UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of Notice of Proposed Rulemaking to Amend the Telemarketing Sales Rule	:	Telemarketing Rulemaking -- Comment FTC File No. R411001

COMMENTS OF THE ELECTRONIC RETAILING ASSOCIATION REGARDING THE COMMISSION'S NOTICE OF PROPOSED RULEMAKING TO AMEND THE TELEMARKETING SALES RULE

I. Introduction

The Electronic Retailing Association ("ERA") is the leading trade association representing the electronic retailing industry. The ERA's 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, and including such well known names as America Online, HSN and QVC. Last year, the infomercial segment of this industry alone accounted for over five billion dollars ($5,000,000,000) in sales. See Lisa Gubernick, I Bought It On TV, Wall. St. J., February 8, 2002.

The vast majority of ERA members' consumer transactions include a telemarketing component, frequently in the form of inbound calls from consumers. As such, the stability and continued growth of electronic retailing is critically dependent upon the continued viability of telemarketing. The imposition of burdensome and overreaching regulatory restrictions would cripple the ability of companies to effectively and cost efficiently conduct telemarketing activities. This would have a devastating impact on ERA members, industry in general and, ultimately, on American consumers.

Throughout its history, the ERA has been committed to ensuring that its members adhere to the highest ethical business standards in connection with the marketing of their goods and services. Since 1996, the ERA has had a Member Code of Ethics pursuant to which its members pledge, inter alia, to be honest and fair in all dealings with their customers and to establish and maintain a fair and equitable system for the handling of customer complaints. In addition, the ERA has promulgated Marketing Guidelines which apply to all radio and television advertisements produced or disseminated by ERA members and which contain substantiation and disclosure requirements designed to ensure that all statements made in such advertisements are truthful and not misleading. The ERA has also established Telemarketing Guidelines which, inter alia, require its members to comply with all applicable federal and state telemarketing laws and regulations.

Moreover, the ERA is highly cognizant of the Commission's concerns with upsells and with the use of preacquired account information, particularly when used in combination with free trial offers. See Notice of Proposed Rulemaking ("NPRM"), 67 F.R. 4492, 4501-02 (January 30, 2002). The ERA has taken the lead for industry in this area by promulgating Advance Consent Marketing Guidelines which establish standards and ethical business practices for sales arrangements that allow consumers to consent in advance to receive and pay for goods or services in the future on a continuing or periodic basis. These Advance Consent Guidelines exceed current minimum legal requirements. The ERA believes that its Advance Consent Guidelines already have, and will continue to have, a substantial impact on curbing many of the abuses which presumably gave rise to certain of the proposals found in the NPRM. These guidelines have only been in effect for a short period of time and, as such, their full impact on the marketplace has not yet been felt. The ERA would urge the Commission to give these self-regulatory guidelines an opportunity to work before imposing additional, unnecessary restrictions which will serve to unduly burden the industry and harm the American economy.

The ERA's Advance Consent Guidelines are built upon the fundamental principles of notice and consent. Specifically, with regard to upsells and the transfer of consumers' account information, the Guidelines require that the consumer be informed of all material terms and conditions of the offer and provide affirmative consent. Similarly, a consumer must expressly consent to the transfer of his or her account information before any such transfer can occur. The ERA believes that the principles of notice and consent are preferable to an absolute ban on the transfer of consumer billing information amongst marketers for use in telemarketing because they preserve the consumer's right to make individual choices about the use and transfer of his or her account information while satisfying the consumer protection goal of insuring against unauthorized transfer and use. We urge the Commission to follow a similar approach in its NPRM.

II. Executive Summary

As noted in its earlier comments (FTC File No. P994414), the ERA believes that the existing Telemarketing Sales Rule[1] represents an approach to addressing the concerns of regulators and/or consumers that is reasonably balanced with the need for companies to engage in sales transactions with potential, existing and prior customers and, in particular, to engage in such transactions efficiently through the use of the telephonic marketing channel. In contrast, the ERA believes that many of the proposals contained in the Commission's NPRM and Proposed Rule are unduly burdensome to business and the American economy, unnecessary to achieve the Commission's stated objectives and, in certain instances, beyond the scope of the Commission's rulemaking authority.

As we hope the Commission is aware, the ERA has always endeavored to work proactively with the Commission to develop solutions to perceived problems that will properly balance consumer needs and industry requirements. Accordingly, whenever possible or appropriate in our comments, we have attempted to not only articulate the ERA's issues with a particular proposal, but also to offer constructive solutions which we believe will adequately address the Commission's stated concerns without unduly burdening the industry. With that in mind, the ERA has comments with respect to eight (8) distinct aspects of the NPRM and Proposed Rule.

The Commission's proposal to bring upsells within the ambit of the Rule by amending the definition of an outbound telephone call is unsound in that such an approach goes well beyond the stated objectives of the Commission and will have the unintended effect of imposing additional unnecessary and illogical restrictions on such upsells. While the ERA supports the Commission's goal of insuring that consumers are aware during an upsell call that they are dealing with a separate seller and a separate sales

[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."

transaction, the ERA believes that these issues can be addressed more appropriately and effectively through properly tailored disclosure requirements specifically designed to convey this information.

The ERA is deeply troubled by the Commission's proposal to ban all third party transfers of consumer billing information in connection with telemarketing transactions. The ERA respectfully believes that the Commission lacks the authority to impose such a ban, and further, that the Commission's concerns with respect to the use of such information in connection with legitimate telemarketing transactions can be addressed in a less draconian fashion by requiring telemarketers to disclose material billing information to consumers and obtain verifiable consumer consent prior to the transfer and use of such information.

The Commission's proposal to create a national do not call list (hereinafter, a "National DNC list") is problematic for several reasons. First, the Commission has not provided any meaningful details regarding the manner in which the list would be administered, how the list would be funded or the economic burden that the list would place on telemarketers. While it is difficult to comment on the proposed National DNC list in this context, the information that has been provided leads the ERA to conclude that the Commission's proposal is flawed in several respects and, further, that a National DNC list is not necessary in light of the existence of the Direct Marketing Association's ("DMA") Telephone Preference Service ("TPS").

With respect to the Commission's request for comments concerning the use of predictive dialers, the ERA believes that a mandatory zero abandonment rate should not be imposed as it would have a devastating impact on telemarketers. In light of the widespread use of predictive dialers by entities not subject to the Rule, a mandatory zero abandonment rate would also do little to reduce the number of abandoned calls received by consumers. Moreover, the ERA believes that the Commission lacks the statutory authority to regulate the use of predictive dialers.

The ERA also objects to the Commission's attempt to apply all of the provisions of the Rule, including in particular, the do not call list requirements to for-profit telemarketers acting as agents in making solicitations on behalf of charitable organizations or other entities exempt from the Rule. As a practical matter, any attempts to enforce Rule requirements against telemarketers acting as agents for exempt entities constitute improper attempts to enforce the Rule against the exempt entities themselves. The ERA believes that the requirements of the PATRIOT Act can be implemented through more narrowly tailored disclosure requirements.

With respect to the prize promotion disclosures called for in the Rule, the ERA does not object to including a disclosure that a purchase will not improve one's chances of winning. However, the ERA is concerned about the proposed timing of this disclosure. Specifically, the ERA does not believe that this disclosure should be required promptly at the beginning of the call, but rather, should be required to be made before the consumer pays. This would allow marketers the flexibility to place the disclosure where it is likely to be most meaningful to the consumer.

Further, the ERA requests that the Commission provide clarification that the proposed requirement that express verifiable authorization be obtained in instances where novel payment methods are used is not applicable to debit card transactions, as such transactions have comparable consumer protections to credit card transactions.

Finally, the ERA is providing comment with respect to the Commission's proposal to make it an abusive telemarketing practice to block a caller identification ("Caller ID") signal. The ERA believes that the Commission's proposal, which calls for a ban on the blocking of Caller ID signals, rather than a requirement that a Caller ID signal be displayed by the telemarketer, represents a balanced and reasonable approach to this issue. The ERA believes, however, that telemarketers should be permitted to substitute a call back number that allows the consumer to reach the seller directly (e.g., the seller's customer service number).

These issues are addressed in greater detail below.

II. Proposal To Amend Definition Of Outbound Telephone Call To Encompass Upsells Exceeds Its Disclosure-Related Purpose

The Commission has indicated that it seeks to "clarify" the Rule's coverage of situations in which, during the course of a single telephone call: (i) a consumer is transferred from one telemarketer to another for the purpose of soliciting a different purchase (or contribution), or (ii) a single telemarketer solicits purchases (contributions) on behalf of two separate sellers (or charitable organizations). See NPRM, 67 F.R. at 4499-500. The Commission's stated purpose in seeking such clarification is to ensure that, in these situations, consumers know that they are dealing with separate sellers (charitable organizations); the identity of the second seller (charitable organization); and that the purpose of the second solicitation is to solicit a separate purchase (contribution). See id.

In an effort to address these disclosure-related concerns and encompass the two situations described above, the Commission has proposed revising the definition of an "outbound telephone call" as follows:

> Outbound telephone call means any telephone call to induce the purchase of goods or services or to solicit a charitable contribution, when such telephone call:
>
> (1) is initiated by a telemarketer;
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> (2) is transferred to a telemarketer other than the original telemarketer; or
>
> (3) involves a single telemarketer soliciting on behalf of more than one seller or charitable organization.

Proposed Rule § 310.2(t).

The ERA acknowledges the Commission's desire to include upsells within the ambit of the Rule and supports the position that, in instances where solicitations are made during a single telephone call on behalf of multiple unaffiliated entities, there should be a clear disclosure to the consumer that the second solicitation is being made by a separate, unaffiliated seller (charitable organization) and that the purpose of this second solicitation is to solicit a purchase (contribution).

However, the ERA believes that the wholesale importation of the requirements applicable to outbound telephone calls to upsells is flawed. Instead, the ERA believes that the Commission's concerns can be more properly addressed by treating upsells as a distinct type of telemarketing call and by imposing disclosure requirements on such calls that are tailored to these particular types of transactions.

(a) The Commission Should Better Clarify The Types Of Calls And <u>Entities To Which Its Upsell Provisions Are Meant To Apply</u>

As currently drafted, Section 310.2(t)(2) of the Proposed Rule applies to calls in which the consumer is transferred from one telemarketer to another for purposes of making a subsequent solicitation. However, this subsection does not clarify that this relates only to instances in which the second telemarketer is making a solicitation on behalf of a second, separate seller or charitable organization.[2] Thus, as currently drafted, the proposed definition of an outbound telephone call could arguably be construed as applying to calls in which multiple offers are made on behalf of the same seller (e.g., where the consumer is transferred to a second telemarketer but both solicitations are made on behalf of a single seller). Such an interpretation would go beyond the Commission's stated purpose of ensuring that consumers understand that two separate sellers are making solicitations during the call. The ERA believes that the proposed disclosure requirements should apply only to telephone calls transferred to a telemarketer other than the original telemarketer for purposes of making a subsequent solicitation on behalf of a separate seller or charitable organization. In other words, any proposals relating to "upsell calls" should apply only to what the Commission has referred to in its NPRM as "external upsells" and not to so-called "internal upsells" by a single seller.[3]

In addition, the ERA believes that the definition of what constitutes a "separate" seller should be further clarified. Under both the Existing and Proposed Rules, a seller is defined to mean "any person who, in connection with a telemarketing transaction, provides, offers to provide, or arranges for others to provide goods or services to the customer in exchange for consideration." Existing Rule § 310.2(r); Proposed Rule § 310.2(x). In many telemarketing transactions, however, there are multiple entities that

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2 This is in contrast to Proposed Rule § 310.2(t)(3) which expressly relates to calls involving a single telemarketer but <u>more than one</u> seller or charitable organization.

3 In the NPRM, the Commission refers to multiple offers by the same seller as "internal upsells" and offers by third party sellers as "external upsells." NPRM, 67 F.R. at 4496. The ERA would characterize multiple offers by a single seller (or its affiliates) as "cross sells," rather than "upsells." In the ERA's view, upsells involve solicitations by separate, unaffiliated sellers. Nevertheless, the Commission's characterizations are used herein for purposes of consistency.

receive consideration for providing or arranging for others to provide goods or services to the consumer.

For example, a marketer might offer (and bill) a consumer for a product that it obtains on a wholesale basis from a manufacturer (in many instances, the marketer may not even taken possession of the product, but rather have the manufacturer ship directly to the purchaser). Both the marketer and the manufacturer receive consideration in exchange for providing, or arranging for the other to provide, the product to the consumer. Thus, both entities are arguably "sellers." However, only the marketer will bill the consumer for the sale. As such, there should be no need to identify both entities to the consumer. In fact, it would likely be confusing to the consumer to do so. Thus, the ERA believes that the definition of "seller" should be modified to clarify that the seller that must be identified to the consumer is the entity that will be billing the consumer in connection with the telemarketing transaction (i.e., the billing entity).

Moreover, many organizations are comprised of multiple related entities (parent, subsidiaries, etc.) and may offer the goods or services of these various affiliates during the course of a single telephone call. For example, an airline might have a separate subsidiary which provides vacation packages and other travel-related services and may offer these vacation services during the course of a telephone call in which a consumer purchases airline tickets. In such a situation, the Commission's concerns regarding the need to disclose the identity of the second entity (seller) would appear to be unfounded. As such, the ERA proposes that the Commission clarify that affiliated entities do not constitute separate sellers. In this regard, the ERA believes that the definition of an affiliate should mirror that found in the Commission's Privacy of Consumer Financial

Information Rule, 16 C.F.R. § 313.3(a) (defining an affiliate as "any company that controls, is controlled by, or is under common control with another company").

(b) Upsells Are A Legitimate Marketing Technique Which Cannot Be Unduly Restricted

The ERA is cognizant of the fact that the practice of upselling has increased dramatically since the Rule was originally promulgated in 1995. The ERA is also aware of the fact that there have been some marketers who have engaged in unscrupulous marketing practices in soliciting purchases via upsells, particularly when such upsells involve a free trial offer and/or other advance consent marketing technique. However, the Commission's proposal extends well beyond its stated objectives and will impose burdensome and unnecessary restrictions on such calls which will do little to advance the Commission's goals and may, in fact, result in illogical consequences. See e.g., Cincinnati v. Discovery Network, 507 U.S. 410, 416 n.12 (1993) (noting that where regulations are imposed which restrict commercial speech there must be a reasonable "fit" between the government's ends and the means chosen to accomplish those ends); U.S. West v. Federal Communications Commission, 182 F.3d 1224, 1238 (10th Cir. 1999), cert. denied, 120 S. Ct. 2215 (2000) (regulations must be narrowly tailored to accomplish the government's desired objective).

The ERA would urge the Commission not to allow the unscrupulous actions of a handful of marketers to taint the Commission's view of an otherwise lawful and legitimate marketing practice. It is estimated that approximately 1.5 billion dollars ($1,500,000,000) in sales are generated through inbound upsells each year.[4] Indeed,

[4] This estimate is based on Commission staff assumptions contained in the NPRM, the DRI/WEFA Report's estimates of direct mail sales and statistics from The Household Diary Study, USPS Fiscal Year 2000. This figure is also based on an estimated 12% conversion rate.

upsell offers are widely utilized by many of the ERA's members and their continued viability is critical to many of our industry members. These programs allow marketers to more efficiently tailor their offers to consumers who are most likely to be interested in them, based on their previous purchase decision. The practice of upselling also allows marketers to share telemarketing and customer acquisition costs, which results in better offers and lower prices to consumers.

Moreover, in evaluating the economic impact of any proposed regulations on upsell marketing, consideration must be given not only to the impact on sales generated through the actual upsell offer, but to the impact on the primary marketer. Many of the ERA's members, particularly those in the direct response industry, are heavily dependent on the incremental revenue generated by upsells to offset the high costs of media and telemarketing. Without that incremental revenue, the viability of many of these marketers may be in jeopardy, resulting in a potential loss of jobs and sales.

(c) The Commission's Proposal To Include Upsells Within The Definition Of An Outbound Call Is Unnecessary And Imposes Additional Restrictions Which Go Well Beyond The Commission's Disclosure-Related Purpose

The ERA concurs with the Commission's view that certain modifications to the Rule may be appropriate to address the increasingly prevalent practice of upselling. In crafting regulations, however, the Commission must take care to ensure that its regulations will directly advance its stated objectives and be no more restrictive than necessary to achieve its intended purpose. See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York, 447 U.S. 557 (1980); U.S. West, 182 F.3d 1224. The Commission's proposal to treat upsells as outbound calls fails on both accounts. Specifically, by proposing to treat upsell calls as outbound calls, the Commission would subject such calls to requirements which are wholly unrelated to the Commission's disclosure related objectives and may, in fact, amount to a de facto ban on such calls.

For example, the Rule prohibits telemarketers from initiating an outbound telephone call to any person who has previously stated that he or she does not want to receive an outbound telephone call made by or on behalf of the seller whose goods or services are being offered. Proposed Rule § 310.4(b)(1)(iii)(A). Similarly, the Proposed Rule would prohibit the placement of an outbound telephone call to any person whose name appeared on a National DNC list. Id. § 310.4(b)(1)(iii)(B). If treated as an outbound telephone call, these prohibitions would also apply to an upsell call, including one made on an inbound call placed by a consumer. However, it is not possible, as a practical matter, for a telemarketer to determine in the middle of a telephone call whether the consumer has previously requested not to receive an outbound call from the second seller, or has placed his or her name on a National DNC list. As such, the Commission's proposal may well amount to a functional ban on these types of calls.

In addition, the fact that a consumer has previously requested not to receive an outbound call from a particular seller, or placed his or her name on a National DNC list, does not necessarily mean that the consumer would object to hearing another offer from a particular seller during a previously established telephone call. Upsells provide a real benefit to consumers by giving them highly targeted offers for goods or services that they are more likely to be interested in purchasing. For example, a consumer calling an airline to book a reservation might be offered the opportunity to rent a car (from another seller) during the same call. Many of the "privacy" and "intrusion" concerns which the do not call provisions are designed to address simply do not exist in the upsell environment because the consumer is already on the phone at the time that the second solicitation is made and has initiated the call at his or her convenience.

Similarly, the Proposed Rule also prohibits telemarketers from engaging in outbound telephone calls to a person's residence at any time other than between 8:00 a.m. and 9:00 p.m. local time at the called person's location. Proposed Rule § 310.4(c). Viewed strictly, this would mean that these calling time restrictions would apply to upsells on inbound calls placed by consumers. However, the telemarketer clearly cannot control the time of day that consumers place inbound calls. Moreover, the rationale underlying the calling time restrictions contained in the Existing and Proposed Rule is to protect consumers' privacy from unwanted and intrusive telephone calls. See NPRM, 67 F.R. at 4521. These privacy concerns are not implicated in instances of an inbound call, as the call is initiated by the consumer. As such, there would not appear to be any legitimate rationale for, or benefit from, restricting the time of day during which an upsell could be made on an inbound telemarketing call. See Board of Trustees v. Fox, 492 U.S. 469, 476 (1989) (restrictions on commercial speech must be no more expansive than necessary to serve the government's interests).

(d) Proposed Rule Revisions To Address Upsells

The ERA proposes that the definition of Outbound Telephone Call as it appears in the Existing Rule remain as is and that the Commission create a new definition for upselling such as the following:

> "Upselling" means soliciting the purchase of any other goods or services or charitable contributions during a telemarketing call on behalf of a second, non-affiliated seller (or charitable organization) after a consumer has already agreed to an initial purchase (or charitable contribution) during that same telemarketing call and provided billing information in connection with such initial purchase or charitable contribution.

The ERA would further propose that the Rule be amended to require disclosure of the following information on all upsell calls: (i) that the upsell is being made by or on behalf of a separate seller or charitable organization; (ii) the identity of the seller or charitable organization on whose behalf the upsell is being made, in a manner that will reasonably enable the consumer to contact the party who will be billing or charging him or her in connection with the upsell transaction; and (iii) that the purpose of the upsell is to solicit the purchase of other goods or services or charitable contribution.

In addition, ERA would recommend that the Commission clarify the definition of a separate seller to make it clear that affiliated entities will not be considered separate sellers, and that it is the entity that will be billing the consumer that should be identified. In this connection, ERA would recommend that the Commission define "affiliate" to mean any company that controls, is controlled by or is under common control with another company. The "seller" in turn should be defined in this context to mean the party who will be billing or charging the consumer.

III. A Total Ban On The Receipt And Disclosure Of Consumer Billing Information For Telemarketing Purposes Is Neither Justified Nor Required

The Commission has proposed the drastic and unwarranted measure of prohibiting all third party transfers of consumer billing information for telemarketing purposes. In particular, the Commission asserts that "receiving from any person other than the consumer for use in telemarketing any consumer's billing information, or disclosing any consumer's billing information to any person for use in telemarketing, constitutes an abusive practice within the meaning of the Telemarketing Act." See NPRM, 67 F.R. at 4514; Proposed Rule § 310.4(a)(5).

In making this proposal the Commission has cited concerns with the use of "preacquired account telemarketing" which, as the Commission itself has noted, involves situations where a telemarketer or seller is in possession of a consumer's billing information prior to the time that the telephone solicitation call is initiated. NPRM, 67 F.R. at 4513. These concerns appear to stem, primarily, from the fact that in such transactions the consumer is not aware that the telemarketer is already in possession of his or her billing information at the time that the telephone call is initiated. Id. The Commission has expressed particular concern over instances where preacquired account telemarketing is coupled with free trial offers and/or negative option plans. These comments seem to focus on past isolated incidents of alleged abuse involving preacquired account telemarketing transactions in which the consumer was allegedly unaware of the fact that the telemarketer was already in possession of his or her billing information at the time that the telephone call was initiated. Id. (noting that "[m]any consumers who complain about . . . free trial . . . programs claim to have been told neither that they would be charged, nor that the telemarketer already had their billing information").[5]

ERA fully supports the position that a consumer's complete billing information should not be transferred to another marketer without the consumer's knowledge and consent. To the extent that the Commission's purpose in proposing Section 310.4(a)(5) of the Proposed Rule is solely to prohibit such unauthorized transfers, the ERA concurs.

[5] The ERA believes that these were isolated incidents which were addressed previously by the Commission through various consent decrees and other enforcement initiatives and which, as discussed in greater detail below, are not representative of industry norms regarding the use of consumer billing information. The business practices of the telemarketing industry with respect to the use of such billing information have evolved over the past several years in response to the Commission's regulatory initiatives and various state legislative efforts in this area.

Regrettably, however, the Commission's proposed ban would appear to extend well beyond situations in which consumer billing information is shared without consumer consent, and would seemingly prohibit all sharing of consumer billing information among marketers, even where the consumer has expressly authorized the transfer and use.

ERA members typically engage in the transfer of consumer billing information in one of two ways – both of which involve the obtaining of consumer consent prior to the transfer and, as such, in our view should fall outside of the definition of "preacquired account telemarketing." The typical scenario involves the transfer of information in connection with an inbound upsell. A consumer placing an inbound call to purchase a product in response to a direct response commercial may subsequently be offered a second product. In such a situation, the consumer will have just provided the telemarketer with his or her billing information in connection with the initial transaction. If (and only if) the consumer accepts the upsell offer, this just-provided billing information will be transferred by the primary seller or its telemarketer to the second seller in order to process the second sales transaction.[6]

In addition, joint marketing and affinity campaigns engaged in by ERA members frequently involve the transfer of consumer billing information after consent has been provided. For example, a marketer of a skin care product might enter into an agreement with a health and beauty magazine publisher allowing the publisher to engage in telemarketing solicitations to its customers. Pursuant to this agreement, the marketer of

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[6] It is important to clarify that the mere fact that a single telemarketer is engaged in solicitations on behalf of multiple sellers during a single call does not, in and of itself, mean that there has been a transfer of billing information between these sellers. In the example provided above, the consumer provides his or her billing information to the telemarketer in its capacity as agent for the primary seller. The telemarketer does not possess or use this billing information in its capacity as agent for the second seller unless and until the consumer provides consent. It is only at that point that the information is "transferred" to the second seller.

the skin care product would provide the publisher with a list of customer names and telephone numbers. This list would also typically contain either partial or encrypted account information to be used by the magazine publisher during the telemarketing call for verification purposes. However, the publisher is not provided with the consumer's complete billing information at this time and, as such, does not have access to the consumer's account. A particular consumer's complete billing information will only be transferred to the publisher if and after the consumer accepts the offer from the publisher and consents to the transfer of his or her billing information.

The ERA strongly believes that neither of the two situations described above constitute "preacquired account telemarketing" and should not be banned. As discussed in greater detail below, the Commission's concerns with respect to the transfer and use of consumer billing information in these contexts can be adequately addressed through the application of the principles of notice and consent to such transactions.[7]

However, the proposed ban on the receipt and disclosure of consumer billing information contained in Proposed Rule § 310.4(a)(5) appears to go well beyond the concerns with "preacquired account telemarketing" raised by the Commission in its NPRM and could be construed as encompassing these legitimate marketing transactions. See 67 F.R. at 4512-13. Again, if it is not the Commission's intention to ban the transfer and use of consumer billing information in such situations, the ERA can support the Commission's position – provided that the term "preacquired account information" is narrowly and properly defined to apply only to those situations where such transfer and use occurs without consumer knowledge or consent. Conversely, to the extent that the Commission does, in fact, propose to ban all transfers of consumer billing information amongst marketers, including those that are made with and following the express consent

[7] This is consistent with the approach taken in the ERA's Advance Consent Guidelines.

of the consumer, the ERA strongly objects. As discussed in greater detail below, such a total ban exceeds the scope of the Commission's regulatory authority, will not directly advance the Commission's stated objectives and is far more restrictive than necessary to achieve the Commission's stated objectives.

(a) The Commission Lacks The Authority To Ban All Transfers Of Consumer Billing Information

The Commission's ability to promulgate regulations with respect to telemarketing activities is limited to the authority delegated to it by Congress. Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988). The Telemarketing and Consumer Fraud and Abuse Prevention Act ("TCFPA") authorizes the Commission to prescribe rules prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or practices. 15 U.S.C. § 6102. Any regulations promulgated by the Commission with respect to telemarketing activities must be consistent with this mandate.

The Commission has asserted that the use of preacquired account information constitutes an "abusive" practice within the meaning of the TCFPA. See NPRM, 67 F.R. at 4514. The term "abusive" is not defined in the statute. Nevertheless, the Commission argues that the use of preacquired account information is abusive within the meaning of the TCFPA because it meets the Commission's traditional criteria of unfairness under the FTC Act. 15 U.S.C. § 45(n). This view is flawed in several respects and constitutes an improper attempt by the Commission to expand the scope of its rulemaking authority in the telemarketing arena beyond that authorized by the TCFPA.

The Congressional findings contained in the TCFPA suggest that the intent of Congress in enacting this statute was to provide consumers with protection against fraudulent or deceptive telemarketing activities, not "unfair" telemarketing activities. See

15 U.S.C. § 6101(1),(5) (finding that telemarketing fraud had become a problem of such magnitude that the resources of the Commission were not sufficient to ensure consumer protection from such fraud, and that consumers were also victimized by other forms of telemarketing deception and abuse, thereby resulting in the need for the enactment of the TCFPA). As noted by Commissioner Swindle:

> Nothing in the language of the [TCFPA] or its legislative history indicates that Congress intended the Commission to use unfairness principles to determine which practices are abusive. Given that it amended the FTC Act to define unfairness the same year that it passed the [TCFPA], Congress presumably would have given some indication if it wanted [the Commission] to employ unfairness principles to decide which telemarketing practices are abusive.

Concurring Statement of Commissioner Orson Swindle in *Telemarketing Sales Rule Review*, File No. R411001. The Commission cannot use its rulemaking authority to amend the TCFPA, or insert an unfairness standard into the statute that is not already contained therein. See Iglesias v. United States, 848 F.2d 362, 366 (2d Cir. 1988). The proposed ban on the use of preacquired account information is based upon unfairness principles not contained within the Commission's statutory mandate under the TCFPA. The ERA believes that the Commission's reliance on these principles is fundamentally flawed and, further, that this prohibition is unlikely to withstand judicial review. See 5 U.S.C. § 706(2)(C); Federal Election Comm'n v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 32 (1981) (holding that courts must reject administrative constructions of statutes reached by rulemaking that is inconsistent with the statutory mandate).

(b) The Transfer Of Consumer Billing Information Is Not Inherently Unfair

Even assuming that the Commission has the authority to promulgate regulations under the TCFPA on the basis of unfairness principles, a total ban on the transfer of consumer billing information between sellers is unwarranted under the unfairness doctrine.

Congress has expressly stated that the Commission has no power to declare an act or practice to be unlawful on the ground that it is unfair unless it "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." 15 U.S.C. § 45(n). The Commission has offered no evidence to suggest that third party transfers of consumer billing information are inherently unfair or abusive or that all transfers or uses of such information are likely to cause injury to consumers.[8]

To the contrary, marketing plans and sales transactions that allow consumers to consent in advance to the transfer and use of account information already in the possession of the marketer are widely used by many industry segments and offer convenience and efficiencies to both consumers and marketers. For example, a consumer placing a call to an airline to book travel arrangements may well wish to receive upsells during that call for car rentals and hotel accommodations and to use the same billing information for all three transactions. Any risk of injury to the consumer associated with the transfer and use of his or her billing information in such circumstances could easily be mitigated by requiring telemarketers to disclose to the consumer the fact that they are going to transfer and/or use the billing information and to obtain the consumer's affirmative verifiable consent prior to such transfer or use. Consumers would be able to

[8] As the Commission itself has acknowledged, even law enforcement representatives and consumer advocacy groups have offered potential solutions to the perceived harms associated with the transfer of consumer billing information that fall well short of a total ban on such transfers. See NPRM, 67 F.R. at 4513-14.

further avoid any perceived injury associated with the use of such information by declining to provide such consent.

In addition, imposing a total ban on third party transfers of consumer billing information in telemarketing would cause significant injury to marketers that would far outweigh any purported benefit to consumers. The transfer and use of consumer billing information is not limited to telemarketing. Many other types of marketers not subject to the Rule (e.g., Internet retailers) use such information in connection with their sales activities. Placing a complete ban on the third party transfer of consumer billing information in connection with telemarketing transactions alone would create an unequal playing field and have an adverse impact on telemarketers by restricting their ability to compete equally in the marketplace with Internet retailers and other marketers who are free to engage in such activities without interference by the Commission.

Moreover, allowing the transfer of consumer billing information with consumer consent, particularly in the context of inbound upsells, is convenient for consumers and efficient for sellers and telemarketers. The ERA has been advised that requiring a consumer to retrieve and repeat his or her billing information a second time during the course of a telemarketing call could increase the duration of the call by sixty (60) seconds. Telemarketing call centers typically charge sellers on an hourly basis. Increasing the duration of each call by a full minute would greatly reduce the number of calls that the telemarketer could engage in during a given hour. In light of this reduction in productivity, the costs to the seller associated with each telemarketing call would increase dramatically. The Commission has estimated that call center charges are approximately fifteen dollars ($15.00) an hour. On that basis, increasing the duration of a call by one minute would increase the cost of the call by as much as twenty five cents (25¢). When considered in light of the volume of telemarketing calls engaged in over the course of a given year, the cumulative effect of this reduced productivity and increased cost could be a staggering $25 million per year.[9]

For these reasons, the ERA believes that the Commission's proposal to ban all third party transfers of consumer billing information would not withstand judicial scrutiny under an unfairness analysis. See 5 U.S.C. § 706(2); 15 U.S.C. § 45(n). Furthermore, as described below, the ERA believes that a total ban is unwarranted in that the Commission's concerns regarding the transfer and use of consumer billing information in connection with legitimate telemarketing activities can be addressed in a less burdensome manner by applying the principles of notice and consent to these transactions. See Rubin v. Coors Brewing Co., 514 U.S. 476, 491 (1995) (stating that the availability of other options that can advance the government's asserted interest in a manner less intrusive of First Amendment rights indicates that a regulation is more extensive than necessary). Indeed, the Commission has consistently recommended that online merchants provide consumers with notice and an opportunity to choose how their personal information will be used, including whether it will be transferred to third parties or used for purposes beyond what is necessary to complete a particular transaction.[10] In the offline context, where the sharing of highly sensitive medical or financial information is at issue, the Commission also has recommended that consumers be provided with sufficient information and an opportunity to consent to the transfer.[11]

(c) Proposed Rule Revisions To Address Transfers Of Consumer Billing Information

The ERA believes that the Rule provisions governing the transfer of consumer billing information for use in telemarketing should be narrowly crafted to prohibit transactions in which the seller obtains a consumer's complete billing information prior

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9 Industry estimates suggest that there are over 100 million upsell transactions engaged in each year. Moreover, ERA believes that the Commission's estimate of $15 per hour for call center charges is conservative. At least one provider estimates that call center charges are approximately $24 per hour.

10 Federal Trade Commission, Privacy Online: A Report to Congress, pp. 7-8, 40-41 (June 1998); Federal Trade Commission, Privacy Online: Fair Information Practices in the Electronic Marketplace, A Report to Congress, pp. 36-37 (May 2000).

11 See Federal Trade Commission Comment regarding proposed privacy standards pursuant to Section 262 of the Health Insurance Portability and Accountability Act of 1996 to U.S. Department of Health and Human Services (February 17, 2000) available at www.ftc.gov/be/v000001.htm; Prepared

to the initiation of the telephone call without the consumer's knowledge and consent. In contrast, it should not cover transfers and uses of billing information after consumer consent has been obtained – such as in the inbound upsell and joint marketing campaign examples provided above. See supra pp. 17-18.

Moreover, with respect to the joint marketing campaign scenario described above, the ERA believes that the transfer of encrypted or partial account information should not be construed as a transfer of a consumer's "billing information" within the meaning of the Proposed Rule. Encrypted or partial account information (e.g., last four digits of the account number) does not provide a seller with complete access to a consumer's account. The ERA believes that the proposed definition of "billing information" should be modified to clarify that only complete account information which allows access to a consumer's account falls within the definition of billing information. To ensure adequate notice, the ERA proposes that the seller should be required to disclose material billing information, such as the identity of the seller that will be charging the account, the amount and date or frequency of the charge, and information sufficient to enable the consumer to reasonably identify the account that will be charged. For example, with respect to an inbound upsell, a statement to the effect that the upsell transaction will be charged to the "credit card that was just provided" by the consumer during that same call should be sufficient to enable the consumer to reasonably identify the account to be charged.

To ensure consumer consent, the ERA proposes that the consumer's express verifiable authorization should be obtained by one of the following methods: (a) express

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Statement of the Federal Trade Commission on Financial Privacy, The Fair Credit Reporting Act, and H.R. 10 (July 21, 1999) available at www.ftc.gov/os/1999/9907/fcrahr10.htm written authorization which includes the consumer's "signature" (including a verifiable electronic or digital form of signature); (b) express oral authorization that is verified by an independent third party verifier; (c) express oral authorization that is tape recorded, where the taped portion of the call includes disclosure of the seller's identity, the consumer's agreement to the purchase, the material billing terms and the method of payment; or (d) written confirmation of the transaction sent to the consumer prior to the submission of the consumer's billing information for payment.[12]

The ERA believes that these revisions to the Rule would protect consumers, preserve their right to choose how their data is used, adequately address the Commission's concerns about abuses associated with the transfer and use of consumer billing information, and not unduly burden legitimate telemarketing activities. If the Commission were to adopt this approach, it might also consider the role that industry self-regulatory programs could play in assuring broad compliance with these provisions. Self-regulatory programs that meet Commission standards might, for example, provide a

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[12] The ERA notes that the Commission proposes to amend the Rule to delete the provision allowing for verifiable authorization to be obtained by the sending of a written confirmation prior to billing. See NPRM, 67 F.R. at 4508. The ERA believes that the proposed removal of this method of obtaining verifiable authorization is unnecessary and not supported by any evidence. The Commission asserts that written confirmation is seldom, if ever, used as a method of express verifiable authorization. Id. This is not correct. Many sellers engaged in inbound upsells (e.g., those offering club membership services or magazine subscriptions) provide written confirmation of the transaction to consumers. Moreover, the fact that this method is less frequently used is not, in and of itself, a sufficient rationale for entirely removing this option for telemarketers. The Commission further asserts that the elimination of this method of verification is unlikely to harm telemarketers because they already commonly tape the customer's authorization. Id. at 4508 n.144. This is also incorrect. While taped authorization is prevalent in the outbound telemarketing environment, it is much less common (and more expensive) in the inbound telemarketing context. Indeed, many inbound telemarketers lack taping capabilities and, as such, upsells on inbound calls (which would now be subject to the Proposed Rule) are often not recorded. Imposing a taping requirement on such calls would materially impact and burden those telemarketers that currently lack taping capabilities. As the Commission has put forth no evidence to support the assertion that written confirmation is an inherently abusive method of obtaining consent, it should not be deleted from the Existing Rule. See Katherine Gibbs School v. Federal Trade Comm'n, 612 F.2d 658, 664 (2d Cir. 1979) (Commission regulations must be based on "substantial evidence in the record taken as a whole").

"safe harbor" for industry members.[13] The ERA strongly supports such an approach. Building on its current Advance Consent Marketing Guidelines, the ERA would be at the forefront in proposing a self regulatory program that would meet the Commission's standards.

IV. Proposed National DNC List Is Outside The Commission's Authority, Not Required And Unlikely To Achieve The Commission's Desired Purpose

As part of its proposed amendments to the Rule, the Commission has called for the creation of a National DNC list for consumers who do not wish to receive telemarketing calls. See Proposed Rule § 310.4(b)(1)(iii)(B). The Commission asserts that the creation of such a list "would enable consumers to contact one centralized registry to effectuate their desire not to receive telemarketing calls." NPRM, 67 F.R. at 4516.

As a preliminary matter, the ERA notes that the Commission appears to lack the statutory authority to establish a National DNC list. The relevant enabling statute, the TCFPA, does not contain any provision expressly calling for the creation of such a list. In contrast, the Telephone Consumer Protection Act ("TCPA") expressly authorizes the Federal Communications Commission ("FCC") to prescribe regulations requiring the establishment and operation of a "single national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations." 47 U.S.C. § 227(c)(3). Had Congress intended for the Commission to also have the

[13] The Commission has identified a number of requirements for an effective self-regulatory program: nearly universal participation by industry members; active monitoring of industry compliance; third party independent review of complaints; a transparent process for handling complaints; and meaningful sanctions for noncompliance, e.g., referral to the Commission. See Federal Trade Commission, Marketing Violent Entertainment to Children: A Review of Self-Regulation and Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries, p. 3 (September 2000); Federal Trade Commission, Online Profiling: A Report to Congress, Part 2 Recommendations, p. 8 (July 2000); Federal Trade

authority to establish a National DNC list, it presumably would have provided such authority in the TCFPA, which was enacted after the TCPA. The absence of such authority suggests that the FCC, not the Commission, is the agency authorized by Congress to create and maintain a National DNC list and, thus, that the Commission's proposal exceeds the scope of its statutory mandate. See also H.R. Rep. No. 79-1980 (1946), reprinted in U.S. Gov't Administrative Procedure Act: Legislative History, S. Doc. No. 79-248, at 233, 274-75 (1946) ("[N]o agency may undertake directly or indirectly to exercise the functions of some other agency. The section confines each agency to the jurisdiction delegated to it by law. . . .").

In addition, contrary to the Commission's assertions, a National DNC list, as currently proposed, would not provide "one stop shopping" allowing consumers to prevent all parties engaged in telemarketing activities from calling them. Neither the Existing Rule nor the Proposed Rule encompasses all telemarketing calls. For example, the Commission does not have the statutory authority to regulate telephone solicitations by banks, savings and loans, common carriers, insurance businesses regulated by State insurance law or non-profit organizations (engaged in telephone solicitations on their own behalf). See 15 U.S.C. § 45(a)(2). Thus, placement on a National DNC list would not prevent consumers from receiving calls from such entities.[14] Similarly, the

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Commission, Self Regulation in the Alcohol Industry: A Review of Industry Efforts to Avoid Promoting Alcohol to Underage Consumers, A Report to Congress, p. 3 (September 1999).

[14] The Commission asserts that the USA PATRIOT ACT amendments, pursuant to which the Rule will encompass solicitations made on behalf of charitable organizations by for-profit telemarketers, will "increase the range of covered calls and presumably decrease complaints about do-not-call compliance." NPRM, 67 F.R. at 4519. This is pure speculation. Contrary to the Commission's assertion, imposing Rule requirements on for-profit telemarketers acting on behalf of exempt charitable organizations, which would not be subject to the Rule if they engaged in telephone solicitations directly, is not likely to increase the number of calls covered by the Rule. Rather, these exempt charitable organizations will merely bring the telemarketing function in-house (to avoid being subject to the Rule) and cease using third party telemarketing call centers to make solicitations on their behalf. The same is true for other exempt entities,

Commission's statutory mandate as set forth in the TCFPA relates only to the regulation of interstate telemarketing calls. The appearance of a consumer's name or telephone number in a National DNC List would not preclude the consumer from receiving intrastate calls. This is likely to lead to confusion and dissatisfaction on the part of consumers as they continue to receive telemarketing calls despite having placed their names on the Commission's proposed list.

Moreover, the ERA concurs with the position taken by the DMA that a National DNC list is not required in light of the DMA's existing TPS. The DMA has been effectively administering its TPS for over fifteen years; the TPS is well-funded and applicable to a broad range of telemarketing calls, including many that would not be subject to the proposed National DNC list.[15] The ERA believes that the TPS, coupled with the requirement that sellers honor specific do not call requests received from particular consumers – found in both the Existing Rule and the TCPA – provides an effective method for consumers to minimize the number of unwanted telephone solicitation calls received, without unduly burdening those marketers that utilize the telephone as a channel of communication with potential and existing customers.

Nevertheless, the ERA is cognizant of the Commission's concerns regarding the current do not call scheme's enforcement mechanisms. See NPRM, 67 F.R. at 4518 (noting the difficulties associated with bringing a private action under the TCPA). In order to address this concern, the ERA would be supportive of an amendment to the Rule

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such as banks and insurance companies. Indeed, attempting to enforce the Rule on telemarketers acting as agents on behalf of exempt entities would have a devastating impact on the telemarketing industry, in the form of lost clients, without any appreciable effect on the number of telemarketing calls received by consumers.

[15] As noted by the DMA in its own comments to the NPRM, the TPS applies to all DMA members – which accounts for eighty percent (80%) of the telemarketing market – including many entities not subject

making it an abusive telemarketing practice for telemarketers to fail to obtain and use the TPS or another industry-maintained do not call list certified by the Commission. This would be consistent with the approach taken by Connecticut, Maine and Wyoming, which have effectively stated that it is a violation of their state do not call list statutes for telemarketers to call any residents of their respective states whose names appear on the DMA's TPS. See www.the-dma.org/cgi/member/privacy/statetelephone.shtml.

In contrast, the ERA cannot support the Commission's National DNC list as currently proposed. While the Commission has provided only the barest details regarding the manner in which the proposed National DNC list would be maintained, funded and administered – making it difficult to provide meaningful comments with respect to the Commission's cost estimates and assumptions regarding the burdens to industry – the little information that has been provided demonstrates that the proposal is flawed in several respects.

(a) Use Of ANI Data To Enroll Consumers In National DNC list Is Improper

The Commission has indicated that it plans to allow consumers to provide notice of their desire to be placed on the National DNC list via automated methods. The Commission proposes to use a dial-in system that employs interactive voice response technology to answer the call from the consumer, coupled with automatic number identification ("ANI") technology to verify the telephone number from which the individual is dialing before adding that number to the list. See Notice of Proposed New Privacy Act System of Records, available at www.ftc.gov/os/2002/03/frnprivacyactdonot.htm.

to the Commission's jurisdiction (such as non-profit organizations). Unlike the proposed National DNC

The use of ANI data to enroll consumers in a National DNC list is problematic in several respects. In its NPRM, the Commission stated that "to ensure that only consumers who actually wish to be on the 'do-not'call' registry are placed there, it is anticipated that enrollment on the national registry will be required to be made <u>by the individual consumer</u> from the consumer's home telephone." NPRM, 67 F.R. at 4519 (emphasis added). However, as ANI data merely identifies the telephone number from which a call is made, there is no way to determine whether the person placing the call is, in fact, the authorized subscriber for the telephone number at issue. As such, reliance on ANI data is likely to lead to a high number of unauthorized requests to be placed on the National DNC list that cannot be verified by the Commission. It is essential, therefore, that any National DNC list mandate that requests to be placed on the list only come from the authorized subscriber for the telephone number in question and that mechanisms be put in place to ensure the identity of this individual.[16]

The Commission itself noted the ineffectiveness of ANI data to ensure that the telephone subscriber was the individual placing the call in its Notice of Proposed Rulemaking regarding amendments to the Pay Per Call Rule (the "Pay Per Call Rule NPRM"), stating that:

> it is [not] reasonable for vendors to presume that telephone-billed purchases made from a subscriber's telephone were, in fact, authorized by the subscriber. A line subscriber has no effective means of preventing these purchases from being made, short of monitoring the placement and content of every telephone call made from his or her telephone. A merchant is not entitled to presume that the line

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list, the TPS also applies to both intrastate and interstate calls.

[16] In particular, the ERA believes that the Commission should clarify that third party requests to place a consumer's name or telephone number on a National DNC list will not be honored. As noted by the Commission, this approach tracks the position taken by the FCC with respect to the do not call requirements of the TCPA. <u>See</u> NPRM, 67 F.R. at 4519. Moreover, the only way to ensure that the identity of the consumer making the do not call request matches the identity of the authorized subscriber for the telephone number in question is to forward the consumer's name and do not call request to the appropriate billing entity (i.e. LEC) for the telephone number in question for verification purposes.

subscriber has agreed to pay for a good or service merely because that subscriber's telephone was used to order a product or service.

Pay Per Call Rule NPRM, 63 F.R. 58524, 58549 (October 30, 1998). Similarly, a telephone subscriber's intent to be placed on a National DNC list cannot be inferred merely by the fact that a call to be placed on the list was made from his or her telephone. In short, allowing consumers to register for a National DNC lists solely on the basis of ANI data is fraught with data integrity problems.

Moreover, the Commission's proposal assumes that it will be able to match the ANI data to a particular consumer's name and telephone number. In fact, industry experience suggests that existing technology provides a match in less than half of all calls. In addition, the transmission of ANI data to the call recipient is controlled by the telephone companies. Telephone companies in some regions of the country do not currently transfer ANI data. Thus, as a practical matter, consumers residing in these areas would be precluded from placing their names on the National DNC list.

In contrast, the DMA's TPS does not suffer from these problems as it does not rely on ANI, but rather captures the consumer's name, address and telephone number.

(b) Placement On National DNC List Should Be For A Fixed Term And Require Payment Of A Fee By The Consumer

Fifteen percent (15%) of the population moved between 1999 and 2000. U.S. Census Bureau, Mobility Status of the Population by Selected Characteristics: 1980 to 2000, Statistical Abstract of the United States: 2001. It can reasonably be assumed that, in the majority of instances, these individuals also change telephone numbers. Therefore, in order to ensure the accuracy of the information contained in the list, a consumer's name or telephone number should only appear on a National DNC list for a fixed period of time, such as one year. At the end of that term the consumer could renew his or her registration on the list. Setting such term limits is consistent with the DMA position and that of several states.[17]

Failure to include a term limit will quickly lead to situations where a consumer who has enrolled on the list no longer matches (i.e., is the authorized subscriber for) the corresponding telephone number on the list. This is problematic in two respects. First, consumers who have previously requested to appear on a National DNC list and subsequently moved will assume (incorrectly) that they are still on the list with respect to their new residence and telephone number. Second, subsequent subscribers to telephone numbers already appearing on the list (and not removed when the previous subscriber moved) will not be afforded the opportunity to receive telephone solicitations that they might otherwise be interested in receiving, despite the fact that there is no evidence to suggest that these subscribers would also wish to appear on the National DNC list. Moreover, given the evolving nature of the telemarketing industry, and the changing nature of individual circumstances and preferences, consumers should be encouraged to periodically review their decision to be included on any National DNC list.

In addition, the ERA believes that consumers should be required to pay a fee in order to appear on any National DNC list. As currently envisioned, the administration of a National DNC list will cost taxpayers millions of dollars. The Commission's estimated cost of five million dollars ($5,000,000) to administer the list in Fiscal Year 2003 appears to be unrealistically conservative. The FCC determined a full decade ago that the costs

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17 For example, Florida and Oregon have annual terms, Georgia has a two year term, and California, Idaho, New York and Texas have three year terms.

associated with creating and maintaining such a national list were likely to exceed twenty million dollars ($20,000,000) in the first year alone and additional twenty million dollars ($20,000,000) thereafter. See In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 7 FCC Rcd 8752, ¶ 14 (1992) (hereinafter, the "FCC Rules and Regulations").[18] Moreover, as noted above, in order to be effective, administration of the proposed list would have to be modified in several ways. For example, rather than relying on automated notification methods, the consumer's name and address should be captured. Similarly, in order to maintain the accuracy of the list, it would have to be updated periodically, preferably through the use of term limits and renewal mechanisms. Adding these features would substantially increase the cost of administering the National DNC list beyond the current extremely conservative estimate.

In recent testimony before a Subcommittee of the Senate Appropriations Committee, the Commission indicated that an estimated three million dollars ($3,000,000) in so-called "Do-Not-Call fees" would be assessed, collected and used in Fiscal Year 2003 to cover the cost of developing, implementing and maintaining a National DNC list. See Prepared Statement of the Federal Trade Commission Before the Subcommittee on Commerce, Justice, State and the Judiciary of the Senate Committee on Appropriations (March 19, 2002), available at www.ftc.gov/os/2002/03/budgetstmt.htm. Even assuming, arguendo, that three million dollars ($3,000,000) were sufficient to offset the enormous costs associated with creating a National DNC list, the ERA believes that any such Do-Not-Call fees should be charged to those consumers who wish to appear on

[18] Indeed, the FCC rejected the creation of a National DNC list at that time, finding that such a list would be "costly and difficult to establish and maintain in a reasonably accurate form." Id.

the National DNC list.[19] Without charging consumers a fee for appearing on the list, the cost of administering the list will ultimately be borne by all taxpayers, including those consumers who do not choose to place their names on the list. While a fee could be charged to telemarketers for obtaining the list, such a charge would be inequitable and burdensome in light of the existing high costs of compliance with such lists and the less onerous alternative already in place of allowing consumers to simply inform telemarketers that they do not wish to receive telemarketing calls in the future. Moreover, increased costs imposed on telemarketers will eventually lead to increased costs for consumers in the form of higher prices for goods and services. See FCC Rules and Regulations, 7 FCC Rcd 8752 ¶ 14 (noting that the greater the cost of compliance for small telemarketing entities, the more likely that such costs will be passed on to consumers). These increases would unfairly apply to those consumers who choose not to appear on the National DNC list. These consumers should not be required to subsidize another person's appearance on a National DNC list.

(c) Any National DNC List Must Preempt Existing State Lists

As noted above, the Commission proposes to create a National DNC list so as to allow consumers to contact one centralized registry to effectuate their desire not to receive telemarketing calls. NPRM, 67 F.R. at 4516. The Commission has also asserted that the effect of such centralization would be to simplify the process for telemarketers as well as consumers and thereby reduce the cumulative burden of complying with multiple

[19] Again, this is consistent with the approach taken in a number of states. For example, Florida and Idaho charge their residents an initial fee of ten dollars ($10) to appear on their state do not call lists, as well as a five dollar ($5) renewal fee. Georgia charges both an initial fee and a renewal fee of five dollars ($5).

do not call lists. See NPRM, 67 F.R. at 4535. However, without preemption, or some other attempted reconciliation with existing state maintained lists, these perceived efficiencies or benefits will not be achieved.

Currently, twenty-one (21) states have enacted do not call list statutes that apply to both intrastate and interstate calls to consumers in those states.[20] In addition, as of this writing at least sixteen (16) other states have pending legislation calling for the creation of state-maintained lists (or mandating the use of the DMA's TPS).[21] The Commission's suggestion that certain of these states may unilaterally rescind the applicability of their do not call statutes to interstate calls in favor the proposed National DNC list is pure speculation.

Without preemption, telemarketers would be faced with the extraordinary burden of having to comply not only with the National DNC list, but with this growing number of state lists. These state statutes have varying requirements with respect to the frequency with which their lists are published and updated, the manner in which telemarketers can obtain the lists and the applicability of their do not call list requirements to particular entities or transactions. The administrative costs associated with attempting to comply with these myriad state requirements is enormous. In light of the proliferation of do not call list legislation over the past few years, these costs are likely to continue to grow exponentially and telemarketers could shortly face the prospect of having to comply with fifty-one (51) separate state do not call lists (including the District of Columbia). Rather than creating efficiencies, a National DNC list that does not provide for preemption would simply add to this administrative burden by becoming yet another list with which telemarketers would be required to comply.

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[20] Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Idaho, Indiana, Kentucky, Louisiana, Maine, Missouri, New York, Oregon, Pennsylvania, Tennessee, Texas, Wisconsin and Wyoming.

[21] Arizona, Delaware, Hawaii, Illinois, Iowa, Kansas, Michigan, Minnesota, Mississippi, New Jersey, Ohio, Oklahoma, Rhode Island, South Dakota, Utah, Virginia.

Moreover, without any express preemption of state-maintained lists consumers are likely to be confused with respect to the lists to which they should add their names. Differences between the National DNC list and the various state lists, for example with respect to statutory exemptions, are also likely to lead to consumer confusion and dissatisfaction.

In addition, contrary to the Commission's assertions with respect to the Regulatory Flexibility Act, requiring small businesses to obtain a National DNC list on a monthly basis, in addition to complying with individual state-maintained lists, will have a significant economic impact on small businesses. Unless these state lists are preempted, the requirement that small businesses obtain the National DNC list on a monthly basis, in addition to obtaining all applicable state-maintained lists, could be prohibitive. It is estimated that the cost of scrubbing a list can range from three to five dollars ($3-5) per one thousand (1000) names. Accordingly, the costs to a small business of scrubbing even small customer lists against fifty-one (51) do not call lists could make telemarketing economically infeasible.

In light of the significant expense involved in creating and maintaining a National DNC call list, and the existence of a less burdensome alternative in the form of the DMA's TPS, a National DNC list could not be justified in the absence of preemption.

(d) National DNC List Must Contain An Exemption For Calls To Consumers <u>With Whom The Seller Has An Established Business Relationship</u>

As currently proposed, the National DNC list would severely curtail the ability of businesses to communicate with those consumers with whom they have established business relationships. The desire to provide consumers with a single, centralized do not call list must be balanced against the legitimate need for businesses to contact their current and prior customers.

Accordingly, any National DNC list requirement must include an exemption for calls placed to consumers with whom the seller has an established business relationship. This approach is consistent with that taken in Arkansas, Colorado, Connecticut, Florida, Georgia, Idaho, Louisiana, Missouri, New York, Pennsylvania, Tennessee, Texas and Wyoming, each of which has a do not call statute with some form of prior or existing business relationship exemption.[22] The TCPA and related FCC regulations likewise recognize an existing business relationship exemption. 47 U.S.C. § 227(a)(3)(B); 47 C.F.R. § 64.1200(f)(3)(ii).

The Commission's assertion that a prior business relationship exemption works to the disadvantage of consumers (see NPRM, 67 F.R. at 4532) is without basis, particularly with respect to a National DNC list. The existence of an established business relationship is evidence of some level of interest on the part of the consumer in the seller's goods or services. Thus, it is reasonable to assume, at least at the outset, that the consumer may be interested in receiving a telephone solicitation from that seller. In the event that the consumer is not interested in receiving such a call, he or she still has the ability, even under the Existing Rule, to request that the particular seller refrain from making telemarketing calls to the consumer in the future. Existing Rule § 310.4(b)(1)(ii).

The Commission's proposed alternative – allowing consumers to expressly identify those entities from which they would be willing to accept telemarketing calls – is

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[22] See Ark. Code § 4-99-403(2)(A); Colo. Rev. Stat. § 6-1-903(10)(b)(II); Conn. Gen. Stat. § 42-288a(a)(9); Fla. Stat. § 501.059(1)(c)(3); Ga. Code § 46-5-27(b)(3)(B); Idaho Code § 48-1003A(4)(b)(i); La. Rev. Stat. § 844.12(4)(c); Mo. Rev. Stat. § 407.1095(3)(b); N.Y. Gen. Bus. Law § 399-z(1)(J)(II); Pa.

wholly inadequate. It is unrealistic to believe that consumers will take the time and effort to identify with particularity (or even be able to recall) all of the entities from which they would be willing to receive telephone solicitations.

Finally, in applying such an exemption, the ERA believes that "established business relationship" must be defined broadly enough to encompass existing business practices. ERA members believe that an established business relationship exists in any instance in which there has been a business-related contact between the consumer and the seller within the previous two (2) years. By way of example, business-related contacts would include product orders or purchases, as well as other transactions or communications between the parties that lack consideration (such as acceptance of free trial offers), customer service inquiries and survey or questionnaire responses.

V. A Zero Abandonment Rate Should Not Be Imposed On The Use Of Predictive Dialers

The Commission has requested comment with respect to the use of predictive dialers, citing concerns that high abandonment rates lead to consumer frustration and inconvenience and, further, that when a predictive dialer disconnects a call without an operator coming on the line there is no way for the consumer to determine from whom the call originated and thus to whom he or she should direct a do not call request (assuming that the consumer desires to make one). NPRM, 67 F.R. at 4523.

As explained in greater detail below, the ERA believes that the Commission lacks the statutory authority to regulate the use of predictive dialers and, further, that

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H.B. 1469 (April 2, 2002); Tenn. Code § 65-4-401(6)(B)(iii); Tex. Bus. & Com. Code § 43.003(b)(2); Wyo. Stat. § 40-12-301(a)(xi)(c).

mandating a zero abandonment rate would adversely impact telemarketers without providing any counterbalancing benefit to consumers.

(a) The Commission Lacks The Statutory Authority To Regulate The Use Of Predictive Dialers

The Commission has provided no evidence to support the position that the use of predictive dialers falls within the scope of its rulemaking authority. The use of predictive dialers was not addressed in either the TCFPA or its legislative history. In contrast, Congress expressly authorized the FCC to promulgate regulations relating to the use of predictive dialers in the TCPA. See 47 U.S.C. § 227.

In particular, the TCPA applies to "automatic telephone dialing systems" which is defined to mean equipment that has the capacity to store or produce numbers to be called using a random or sequential number generator and to dial such numbers. Id. As noted previously with respect to the creation of a National DNC list, had Congress intended to authorize the Commission to regulate the use of predictive dialers in connection with telemarketing transactions, it could have done so in connection with the subsequently enacted TCFPA. Moreover, despite its express rulemaking authority, the FCC has not chosen to adopt any mandatory abandonment rate with respect to the use of predictive dialers. See 47 C.F.R. § 64.1200 (containing the FCC's regulations under the TCPA). The only "technical" requirement contained in the TCPA and accompanying FCC regulations is that automatic telephone dialing systems that transmit artificial or prerecorded messages (i.e., "autodialers") must hang up within five (5) seconds of being notified of the called party's hang up. See 47 U.S.C. § 227(d)(3)(B).

If the agency expressly authorized by Congress to regulate the use of predictive dialers has elected not to impose any mandatory abandonment rates, there would clearly be no basis for the Commission, which lacks such a statutory mandate, to attempt to do so. Nevertheless, the Commission has taken the position that "one fact is clear: Telemarketers who abandon calls are violating § 310.4(d) of the Telemarketing Sales Rule." NPRM, 67 F.R. at 4524. The Commission argues that the disclosures required under that section must be made when the consumer "answers" the call. Under this interpretation, any call which is disconnected prior to a live operator initiating a conversation with the consumer (and making the necessary disclosures) is in violation of the Rule. The ERA believes that this reasoning is flawed in several respects.

First, the disclosure requirements of Section 310.4(d) of the Existing Rule apply only to outbound telephone calls, which are defined as telephone calls initiated by a telemarketer "to induce the purchase of goods or services." The ERA submits that an abandoned call does not meet this definition because no effort to induce the purchase of goods or services occurs during such calls. Until a live operator comes on the line and "initiates" a conversation with the consumer designed to induce the purchase of goods or services, there is no outbound telephone call within the present definition of that term.

Moreover, this position appears to be inconsistent with other comments made by the Commission in the NPRM and contrary to any view taken by the Commission previously with respect to the use of predictive dialers. As the Commission itself notes, predictive dialers are not a new phenomenon, but rather have been used by telemarketers for over a decade. <u>See</u> NPRM, 67 F.R. at 4523. However, the issue of abandoned calls and the use of predictive dialers was not addressed in the Commission's 1995 rulemaking in connection with the Existing Rule.

The ERA is also unaware of any prior attempt by the Commission to argue that an abandoned call constitutes an outbound telephone call within the meaning of the Existing Rule or to engage in any enforcement activity on that basis. If an abandoned call did in fact already constitute a violation of the Rule, there would already be a de facto zero abandonment rate requirement in effect. As such, there would be no need for the Commission to seek recommendations regarding alternative approaches to the use of predictive dialers, such as mandating a maximum setting for abandoned calls, as it would already have the ability to enforce the Existing Rule against telemarketers that abandon calls. See NPRM, 67 F.R. at 4524. Accordingly, the ERA does not believe that an abandoned call constitutes a violation of the Existing Rule.

(b) Zero Abandonment Rate Would Adversely Impact Telemarketers Without Providing Any Counterbalancing Benefit To Consumers

Predictive dialer devices create significant efficiencies for telemarketers in terms of operator productivity by automatically dialing the consumer's telephone number (rather than having a live operator dial the number manually) at a rate designed to minimize operator down time and maximize the number of consumers that a particular operator can speak with during a specific time period. Contrary to the Commission's assertions, there is nothing inherently coercive or abusive about placing a telephone call to a consumer through the use of a predictive dialer, as opposed to placing the call manually. Indeed, calls can be "abandoned" (i.e., disconnected prior to the caller ever initiating a conversation with the called person) when placed manually as well.

Nevertheless, the ERA acknowledges that the efficiencies and increased productivity achieved through the use of predictive dialers must be balanced against consumer objections to abandoned calls. As such, the ERA believes that telemarketers should utilize the lowest possible abandonment rate commensurate with effective and cost efficient marketing, and is supportive of the DMA's established industry guidelines which recommend an abandonment rate of five (5%) percent. However, the ERA is opposed to any regulation or legislation which would mandate a zero abandonment rate.

A mandatory zero abandonment rate would have a disproportionate negative impact on telemarketers that would far outweigh any benefit to consumers. Outbound telemarketers are typically compensated on the basis of the number of calls placed, or orders generated, during a particular time period (an hour, day, etc.). Compliance with a zero abandonment rate (to the extent technologically feasible) would result in fewer calls being placed during the relevant time period and, thus, would directly reduce the revenues earned by telemarketers.

In addition, a zero abandonment rate would add significant costs to telemarketers. Not all predictive dialer equipment has the technological capability of achieving a zero abandonment rate. Many telemarketers with older equipment would be required to incur significant capital expenditures to upgrade their predictive dialers. For many smaller telemarketers with more limited financial resources the cost of these upgrades could be prohibitive. These companies would essentially be forced to cease using predictive dialers, which would drastically reduce their operator productivity and place them at a distinct competitive disadvantage with respect to larger call center operations that are better able to absorb the increased cost associated with ensuring compliance with a zero abandonment rate. Ultimately, this would result in many smaller telemarketers going out of business and a significant loss of jobs.[23] In short, it is not economically feasible for

[23] The telemarketing industry employs an estimated 415,000 workers and impacts upon an additional 4.1 million jobs. Economic Impact: U.S. Direct Marketing Today 2002 (forthcoming), commissioned by

telemarketers, particularly smaller telemarketers, to achieve and maintain a zero abandonment rate.

Moreover, mandating a zero abandonment rate for the use of predictive dialers by those telemarketers subject to the Rule would not alleviate the purported harm to consumers to any material degree. Many of the entities that use predictive dialers to place calls to consumers are not subject to the Rule. For example, politicians regularly use predictive dialers when engaged in telephone campaigns relating to fundraising or voter turnout initiatives. Likewise, non-profit organizations (soliciting on their own behalf), banks and insurance companies all use predictive dialers in connection with telephone solicitation efforts. As none of these entities are subject to the Rule, however, consumers will continue to receive calls placed by predictive dialers. Selective enforcement of a zero abandonment rate against those telemarketers subject to the Rule would amount to an improper restriction on commercial speech in that it would not eliminate abandoned calls by some of the heaviest users of such equipment and, thus, would not advance the interest asserted by the Commission. See Central Hudson, 447 U.S. at 566 (regulations restricting commercial speech must directly advance the governmental interest asserted); Edenfield v. Fane, 507 U.S. 761, 771 (1993) (the government must demonstrate that its restrictions will in fact alleviate the alleged harm to a material degree).

To the extent that the Commission feels compelled to mandate an acceptable abandonment rate, the ERA would propose that the Commission consider a standard of five (5%) percent, which is consistent with the DMA's current self-regulatory standard.

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the Direct Marketing Association, conducted by DRI/WEFA. Clearly, the number of workers that could potentially be impacted by such a requirement is significant.

In addition, consideration must be given to the time period over which the abandonment rate will be measured and the definition of what constitutes an abandoned call. Abandonment rates will 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. Moreover, the term "abandoned" must be defined narrowly to ensure that it encompasses only those situations where a call is connected to a consumer and then disconnected by the predictive dialer because an operator was unavailable to be connected to the call. For example, instances where the consumer hangs up before the operator begins his or her contact (but has been connected and is available for the call), or where the operator is connected but disconnects the call because there is no response from the consumer or the consumer's response is inaudible, should not constitute abandoned calls.

VI. The Provisions Of The Rule Should Not Be Applied To For-Profit Telemarketers Acting On Behalf Of Charitable Organizations Or Other Exempt Entities

The Commission has asserted that the amendments to the TCFPA effectuated by Section 1011 of the USA Patriot Act expand the coverage of the Rule to encompass charitable solicitations by for-profit telemarketers on behalf of non-profit organizations that are themselves exempt from the provisions of the Rule. NPRM, 67 F.R. at 4497. The Commission further claims that the provisions of the Rule apply to telemarketers engaged in solicitations on behalf of other exempt entities, such as banks, credit unions or savings and loans. Id. at 4497 n.56.

The ERA disagrees with this overly expansive view of the Commission's ability to enforce the provisions of the Rule. As the Commission has itself noted, nothing in the USA Patriot Act or in its legislative history suggests that the USA Patriot Act amended Section 6105(a) of the TCFPA. NPRM, 67 F.R. at 4496-97. This provision expressly provides that "no activity which is outside of the jurisdiction of the [FTC] Act shall be affected by this chapter." 15 U.S.C. § 6105(a). The FTC Act clearly provides that the Commission's authority to prevent parties from engaging in unfair or deceptive acts or practices does not apply to non-profit organizations, banks, credit unions, savings and loans and common carriers. 15 U.S.C. § 45(a)(2). The Commission's proposed amendments to the TSR would effectively, however, regulate the activities of charitable organizations that are clearly outside the scope of the FTC's jurisdiction.

Telemarketers engaged in solicitations on behalf of non-profit organizations or other exempt entities are merely acting as agents for these exempt entities. Any attempt by the Commission to enforce the provisions of the Rule against telemarketers when acting in their capacity as agent for such exempt entities, would as a practical matter, constitute an attempt by the Commission to impose the Rule requirements on the exempt entities themselves. This would clearly constitute an improper expansion of the Commission's authority beyond its statutory mandate. See 5 U.S.C. § 706(2)(C).

The ERA particularly objects to the Commission's proposal to subject charitable solicitations conducted by professional fundraisers to the do not call list requirements. This will have a severe negative impact on the ability of charitable organizations to conduct fundraising campaigns. ERA believes that the Commission can implement the requirements of the PATRIOT Act through narrowly tailored disclosure requirements designed to prohibit misleading and deceptive charitable solicitations.

VII. Prize Promotion Disclosures Should Be Made Prior To Payment For Goods Or Services Rather Than At Outset Of Call

The Existing Rule requires that, in any prize promotion, a telemarketer must disclose the odds of being able to receive the prize, that no purchase or payment is required to win a prize or participate in a prize promotion, and the no purchase/no payment method of participating in the prize promotion. See Existing Rule §§ 310.3(a)(1)(iv), 310.4(d)(4). The Commission has proposed to amend these provisions to require that the telemarketer also disclose that "any purchase or payment will not increase the person's chances of winning." See Proposed Rule §§ 310.3(a)(1)(iv), 310.4(d)(4). While ERA questions whether this additional disclosure requirement, which was developed for direct mail solicitations under the Deceptive Mail Prevention and Enforcement Act, 39 U.S.C. § 3001(k)(3)(A)(II), is necessary in the context of telephone solicitations, the ERA does not object in concept to the addition of this disclosure

Nevertheless, the ERA believes that the requirement under Section 310.4(d)(4) that such disclosures be made promptly at the outset of outbound telephone calls is not necessary. Instead, the ERA believes that these disclosures are more properly made prior to the providing of billing information by the consumer, along with the other disclosures required by Section 310.3(a)(1) (e.g., the total cost of the goods or services, all material conditions to purchase, and any material refund, cancellation, exchange or repurchase policies). There does not appear to be any compelling rationale for requiring disclosure of information regarding the prize promotion at the outset of the telemarketing call, when the consumer may not yet have even been solicited to purchase the goods or services which are the subject of the underlying telemarketing transaction. Requiring that such disclosure be made prior to "payment by the consumer," rather than at the outset of the call, would provide the marketer with the flexibility to place the disclosure where it believes it is most likely to be meaningful to consumers.

VIII. The Requirement That Express Verifiable Authorization Be Obtained For Novel Payment Methods Should Not Apply To Debit Card Transactions

The Commission proposes to amend Section 310.3(a)(3) of the Rule to require that a consumer's express verifiable authorization be obtained when novel payment systems are used to bill and collect for a telemarketing purchase. See NPRM, 67 F.R. at 4507. The ERA is supportive of this proposal in principle, but believes that the Commission must clarify that a debit card does not constitute a novel payment system that would require that express verifiable authorization be obtained.

The Commission identified "lack [of] chargeback protection and dispute resolution rights, as well as limited customer liability in the event of unauthorized charges," as factors supporting the expansion of the express verifiable authorization provision to encompass novel payment methods. NPRM, 67 F.R. at 4507. However, these issues are inapplicable to the vast majority of debit cards. Although not subject to the Fair Credit Billing Act or the Truth in Lending Act, nationally branded Visa and MasterCard debit cards offer comparable protections to consumers, as Visa and MasterCard mandate such protections as part of their merchant agreements with sellers.

Moreover, applying this provision to debit cards would, as a practical matter, force telemarketers to obtain express verifiable authorization in connection with credit card transactions as well. A telephone operator obtaining an account number from a consumer during the course of a telemarketing call has no way of determining whether the account number provided is a debit card or credit card number other than by asking the consumer. Moreover, many consumers are unfamiliar with the differences between debit cards and credit cards and are unable to tell the operator with any degree of accuracy whether the billing information provided is for a debit or credit account. Thus, the only way to ensure compliance would be for telemarketers to assume that all cards provided are debit cards and, thus, that express verifiable authorization is required in all instances. Such a result would be unduly burdensome and impose unnecessary restrictions on telemarketers that are not contemplated by the NPRM. To avoid any uncertainty the Commission should clarify that the provisions of proposed Section 310.3(a)(3) are inapplicable to debit card transactions.

IX. The Commission's Proposals Regarding The Blocking Of Caller ID Information Are Appropriate

The ERA agrees with the Commission that there is no reason why a legitimate telemarketer would ever seek to subvert or block the display of information on Caller ID equipment. The ERA supports the approach taken in proposed Section 310.4(a)(6), which would prohibit the blocking, circumventing or altering of the transmission of the calling party's name and/or telephone number for Caller ID purposes. However, as the Commission rightly noted in its NPRM, it is technologically impossible for many telemarketers to transmit Caller ID information due to the types of telephone systems that they use. See NPRM, 67 F.R. at 4515. Accordingly, the ERA would oppose any regulation which would require telemarketers to display Caller ID information.

In addition, as the Commission again properly notes in its NPRM, in many instances the actual number from which the call is placed may not be helpful to the consumer as it may relate to a particular phone line in the seller's or telemarketer's call center. The ERA believes that the remaining language of Section 310.4(a)(6) – which provides that telemarketers may substitute the actual name of the seller and the seller's customer service telephone number, which is answered during regular business hours, for the telephone number used in making the call – is also appropriate.

In sum, the ERA believes that proposed Section 310.4(a)(6) presents a reasoned and balanced approach to the issue of Caller ID blocking.

X. Conclusion

The ERA supports the Commission's goal of strengthening the TSR where necessary to combat abusive and deceptive telemarketing practices. The ERA believes, however, that the TSR has been highly effective in eliminating the fraudulent practices that once plagued the industry and does not believe changes as sweeping and extensive as those being proposed by the Commission are either necessary or appropriate. Moreover, the ERA believes many of the Commission's proposed amendments raise serious First Amendment considerations because they are far more restrictive than necessary to achieve the Commission's stated purpose and will not materially advance the stated goals. The ERA would urge the Commission to consider more narrowly tailored alternatives such as those being proposed by the ERA which will be equally, if not more effective in achieving the Commission's goal and more properly balance the needs of consumers and industry alike.

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