so that a face-to-face conversation can take place?

#### **D. The Integrity of the Process**

The Commission must be cognizant of the potential for abuse in the sign-up process. Not only must the Commission address how the application process will be conducted, but also determine the criteria as to whom will be authorized to enroll. DialAmerica has experienced incidences where one member of a household has requested to be placed on a do-not-call list, while another has asked that the calls continue.

Some states have implemented their do-not-call lists by allowing sign-up over the Internet or by telephone. There are no safeguards to ensure that the person calling or accessing the web site is the person in control of the telephone number. In one instance, the Internet web site allows

anyone who accesses it to sign up as many as five telephone numbers at a time. Indeed, the threat of third-party abuse is very real.

If a national do-not-call registry were to be implemented, despite its objections, DialAmerica would ask the Commission to require written applications including some form of verification. Sign up should be for a period of no longer than one year and should require the payment of a fee. The cost of administering a national do-not-call registry will be expensive and should be borne by the enrollees. Those wishing to take advantage of the opportunity should bear the cost of the service they are receiving.

#### **E. Reactivation**

The proposed procedure to reactivate individuals who have placed their names on the national do-not-call registry is not reasonable, practical or economical. As currently written, it would require contact by direct mail asking consumers to reactivate their eligibility for future calls by calling an 800 number and having their request tape recorded.

DialAmerica believes the burden to consumers, who are on the registry but want to receive calls from specific sellers, of having to “provide express verifiable written authorization to specific sellers” (*page 72 of the NPRM*) is far greater than the burden to the consumer to be placed on a company-specific do-not-call list. There will be very few instances of this happening.

The risk to businesses is obvious. Many companies will discover that current customers who enter their names on a national do-not-call registry to avoid others will be out of their reach. DialAmerica would ask the Commission to conduct an independent investigation as to the potential impact on the economy. Once again, loss of business activity translates to the loss of jobs.

#### **F. Legitimate Telemarketing Provides Significant Benefits To The Public**

It is also important to point out that telemarketing offers an alternative for those who are not mobile, as well as for those who are located in portions of the country where they may not otherwise have the opportunity to be made aware of and/or obtain products or services being offered elsewhere. In addition, many people are very busy and will procrastinate unless prompted to act. Many times the telephone call will prompt individuals to undertake an act that they want to do and is beneficial to them, such as refinancing a mortgage, purchasing cellular phone service or renewing a magazine subscription.

#### **G. Economic Impact**

The Commission has estimated that at least forty percent (*FTC, Fiscal year 2003 Congressional Justification Budget Summary*) of all eligible telephone numbers will ultimately be placed on a national do-not-call registry. Potentially, that will mean the permanent loss of 1 million jobs.

Many of those who lose their jobs will have difficulty in finding new employment, and families will suffer.

If the FTC and others are correct in their projections of the number of consumers who would place their numbers in such a registry, it would have a significant adverse impact on DialAmerica's business, as well as other legitimate businesses who engage in outbound telemarketing. The negative impact of a national do-not-call registry on the economy would be significant. Many companies use outbound telemarketing as a primary sales channel. The impact of a national do-not-call registry would significantly constrict this sales channel, resulting in lost sales, and ultimately, lost jobs.

If the loss of names correspond to an equal loss of jobs, from DialAmerica's perspective, that would mean the company would have to lay off 4,400 employees. In many instances, those employees would not be able to find other comparable employment. DialAmerica believes that the numbers represented from its own projection translate to the industry as a whole.

DialAmerica notes that there is no discussion of the impact of a national do-not-call registry on the telemarketing industry. DialAmerica concludes from this that the Commission, in proposing a national do-not-call registry, did not consider such impact. DialAmerica believes that if a large number of consumers place their numbers on a national do-not-call registry (as is projected by numerous sources), legitimate telemarketers will suffer significant harm. Even a twenty percent decline in call volume caused by such a registry could result in the loss of hundreds of thousands

of jobs, if not more. The revenue loss to the industry could very well put legitimate telemarketers out of business. Given some of the projections of the number of consumers who would “sign up”, DialAmerica projects that its Sponsor Program (described earlier) would no longer be viable.

DialAmerica urges the Commission to perform a thorough analysis of the impact that a national do-not-call registry may have on legitimate telemarketers and businesses that use telemarketing. DialAmerica is confident that such an analysis will show that the harm done to legitimate telemarketers and other businesses will far outweigh any perceived benefit to consumers.

#### **H. Public Confusion**

The TSR does not apply to intrastate calls nor does it apply to calls from certain exempt industries and charitable organizations. Consumers who have placed their names on the proposed national do-not-call registry will still receive these calls. DialAmerica believes that this will create a great deal of confusion for consumers and a tremendous number of complaints to the FTC and the States. The FTC and the States will have to devote significant resources to investigate these complaints, only to find that most are unfounded because they concern calls not covered by the TSR. Following up on unfounded complaints would result in waste of time, resources, and money (that would be taxpayer’s money, of course). This burden could be so great as to hamper the investigation of valid complaints and compromise the ability to enforce the TSR and other rules and regulations of the FTC and the States.



## **I. Two-Year Review**

DialAmerica believes that if a national do-not-call registry is implemented, irrevocable harm will be done to the telemarketing industry. The two-year review proposed in the NPRM will be two years too late as it relates to regulatory and economic impact, particularly in regard to the telemarketing industry.

## **J. Legal Issues**

The solicitation for support by nonprofit organizations has been held to be so intertwined with information, education and advocacy that it is a form of free speech, and therefore, entitled to the full plenary protection of the First Amendment. *See Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, (1988); *Secretary of State of Maryland v. Joseph H. Munson Company*, 467 U.S. 947 (1984); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980).

The sale of goods and services is a form of protected commercial speech also entitled to the protection of the First Amendment. *See Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, 447 U.S. 557, 566 (1980). Therefore, whether one tests the establishment of a national do-not-call registry by free-speech standards or commercial speech

standards, the result is the same, *viz.*: government cannot favor one speaker over another based upon the content of the call.

The First Amendment prohibits overbroad statutes and regulations that bring protected speech within their prohibitions, thereby creating a “chilling effect” on persons who refrain from the conduct because they fear prosecution. *See Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940). The proposed amendments are a content-based restriction on protected speech that lack any compelling reason to justify the infringement upon free-speech rights. *See U.S. v. Playboy Enterprises Group, Inc.*, 529 U.S. 803, 811-12 (2000).

A do-not-call list that prohibits some calls but not others was the subject matter in *Pearson v. Edgar*, 153 F.3d 397 (7<sup>th</sup> Cir. 1998). This case was decided on commercial speech standards, which are less stringent than free-speech standards, which are implicated in the Commission’s proposal to create a national do-not-call registry. In *Pearson* the court found that the challenged law did not meet the “reasonable fit” mandated by the United States Supreme Court in *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 (1993).

A do-not-call law that excludes some calls by definition and others by lack of jurisdiction creates an unconstitutional content-based regulation of presumptively protected speech.

Regardless of what steps the Commission might take, consumers will continue to receive telephone calls they might find inconvenient. The fact that they may receive them is a small price to ensure compliance with certain rights guaranteed under the First Amendment.

Furthermore, DialAmerica believes there is little evidence to support that the combination of state laws, company-specific do-not-call lists, the TPS and the duties and obligations mandated under the TCPA of 1991 are not collectively adequate to protect the interest of citizens who do not wish to be called. This additional layer of regulation at the federal level mandating a prohibition against certain calls will not resolve the problem, but will cost jobs and increase costs for consumer goods.

DialAmerica urges the Commission to delay implementation of the proposed amendments to the TSR until it has had the opportunity to fully understand the economic impact of a national do-not-call registry, as well as the related legal and administrative issues.

## **V. OTHER CONCERNS AND COMMENTS**

### **A. “Dead Air”**

DialAmerica recognizes that “dead air” issues referred to in the NPRM are a source of concern for consumers receiving telemarketing calls. “Dead air” is the silence on the line for several seconds after the consumer answers the call. The call is then either switched to a sales representative or abandoned.

DialAmerica believes that there are two reasons for “dead air.” The first reason is Answering Machine Detection (AMD). AMD is performed by technology, both hardware and software,

contained in automated dialing equipment, whether predictive or not. The technology monitors the line after the call is answered. If the technology hears “noise,” e.g., the word “Hello” followed by silence, it assumes that a person has answered the phone and attempts to switch the call to a sales representative. However, if the technology hears continuous “noise” for several seconds, e.g., “Hi. You have reached the Smiths. We’re not home...,” it assumes that it is an answering machine and abandons the call. The use of AMD involves monitoring the line for several seconds, referred to as detection time, thus creating “dead air.”

Another aspect of AMD is the detection error. Detection error occurs when AMD technology mistakenly interprets a live person for an answering machine. This happens when there is sufficient background “noise,” such as from a TV or radio, to cause AMD technology to interpret this as continuous “noise,” similar to an answering machine. Another detection error can occur if a person answers the phone by saying more than “Hello,” e.g., “Hello. This is Susan. How may I help you?” Again, the continuous “noise” will be taken by AMD technology to be an answering machine. When detection errors occur, a call answered by a live person will be abandoned.

The second reason for “dead air” is waiting for a sales representative to become available to handle the call. This will be covered in the discussion of abandonment rates.

AMD is used in automated dialing systems to create efficiency. It is more efficient to have technology detect answering machines than it is to transfer every answered call to a sales

representative and have the sales representative make the determination. In cases where a sales representative gets an answering machine, it is considered an inefficient use of the sales representative's time.

There is another way that AMD is used. If an answering machine is detected, a message is left on the answering machine. However, if no answering machine is detected (i.e., a live person is detected), the call is abandoned (resulting in as high as a 100% abandonment rate). The economics of delivering such a message are significant. There are no sales representatives involved. The cost to deliver the message is the telephone cost. At 6 cents a minute, the variable cost to deliver a two-minute message is 12 cents. Since most people listen to their answering machine messages, the effectiveness is high. Interestingly, DialAmerica believes that a major use of this marketing approach is for political calls.

DialAmerica has not used Answering Machine Detection in the past, does not use it now, and has no plans to use it in the future even though it has the technology to do so. DialAmerica believes that in an effort to become more efficient, the telemarketing industry has embraced AMD. DialAmerica believes that the efficiencies for the industry do not outweigh the level of discomfort caused to consumers by "dead air." Furthermore, DialAmerica believes AMD is the most significant reason for "dead air." DialAmerica believes that the elimination of the "dead air" problem will result in a substantial decrease of consumer complaints concerning telemarketing and thus urges the Commission to amend the TSR to prohibit AMD technologies that use detection time ("dead air") to detect answering machines.

DialAmerica was surprised that it could not find any reference to AMD in the text or footnotes of the NPRM. If the issue of AMD, in fact, has not been thoroughly considered by the Commission, for the purpose of amending the TSR, DialAmerica considers this to be a major deficiency in the review of the TSR. DialAmerica urges the Commission to delay implementation of the proposed amendments to the TSR in order to provide an adequate opportunity to fully understand the impact of AMD on the industry, and more importantly, on consumers.

## **B. Call Abandonment**

Call abandonment primarily occurs in a predictive dialing environment. In a predictive dialing environment, more calls are placed by the predictive dialer than there are available sales representatives to receive the calls. Algorithms are used to predict how many of the placed calls will be answered by consumers. It matches this prediction with the number of sales representatives available or predicted to become available when a call is answered. There is an error rate associated with this predictive process. If the number of calls answered by consumers is less than the number of sales representatives available, sales representatives will be idle, and hence, inefficient. On the other hand, if the number of placed calls answered by consumers is greater than the number of sales representatives available, some calls will be abandoned or “placed on hold” (experience “dead air”) for several seconds in the hope that a sales

representative will become available to handle the call. The “error” that is of concern to consumers is the latter practice and is the subject at hand.

The algorithms used in predictive dialing can control the error rate of abandoned calls, i.e., the abandonment rate (AR). With a higher AR, it is more likely that a call answered by a consumer will be available when a sales representative becomes available than would be the case with a lower AR. As a result, a higher AR is more efficient from a telemarketer’s viewpoint. However, there is a cost to a higher AR. That cost is measured in the level of consumer annoyance caused by consumers answering the phone only to find no one is on the other end of the line.

Abandoned calls can also be caused by individuals who call a friend, let the telephone ring four times and, thinking no one is home, hang up as the friend picks up the telephone to answer the call, only to hear a click, hence, an “abandoned call.” DialAmerica does not believe that abandoned calls, per se, are the cause of irritation to consumers. Rather, it is DialAmerica’s position that the number of abandoned calls is what causes consumer frustration. DialAmerica also believes that, in the pursuit of efficiency, some members of the telemarketing industry have allowed ARs to exceed, and perhaps far exceed, the guideline of 5% set by the DMA. DialAmerica believes the DMA needs more time to implement its relatively new guideline of a 5% abandonment rate. If such implementation does not lower the incidence of abandoned calls, then DialAmerica would urge the Commission to amend the TSR to mandate a 5% upper limit on abandoned calls. The 5% limit would apply to all calls the telemarketer makes, as well as all calls on behalf of each seller, so that abandoned calls on behalf of one seller could not be in

excess of the 5% rate and be offset by abandoned calls on behalf of another seller under the 5% rate.

DialAmerica has major concerns over the proposed new application of 310.4(d) of the TSR to abandoned calls. The TSR has been in place since 1996, and this is the first time DialAmerica became aware that the Commission believes that 310.4(d) applies to abandoned calls. The Commission was aware that calls were abandoned as part of predictive dialing systems in 1996, 1997, 1998, 1999, 2000 and 2001. But only in the course of this NPRM does the position of the Commission with regard to abandoned calls and 310.4(d), come out. Furthermore, it is technically not part of the NPRM. DialAmerica is in favor of industry self-regulation and, if necessary, an amendment to the TSR, to control abandonment rates but does take exception to a new interpretation of a rule that has been in place for over six years that would eliminate abandoned calls altogether.

### **C. Caller Identification**

DialAmerica believes that accountability will help to move the telemarketing industry away from the Commission's perceived precipice of public concern. DialAmerica believes the Commission should amend the TSR to require the delivery of Calling Party's Number (CPN). CPN is the number displayed on the Caller ID device. Instances of "dead air" and call abandonment in telemarketing are of concern to many consumers. When they happen together on the same call, it is of even more concern to consumers. DialAmerica has offered comments on how to address



what it believes are two of the biggest problems in telemarketing, i.e., “dead air” and call abandonment. The question then becomes, “If the TSR is amended to specifically address these two issues, how is accountability created to monitor compliance?”

DialAmerica proposes that a method to monitor compliance with its suggested approaches to “dead air” and call abandonment would be the requirement that all telemarketing calls made to consumers must also deliver caller identification information to the consumer’s Caller ID device.

The conclusion stated in the NPRM on page 61 that trunk or T-1 lines will only display a term like “unavailable” is not correct. DialAmerica currently provides CPN over regular T-1 lines for a portion of its Sponsor Program. The number provided is that of DialAmerica’s local branch from where the call originated. If a consumer calls this number, the call is routed from the branch to DialAmerica’s centralized customer service department. DialAmerica is currently developing systems and procedures to allow its customer service representatives to handle consumer calls in an efficient and effective manner from the consumer’s point of view. DialAmerica is currently providing CPN over AT&T T-1 lines and is investigating the availability of CPN by other carriers. DialAmerica plans to deliver CPN for other programs as it develops requisite systems and procedures.

DialAmerica believes that there is a significant lack of accountability in telemarketing, particularly as it relates to the issues of “dead air” and call abandonment. Mandating the delivery of CPN in outbound telemarketing would provide the consumer with a “return address.”

Systems and procedures would need to be in effect to adequately handle consumers who choose to call the number back. Additionally, a “trail” would be provided (the carrier would know the billing party associated with the CPN) which should make enforcement more effective.

DialAmerica believes some caution should be exercised with regard to what number is delivered through CPN. Using the local number, which is tied to billing, creates a clear “trail.” Allowing the substitution of a name and different number should only be allowed if there are sufficient safeguards to keep the “trail” clear.

DialAmerica does not believe that adequate consideration was given to the delivery of CPN, based on the stated conclusion in the NPRM that T-1 lines will display a term like “unavailable” on a Caller ID device, particularly since DialAmerica is currently displaying a number on such devices using T-1 lines and consumers are calling that number. DialAmerica again urges the Commission to delay implementation of the proposed amendments to the TSR in order to fully understand the possibilities of requiring the delivery of CPN on outbound telemarketing calls and the accountability it would create for the industry.

#### **D. Payment Authorization**

DialAmerica agrees that consumers must receive additional information in order for payment authorizations to be deemed verifiable (*page 38 of NPRM*). DialAmerica believes this should be limited to the account name. As a matter of corporate policy, DialAmerica discourages the

solicitation of credit card numbers by its sales representatives nor does it provide the credit card number to the sales representative. It does so because of a strong concern for the privacy of such information. A rule to require the recitation of the account number would clearly be at odds with such concerns.

#### **E. Fraudulent Telemarketing**

As in any other medium of commerce, DialAmerica acknowledges that some fraud is taking place utilizing the facilities of telemarketing. The problem, however, is not the medium of communication per se, but rather, those who would abuse it. The issue of fraud and the extent of fraud will not be measurably curtailed by instituting the proposed amendments. The solution to curbing fraudulent telemarketing is active law enforcement. DialAmerica believes that the appropriate law enforcement agencies have the necessary tools to address this problem. Those who intentionally violate the law will violate a do-not-call registry or any other restriction imposed by the Commission.

#### **F. Prisoner Telemarketing**

DialAmerica finds the most grievous incident of telemarketing cited in the NPRM to be that concerning April Jordan's daughter (*page 87 of the NPRM*). DialAmerica believes virtually all consumers would object to receiving a telemarketing call, or any other unsolicited call, from a prisoner in jail. DialAmerica strongly believes that this is an unacceptable telemarketing practice

and urges the Commission to propose a ban on prisoner telemarketing.

## **G. Privacy**

DialAmerica believes there are two distinct issues that are lumped together under the privacy umbrella (“However, enhanced data collection and target marketing also have led to increasing public concern about what is perceived to be increasing encroachment on consumers’ privacy.” *(page 9 of the NPRM)*). There is a big difference between a person peeking in a window of a consumer’s home to spy and gather information about a consumer without the consumer’s knowledge and a person knocking on a consumer’s door to sell something. While both may be considered an invasion of privacy, DialAmerica contends that consumers may find the latter annoying but would find the former unacceptable. Internet “pop-up” ads may be annoying to consumers, but a company knowing every website or web page a consumer visited would be unacceptable. DialAmerica feels that the consumers’ concerns about “access to their time and attention” *(page 9 of NPRM)* are far less than their concerns about what is known about them unbeknownst to them. DialAmerica urges the Commission to recognize these two distinct privacy issues and not put undue weight on the “time and attention” issue by grouping it with the “what is known about them” issue under the same privacy umbrella.

## **VI. ANTI-COMPETITIVE EFFECT**

DialAmerica urges the Commission to review the proposed amendments and the current

Telemarketing Sales Rule, as well as the requirements of the Federal Communications Commission as to ensure it is not creating a regulatory framework that is anti-competitive by application. Therefore, the Commission needs to conduct further inquiries as to the impact of the proposed amendments.

## **VII. EFFECT ON SMALL BUSINESS ENTITIES**

On page 115 of the NPRM, the Commission states “In issuing this Notice proposing rule amendments to the TSR, the Commission similarly certifies that these Rule Amendments, if adopted, will not have a significant impact on a substantial number of small entities.” DialAmerica disagrees with this blanket conclusion and feels that the TSR amendments, particularly the national do-not-call registry, if adopted, could very well have a significant impact on a large number of small business entities.

Small businesses do not have access to most traditional sales channels, such as direct mail and general media advertising, principally due to the expense associated with these forms of “mass media.” DialAmerica believes that outbound telemarketing presents a very efficient and very effective alternative to these other forms of marketing.

DialAmerica believes that a large number of small businesses market interstate and that such interstate marketing efforts are not confined to “... areas, like the Washington metropolitan area” (*Rule Tr. page 293*). Forty-eight of the fifty states have contiguous borders. It is not

unreasonable to expect that many small businesses have market areas that cross state lines.

DialAmerica believes the economic burden to maintain a national do-not-call registry would be significant to those entities. Many do not have the technological resources or knowledge base to handle a file that may have tens of millions of records in it. Alternatively, these entities would need to stop any interstate telemarketing efforts to comply with this proposed do-not-call amendment. Excluding part of a small business' marketing opportunity obviously has an adverse economic impact on such an entity.

DialAmerica urges the Commission to delay the implementation of the amendments to the TSR until the impact on small business entities, particularly as it relates to a national do-not-call registry, can be reasonably determined.

## **VIII. REVIEW OF THE RECORD**

DialAmerica thoroughly reviewed the record developed during the TSR review proceedings. This record consists of the January 11, 2000 Do-Not-Call Forum, comments submitted during the comment period ending May 30, 2000, and the July Forum held on July 27<sup>th</sup> and 28<sup>th</sup>, 2000 (*pages 6, 7, and 8 of the NPRM*). This record is characterized and cited numerous times throughout the NPRM. Based on this review, DialAmerica believes there are a number of significant mischaracterizations of the record contained in the NPRM and notes two examples of those in the following discussion

On page 69 of the NPRM is the following: “Consumer commenters unanimously (emp. added) expressed their strong dislike of telemarketing and their desire to be free of telemarketing calls, citing the intrusiveness and inconvenience of those calls.” A number of consumer commenters made no such expression. See, e.g., Brass, Brosnahan, Budro, Doe, and others. In the “Mack at 1” cite in footnote 243, Mr. and Mrs. Mack go on to say, “We understand that marketing by phone is a reasonable business.” DialAmerica believes, based on its review of the record, that the majority of consumer commenters have a problem with specific elements of telemarketing, e.g., “dead air,” hang-ups, prisoner telemarketing, and no Caller ID information, but did not express an overall “strong dislike of telemarketing.”

A second example of mischaracterization of the record is found on page 70 of the NPRM. DialAmerica does not believe that “(t)he vast majority of individual commenters, however, joined by consumer advocates and State law enforcement, claimed that the TSR’s company-specific ‘do-not-call’ provision is inadequate to prevent unwanted telemarketing calls.” See, e.g., Alan, Bishop, Bowman-Kruhm, Braddick, Budro, Croushore, Dawson, Doe, S. Gardner, Haines, Hecht, Hollingsworth, Holmay, Jordan, Kelly, Lee, LeQuang, Leshner, Mack, Manz, Merritt, Strang, and Warren. In fact, several commenters and one FTC staff member think it works. See, e.g., Brass, Hickman, and Rule Tr. on page 429. DialAmerica does not believe the record supports the conclusion “that the current approach [company-specific] is inadequate to fulfill the mandate in the Telemarketing Act” (*page 72 of the NPRM*).

DialAmerica believes that such mischaracterizations noted above, as well as others, particularly as they relate to the discussion of a national do-not-call registry bring into question the credibility of the rulemaking process. Was the idea of a national do-not-call registry a “done deal” going into the rulemaking process?

## CONCLUSION

DialAmerica is one of the largest outbound telemarketing service bureaus in the United States. Its business is substantially dependent on outbound telemarketing. Therefore, DialAmerica has a keen interest in the TSR.

DialAmerica fully supports initiatives it believes will enhance consumers’ acceptance of telemarketing. To this end, DialAmerica has made proposals which it believes should be given more consideration by the Commission before any proposed TSR amendments are implemented. These proposals, as set forth in Section V of its comments, relate to “dead air”, call abandonment, Caller ID and prisoner telemarketing. DialAmerica believes that the implementation of these proposals would greatly increase consumers’ acceptance of outbound telemarketing.

DialAmerica strongly opposes the amendments that relate to the establishment of a national do-not-call registry. Such amendments, if adopted, with the many exemptions, industry exceptions, and lack of jurisdiction over intrastate calls, will cause confusion among consumers, eroding



consumer acceptance of telemarketing and will not really be a significant benefit to consumers. On the other hand, the proposed amendments relating to a national do-not-call registry will cause irrevocable harm to legitimate telemarketers. If these amendments are adopted, they would clearly create an imbalance between the perceived interests of consumers and the burden placed on legitimate telemarketers.

Telemarketing is an integral part of the American economy. The impact of the proposed amendments on the telemarketing industry, on sellers, both large and small, that rely on telemarketing as an important sales channel, on employment and on the economy as a whole must be thoroughly studied before implementation of any of the proposed amendments.

DialAmerica is a leader in the telemarketing industry and has been for over forty years. We would welcome the opportunity to work with the Commission to develop the TSR in such a way as to strike a proper balance between the interests of consumers and those of legitimate telemarketers.