UNITED STATES OF AMERICA

BEFORE THE FEDERAL TRADE COMMISSION

Washington, D.C. 20580

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

COMMENTS OF

THE PROMOTION MARKETING ASSOCIATION.

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The Promotion Marketing Association ("PMA"), through its undersigned counsel, respectfully submits these comments in response to the Federal Trade Commission's request for public comments in connection with its proposed amendments to the Telemarketing Sales Rule ("TSR" or "Rule"), 16 C.F. R. Part 310.[2] The PMA has, under separate cover, notified the Commission of its desire to participate in the public forum on the proposed amendments that is scheduled for June 5-7, 2002.

I. BACKGROUND INFORMATION REGARDING THE PMA

The PMA has been the leading non-profit association representing the promotion marketing industry since 1911. Our membership consists of more than 650 companies

[2] Notice of Proposed Rulemaking ("NPRM"), 67 Fed. Reg. 4492 (January 30, 2002).

representing diverse aspects of the industry, including many Fortune 500 consumer goods and service companies, advertising and promotion agencies, and university faculty who educate about promotional activities as part of a business curriculum.

One of the PMA's primary missions is to educate its members on the laws that govern promotions through its annual law conferences and other educational seminars and conferences, and through its legal bulletins detailing trends in legislation and regulations affecting the industry. The PMA also serves as a resource to state legislatures, state attorneys general and federal regulatory agencies in drafting appropriate and focused legislation and rules to combat deceptive advertising and marketing practices.

Since the TSR first became effective in 1995, there has been substantial industry compliance with its standards. Today, telemarketing presents a viable and legitimate promotional tool for marketers of well-known consumer products and services as well as marketers seeking to introduce new and innovative products and services to consumers. Many PMA members currently follow an "integrated marketing" approach, which involves the use of a combination of different media and marketing tools to execute an overall marketing plan. Inbound and outbound telemarketing play an important role in such integrated marketing programs for many PMA members. The PMA thus has a keen interest in ensuring both that the telemarketing industry remains free of abuses and that the telemarketing channel not be subject to unnecessarily burdensome regulation.

As the Commission may recall, the PMA was actively involved in the rulemaking process during the promulgation of the original TSR in 1995. At that time, the PMA's goal was to provide the Commission with a unique industry perspective on how various contemplated regulatory proposals affected many of the country's responsible marketers. The PMA looks forward to offering the same input and perspective in connection with the instant rulemaking proceeding.

II. EXECUTIVE SUMMARY

The FTC has asked for comment on a variety of issues. The PMA's interests relate principally to those areas that would impact the use and viability of inbound and outbound telemarketing services as a marketing tool, and the PMA's comments are, therefore, principally focused on those issues. The PMA believes that the TSR has thus far been extremely effective in curtailing unfair and deceptive telemarketing practices while encouraging the growth of legitimate telemarketing activities.

The PMA understands that telemarketing practices have evolved since the promulgation of the original TSR in 1995, particularly in connection with the increasing marketing of products and services via "upsells." However, several of the amendments proposed in the NPRM are of great concern to PMA members because they would have a significant negative impact on responsible business practices that would greatly exceed any positive impact. In our view, the Commission's legitimate concerns regarding deceptive and abusive telemarketing practices can be fully and properly addressed through more narrowly focused regulatory changes than those that are currently proposed in the NPRM. In an attempt to assist the Commission in crafting balanced regulatory standards that will allow responsible businesses to continue to engage in productive telemarketing activities while prohibiting deceptive and abusive practices, we have comments on the following six TSR amendments proposed by the Commission:

First, with respect to the proposed addition of the disclosure "a purchase does not improve your chances of winning," the PMA does note that there does not appear to be any evidence in the record to support the necessity of this additional disclosure. Specifically, this disclosure is one of the affirmative disclosures required for all direct mail solicitations under the recently enacted Deceptive Mail Prevention and Enforcement Act, 39 U.S.C. § 3001 et seq. This disclosure was deemed necessary by

Congress for direct mail solicitations based on evidence in the record that certain of the representations commonly utilized in direct mail solicitations may have led some consumers to believe that a purchase would improve their chances of winning. The PMA is unaware of any similar evidence of consumer confusion in the context of telephone solicitations. While the PMA does not believe, therefore, that such an additional disclosure is necessary, and is concerned about unduly increasing the length of the telemarketing call, it will not, as a gesture of its good faith, object to the addition of this disclosure if the Commission feels strongly that this disclosure is required. PMA does, however, have a concern with the proposed timing of that disclosure. Specifically, PMA believes that this disclosure should be required to be made, "before the consumer pays" rather than "promptly at the beginning of the call." Requiring this disclosure "promptly" at the beginning of the call could result in situations where the disclosure is made to the consumer before the consumer has been solicited to purchase a product or service. The PMA believes that this disclosure would be more meaningful if made in conjunction with the product or service solicitation and in closer proximity to the provision of billing information. Including this disclosure within the list of disclosures required to be made "before the consumer pays" would afford marketers the flexibility to determine the point in the telephone solicitation at which the disclosure would be most meaningful to the consumer.

Second, the proposed amendment to redefine the term "outbound telephone call" to include upsells and cross sells[3] will impact PMA members far more than the Commission may realize. Upselling is a legitimate marketing tool widely utilized by many of PMA's members. The PMA is concerned that the Commission's proposal to subject such calls to all of the Rule's requirements applicable to outbound calls will severely impair the continued viability of upsells and may, in fact, amount to a functional ban on such calls. The PMA believes that the Commission can achieve its

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stated goals on this issue more effectively by treating upsells as a separate category of calls, and by establishing disclosure requirements that are designed to convey the type of information which the Commission believes are important for this category of calls.

Third, the Commission's proposal to ban the use of preacquired account information is much more extreme than required to achieve the intended purpose of ensuring that consumer billing information is not transferred to a separate seller without the consumer's prior consent. The Commission's stated goals can be achieved more appropriately by imposing a requirement that consumer billing information not be transferred to a separate seller without notice to the consumer of material billing information and the consumer's express verifiable consent.

Fourth, while the proposed TSR amendments implementing section 1011(b)(3) of the USA PATRIOT Act (the "PATRIOT ACT") are generally acceptable, we cannot support the amendments that would make the "do-not-call" registry applicable to for-profit entities soliciting charitable contributions. Such amendments are objectionable because they infringe upon the First Amendment protection afforded to charitable organizations and to entities that raise funds on behalf of the charitable organization. These TSR amendments will severely restrict the ability of charitable organizations to use effectively for-profit entities for fundraising purposes.

Fifth, the PMA has serious concerns about the Commission's proposal for the creation of a national do-not-call registry. In fact, the legal authority for the creation of such a registry was expressly granted to another regulatory agency by Congress. Overall, the PMA believes that the Direct Marketing Association's ("DMA's") Telephone Preference Service ("TPS") sufficiently meets the needs of consumers and businesses. Although it is difficult for the PMA to comment fully on the Commission's registry proposal due to the absence of operational details, the information that has been provided thus far raises the potential for significant operational difficulties that are

[3] A "cross sell" is the industry term for a product or service that is offered via an upsell by the same

not presented by the DMA's TPS. While we do not believe that a Commission-created and Commission-maintained federal do-not-call registry is necessary, we do believe that the operational and structural problems presented by the Commission's proposal must be addressed if the Commission chooses to move forward with its proposal.

Sixth and finally, the potential imposition of a zero percent abandonment rate standard for predictive dialers would have a devastating effect on many PMA members that utilize outbound telemarketing as part of their integrated marketing efforts. The loss of efficiencies that would result from such a requirement may indeed cause certain PMA members to abandon outbound telemarketing entirely. The PMA recommends that the Commission consider the imposition of a low abandonment rate standard, such as five percent, which would enable the Commission to achieve its goals without devastating the industry.

III. SWEEPSTAKES

In concept, PMA members do not object to the Commission's proposal to amend the Existing Rule to require an express disclosure that a purchase or payment will not increase an entrant's chances of winning in a telemarketing solicitation for a prize promotion. We do note that there does not appear to be any evidence in the record that would support the need for this disclosure in telemarketing solicitations. This disclosure was included as a requirement for direct mail solicitations based on evidence that such solicitations often contained language that may have led consumers to believe that a purchase would improve their chances of winning. Telephone solicitations by their very nature do not generally contain the types of representations commonly utilized in direct mail. Accordingly, the PMA is not persuaded that such disclosure is required in the telephone solicitation context and does note, therefore, for the record,

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marketer that offered the initial product or service to the consumer.

that the addition of such a disclosure requirement will increase the length of the telemarketing call without any resulting consumer benefit.

While the PMA does not believe that the addition of this disclosure is necessary for the reasons discussed above, PMA would suggest that this disclosure be included among those disclosures that must be made "before the consumer pays" rather than "promptly" at the outset of the call. The PMA's concern with requiring that this disclosure always be made "promptly" at the beginning of the call is that often in a telephone solicitation involving a prize promotion, the sweepstakes offer may be presented before the product or service solicitation is made. If the disclosure that a purchase will not improve one's chances of winning is required to be made before the full product or service solicitation occurs, the result may be very confusing to consumers.

Moreover, the PMA believes that in many instances this disclosure may actually be more meaningful if it occurs in closer proximity to the solicitation for the product or service. By requiring simply that this disclosure be made "before the consumer pays," the Commission will serve its purpose of ensuring that the required information is disclosed to the consumer while allowing the marketer the flexibility to determine where within the telephone solicitation the disclosure will be most meaningful. Accordingly, the PMA would support the addition of the disclosure that a purchase will not increase the chances of winning, but would recommend that the disclosure provision be added only to proposed section 310.3(a)(1)(iv) rather than also to proposed section 310.4(d)(4).

IV. EXPANSION OF THE DEFINITION OF "OUTBOUND TELEPHONE CALL"

The PMA acknowledges that the practice of marketing products and services via upsell offers has increased in recent years and that the existing TSR does not provide express guidance regarding responsible marketing practices via the upsell channel. For

those reasons, the PMA understands the Commission's desire to regulate the portion of the telemarketing call involving an offer that is made via an upsell. PMA believes, however, that the approach proposed by the Commission in the NPRM, which would essentially subject upsell calls to all of the Rule requirements applicable to outbound calls, is overbroad, more restrictive than necessary to achieve the intended purpose, and will lead to unintended and illogical results. A more appropriate alternative which would more directly and efficiently advance the Commission's stated objectives would be to create a separate category of calls called "upsells" and subject such calls to a unique set of disclosure requirements tailored to that category of calls.

As a preliminary matter, we note that the Commission's stated goal is to ensure that consumers understand that a subsequent offer is being made on behalf of a separate seller. for the purpose of soliciting the purchase of another product or service. NPRM, 67 Fed. Reg. at 4500. As an initial matter, given the Commission's stated concerns, we would suggest that the Commission clarify that any proposed modifications to the Rule dealing with upsells would apply only when the subsequent offer is made on behalf of a separate seller. If the subsequent offer is made by the same seller as the initial offer, the Commission's concerns regarding disclosure of the "separate seller" do not arise. Consequently, the PMA believes that the Commission should clarify that any upsell-specific disclosure requirements would only apply to upsells, on behalf of a separate seller, which the Commission calls "external upsells," and not to upsells on behalf of the same seller, which the industry refers to as cross sells, and which the Commission refers to as "internal upsells."

In addition, in crafting regulations designed to regulate upsell calls, it is important for the Commission to recognize that upselling is a legitimate marketing technique that provides benefits to both consumers and marketers. Upselling provides enormous benefits to marketers because it allows them to share the high costs of telemarketing and customer acquisition which in turns results in lower prices and more

valuable offers to consumers. Upselling also provides added value and benefits to consumers because it allows customers to receive offers that are likely to be more targeted to their specific interests. The ultimate result is lower operational costs for marketers and lower prices on more targeted offers for consumers. The upsell channel is often heavily utilized by responsible and reputable marketers, including PMA members, to conduct affinity marketing programs with partners who provide products or services that are likely to fit within the needs of the primary marketer's customer base. Indeed, it is estimated that approximately $1.5 billion dollars in sales are generated through upsells. For example, at the conclusion of a consumer's call to purchase airline tickets, the airline marketer may offer the consumer a promotional discount on a rental car offer. The advantages of such marketing programs to consumers and marketers alike is readily apparent. PMA thus has a strong interest in ensuring that upselling remains a viable marketing technique for its members who regularly engage in such affinity marketing programs.

A. The Imposition Of All Of The TSR's Outbound Call Requirements To Calls Involving Inbound Upsells Will Lead To Irrational Results.

Commission regulation of upsell marketing practices should take into account the fact that such practices, when conducted responsibly, benefit both consumers and businesses by lowering prices and costs as described above and affording consumers the opportunity to receive in a convenient and efficient manner solicitations for products and services that are likely to be of interest to them. The current approach proposed in the NPRM is problematic because it will subject such calls to overly burdensome restrictions which not only are unlikely to materially advance the Commission's stated goals but are likely to result in unintended and illogical consequences. For example, treating upsell calls as outbound calls will subject all such calls, the majority of which occurs in the inbound channel, to the calling time

restrictions imposed on outbound calls. These calling time restrictions were included in the Rule to protect consumers from the intrusion of outbound calls during certain time periods. The imposition of these calling time restrictions onto the upsell portion of an inbound call would not make sense because consumers initiate such calls at their own convenience. In addition, subjecting inbound upsells to the prohibition on calling any person who has indicated that he or she does not wish to receive an outbound call made by the seller or to any do-not-call registry requirement would be impossible because it would require the telemarketer to determine -- in the middle of an inbound call -- whether or not the customer made such a request or the customer's name appears on the registry. Such results would be impractical, illogical, and unwarranted.

B. Upsell Offers Should Be Treated As A Separate Category Of Calls Rather Than As Outbound Calls.

To the extent that the Commission's stated goals is to ensure that consumers understand that they are dealing with a separate seller and a separate sales transaction, the PMA respectfully submits that this goal can be far more effectively achieved by treating upsells as a separate category of calls and requiring certain specific disclosures that would convey the type of information the Commission has identified as being important in these types of calls. Specifically, the PMA would propose that telemarketers be required to disclose (a) that they are dealing with a separate seller (or charitable organization); (b) the identity of the separate seller (or charitable organization); and (c) that the purpose of the upsell is to solicit a purchase (or a charitable contribution). These disclosure requirements will directly address the Commission's disclosure related objectives without subjecting upsell calls to unduly restrictive requirements which not only will do little to advance the Commission's stated goals but may well result in illogical and unintended consequences without any countervailing consumer benefit.

C. The Definition Of "Separate Seller" Should Be Clarified For Purposes Of Upsell Offers.

To ensure that the scope of the upsell disclosure requirements is properly defined, we believe it would also be useful for the Commission to clarify the meaning of the term "separate seller" within the context of upsells and the related issue of preacquired account information. A "seller" is defined in both the existing TSR and the proposed TSR as 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. Many companies in the promotional advertising industry would fall within this definition, including promotional services

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companies that redeem coupons or rebates in connection with promotional telemarketing offers. However, these companies do not bill or charge consumers in connection with the transaction. To address the issue, the definition of a seller should be modified to cover only the entity that will be billing or charging the consumer in connection with the sale.

In addition, the definition of a separate seller should exclude affiliated entities because corporate affiliates do not present the same types of disclosure concerns as unaffiliated entities. We would suggest that a standard similar to that used under the TCPA for internal do-not-call lists be used. Under the TCPA standard, the FCC explicitly exempts "affiliated persons or entities" from a subscriber's do-not-call request, unless the consumer would reasonably expect them to be included given the identification of the caller and product being advertised. 47 C.F.R. §64.1200(e)(2)(v). Thus, we suggest that corporate affiliates be exempt in those situations where the consumer would reasonably expect such affiliates to be related to the original seller.

V. PROPOSED BAN ON THE USE OF PREACQUIRED ACCOUNT INFORMATION

The Commission's proposal to ban the use of pre-acquired account information has raised significant concern among PMA members. The absence of a precise definition of the term "pre-acquired account information" within the NPRM, coupled with the extremely broad scope of the proposed ban, has created some confusion within industry regarding the specific practices that the Commission intends to prohibit. Moreover, we question whether the Commission has the statutory authority to prohibit the transfer of billing information altogether. We also respectfully, but strongly, disagree with the Commission's assertion that all billing information transfer practices are inherently unfair to consumers. When conducted properly and responsibly, with the proper notice to and consent of the consumer, billing information

transfers provide significant benefits to both consumers and to reputable marketers in the form of increased convenience, reduced costs, and enhanced privacy protections. By issuing a rule that provides clear guidelines regarding the responsible transfer of consumer billing information -- rather than by banning the practice altogether -- the Commission would maintain its enforcement authority with respect to the actions of irresponsible marketers while allowing reputable marketers to continue routine, uncontroversial, responsible, and beneficial marketing practices.

A. The Meaning Of The Terms "Pre-Acquired Account Information" Should Be Clarified.

As a threshold matter, the Commission's use of the term "pre-acquired account information" in the NPRM without a definition of that term, coupled with the broad scope of the proposed ban presents a substantial problem. If the Commission intends the prohibition on the transfer of pre-acquired account information to mean only a prohibition on the transfer of complete billing information [similar to the concept embodied in the definition of a "properly completed order" from the Mail and Telephone Order Merchandise Rule, 16 C.F.R. 435.2(d)] that is transferred to a billing entity prior to the telemarketing solicitation and without the consumer's consent, the PMA would not oppose the Commission's proposal. Such an approach would be consistent with the enforcement actions that have thus far been brought by the Commission and by other regulators. These cases typically involved billing information transfers or billing submissions that occurred prior to the initiation of the telemarketing solicitation and without the consumer's consent. Responsible businesses, in contrast, transfer and use consumer billing information only with and after obtaining consumer knowledge and consent.

Responsible businesses typically transfer consumer billing information in one of two situations. In the first situation, which involves inbound upsell offers, the consumer's billing information is transferred from the primary marketer to the upsell marketer upon the consumer's acceptance of the upsell offer. Although a third party telemarketer may present both the primary and the upsell offers to consumers, consumers know and understand that the telemarketing sales representative has their billing information because they have just provided it in connection with the primary offer. More importantly, in the upsell situation, the consumer billing information is not transferred to the second seller unless and until the consumer has consented to the second sales transaction and authorized the transfer of their account billing information to that second marketer.

In the second situation, the first marketer enters into a joint marketing relationship with a second marketer. Such marketing partnerships are often based on a complementary relationship between the products or services offered by the first marketer and those offered by the second marketer. For example, airline tickets and car rentals are complementary services. In this situation, the airline provides the car rental company with certain information about its customers, such as name and telephone number. The information transferred may also include encrypted or partial consumer billing information. The information transferred does not, however, contain sufficient information to allow the car rental company to bill the customer's account. Upon the consumer's acceptance of the car rental offer, the airline transfers the complete billing information to the car rental company (or to a third party payment processor intermediary that is authorized to decrypt or otherwise identify and then process the complete billing information) to bill the consumer for the offer that was accepted. If the car rental company's offer is not accepted, the consumer's complete billing information is not transferred to the car rental company or the third party intermediary is not authorized to identify and then process the complete billing information.

If the Commission shares the PMA's view that the routine business practices of responsible marketers described above fall outside the scope of the definition of "pre-acquired account information" for purposes of the revised Rule, then the PMA does not object to the Commission's current proposal. However, the Commission's proposal as currently drafted is not limited to the transfer of account billing information without consumer knowledge and consent and would seemingly apply to and ban the very legitimate marketing practices described above.

B. The Commission Does Not Have The Statutory Authority To Prohibit The Transfer Of Consumer Billing Information.

The proposed ban on the transfer of consumer billing information appears to be regulatory overreaching that is not supported by a valid Congressional delegation of authority. An agency's authority to promulgate regulations is limited to the authority delegated to it by Congress. Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988). The TCFPA expressly authorizes the Commission to prescribe rules prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or practices. 15 U.S.C. § 6102. The Commission bases the proposed ban on the use of pre-acquired account information on its assertion that the use of pre-acquired account information constitutes an "abusive" practice for purposes of the TCFPA. The Commission further claims that the use of pre-acquired account information is "abusive" because it meets the Commission's traditional criteria of unfairness under the Federal Trade Commission Act, 15 U.S.C.§ 45(n).

We respectfully disagree with the Commission's approach as well as its underlying analysis on this issue. The Commission cannot, as a legal matter, properly substitute the unfairness standard for the abusiveness standard that was imposed by Congress. We note, as did Commissioner Swindle in his concurring statement upon the issuance of the NPRM, that Congress used the "abusive" standard rather than the

"unfairness" standard in the statute, despite that fact that Congress was aware of the existence of the unfairness standard. See *Concurring Statement of Commissioner Orson Swindle*, 67 Fed. Reg. 4545. In applying the unfairness standard, rather than the "deceptive or abusive" standard required by the TCFPA, the Commission has impermissibly exceeded the scope of its authority in proposing to regulate the transfer of preacquired account information. As the Commission itself has stated in the NPRM, "[t]he jurisdictional reach of the [TSR] is set by statute, and the Commission has no authority to expand the [TSR] beyond those statutory limits." NPRM, 67 Fed. Reg. 4492, 4497.

We further do not agree with the Commission's assertion that the unfairness standard is necessarily higher than the abusiveness standard. They are simply different from one another. To the extent that the proposed ban on the use of pre-acquired account information is based upon an unfairness standard, we respectfully submit that the Commission has exceeded the scope of its rulemaking authority.

C. Billing Information Transfer Which Occurs With Consumer Consent Is Neither Abusive Nor Unfair, And Should Not Be Prohibited.

As noted earlier, the PMA understands the Commission's concerns regarding the transfer of consumer account information among marketers without the consumer's authorization. However, the PMA believes that the Commission should recognize the difference between solicitations where the transfer of consumer account information occurs without consumer consent and those instances where the transfer has been expressly authorized by the consumer. Where a consumer has consented to the transfer and/or use of his account information, there is no unfair or abusive activity. Therefore, the Commission cannot properly include such activity within its definition of "pre-acquired account information."

The specific account information abuses described by the Commission in its NPRM[4] as well as the enforcement actions brought by the Commission and by other regulators in this area have involved marketers who engaged in billing information transfer practices that are vastly different from those conducted by reputable marketers. In those cases, complete consumer billing information was transferred and used by a second marketer prior to and without consumer consent. Such practices are not typical or representative of the way in which responsible marketers, including PMA members, share consumer billing information. Rather, as described above, responsible marketers do not obtain or use complete consumer billing information without consumer knowledge and consent.

This fact is key because the unfairness standard requires the existence of material injury that consumers cannot reasonably avoid and for which there is no countervailing benefit to consumers or to competition. 15 U.S.C.§ 45(n). As long as consumers are required to consent affirmatively to the transfer of their billing information, there is no "unavoidable" injury to consumers because consumers can simply refuse to provide consent. In attempting to prevent consumer injury, the Commission must be careful not to sweep away non-injurious, economically-efficient activity. Where a consumer has affirmatively consented to the transfer of his or her billing information, there is no consumer injury. Therefore, it would be more appropriate to require informed verifiable consent rather than to ban all sharing of consumer account information irrespective of the consent of the consumer or the relationship of the parties. The ability of marketers to share consumer account billing information with consumer knowledge and consent affords enormous benefits and efficiencies to marketers and consumers alike. For example, if a consumer calls a travel agent and books an airline ticket, the travel agent might well ask if the consumer is interested in a rental car or hotel. If the consumer is interested, the same agent may book the rental car or hotel for the

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[4] See NPRM, 67 F.R. at 4513.

consumer and transfer the consumer's account billing information to the rental car company or hotel for billing purposes. Such an arrangement saves the consumer the inconvenience of having to retrieve their credit card again, and allows the marketers to save on the added telemarketing costs that would result from the consumer having to retrieve and restate their consumer account information. Under the Commission's proposed ban, the travel agent would be required to ask the consumer to repeat their account information for each subsequent and related purchase. This practice is likely to be annoying to the consumer and creates an inefficiency that has no countervailing benefit. Consequently, there is no legitimate reason to prohibit the use of and transfer of consumer billing information with the consumer's consent.

Moreover, prohibiting the use of preacquired account information by telemarketers would hinder competition in a significant manner. The Commission's proposed prohibition would apply only to telemarketers, who would no longer be able to compete with other marketers (e.g., Internet and/or direct mail marketers) because the other marketers would not be subject to the same prohibition. The Congressionally-mandated unfairness standard set out in 15 U.S.C. § 45(n) requires the Commission to consider these substantial anti-competitive effects that would result from its proposal.

To the extent that the Commission's concern in proposing an absolute ban on any sharing of consumer account billing information is to prevent unauthorized transfers and billing, the Commission's concerns can be achieved through far less draconian measures than the absolute ban being proposed. Rather than banning the transfer of consumer billing information altogether, the Commission can more effectively meet its goals by requiring marketers to disclose material billing information and to obtain express verifiable consumer consent prior to obtaining billing information from any source other than the consumer. The required disclosures would involve the identity of the seller that will be billing the consumer's account, disclosure of when and how much the consumer will be billed and sufficient information that would allow a reasonable

consumer to identify the account that will be billed. With regard to the manner in which the express verifiable consent is obtained, the PMA recommends that the Commission allow any one of the following three methods: (1) an express written authorization, including a verifiable electronic or digital signature; (2) a recorded express oral authorization that includes the seller's identity, the consumer's consent, the material billing terms, and the payment method; and (3) a written acknowledgement that is sent to the consumer before the consumer's billing information is submitted for payment.

Although the Commission currently proposes to eliminate the written acknowledgement method for express verifiable consent (NPRM, 67 Fed. Reg. at 4506), we do not believe that the record supports the elimination of this methodology. The only basis for the Commission's removal of this mechanism is the assertion that it is rarely used by industry. In truth, the assertion is inaccurate. Many marketers who utilize the upsell channel to offer products and services to consumers currently send such written confirmation to consumers. Moreover, the Commission's claim that marketers will not be harmed by the elimination of the written acknowledgement method because marketers have already adopted the taping methodology is actually factually inaccurate. While many outbound telemarketers have already adopted taping technologies, many inbound call centers have not done so. As the revised Rule is likely to impose requirements on many of these inbound call centers for the first time, and as taping technologies are fairly expensive, we cannot predict which verifiable consent mechanisms will work for such centers. For that reason, as a practical matter, we believe that the Commission should not eliminate the written acknowledgement method of verifiable consumer consent at this stage.

VI. CHARITABLE SOLICITATIONS

The proposed amendments to the TSR implementing the PATRIOT Act that would require TSR compliance by third parties who are conducting solicitations for charitable organizations are overly broad and restrictive, and not narrowly tailored to implement the mandates of the PATRIOT Act. The TSR amendments, as currently proposed, would effectively regulate the activities of charitable organizations that are clearly outside of the Commission's jurisdiction and authority. By subjecting for-profit entities who solicit on behalf of charitable organizations to the TSR in its entirety, the Commission will create unforeseen consequences for charitable organizations.

Currently, the vast majority of charitable organizations conducting fundraising campaigns employ third parties to conduct telephone solicitations on their behalf. These third parties, under the proposed amendments, would have to comply with the do-not-call registry. Consequently, the do-not-call registry requirement would, as a practical matter, unnecessarily restrict the ability of charitable organizations to hire third parties to solicit on their behalf. The amendments would require, in effect, all charitable organizations who hire third parties to comply with the TSR, resulting in the Commission indirectly, and without authority, regulating solicitations by charitable organizations. Moreover, charitable fundraising is afforded First Amendment protection, and such protection is extended to for-profit entities conducting solicitations on their behalf. See Riley v. National Fed'n of the Blind of North Carolina, 487 U.S. 781 (1988) (holding fundraising activities for charitable organizations are protected by the First Amendment).

In addition to impacting the ability of charities to raise funds, the proposed TSR amendment would further restrict charitable organizations' arrangements with for-profit entities that conduct fundraising activities on behalf of the charity ("commercial co-venturers"). Subjecting commercial co-venturers to the TSR would limit the type of assistance these entities could provide to charitable organizations and would severely

reduce the amount of charitable contributions being made in this context. This restriction clearly limits opportunities for charitable organizations, and is a consequence that is not addressed in the proposal or the PATRIOT Act.

Moreover, there are less restrictive and more direct alternatives to implementing the PATRIOT Act as it relates to solicitations by third parties for charitable organizations. A provision in the TSR mandating that third parties conducting charitable solicitations must comply with enumerated provisions that specifically implement the language of section 1011 of the PATRIOT Act would be less restrictive than the Commission's current proposed amendments.

A. Proposed Definition of Charitable Contribution

The proposed definition of "charitable contribution" should explicitly clarify that the definition does not include those contributions made as a result of a direct call from a charitable organization. Direct fundraising activity by charitable organizations is clearly not within the jurisdiction of the Commission.

B. Proposed Section 310.4(a)(6) Inclusion of Charitable Organizations For Caller ID Restrictions.

While the PATRIOT Act amended the definition of "telemarketing" in the Telemarketing and Consumer Fraud and Abuse Prevention Act ("TCFPA"), 15 U.S.C. § 6102, to include charitable contributions, nothing in the PATRIOT Act extended the Commission's jurisdiction over charitable organizations. As such, charitable organizations should not be included in proposed section 310.4(a)(6) regarding caller identification services ("caller ID"). This caller ID requirement should be limited to for-profit entities covered by the TSR. As provided in the proposed amendment to section 310.4(e) of the TSR, the name of the charitable organization must be identified initially by the telemarketer.

C. <u>Proposed Section 310.4(b)(1)(ii) and Section 310.4(b)(1)(iii) Denying or Interfering with Rights and the Proposed "Do-Not-Call" Registry</u>

The Commission's proposals for section 310.4(b)(1)(ii) and (iii) would prohibit a telemarketer from denying or interfering in any way with a person's right to be placed on a do-not-call registry and would extend to telemarketers soliciting charitable contributions. In addition, section 310.4(b)(1)(iii) proposes a national do-not-call registry on which consumers could place their names if they do not wish to receive telemarketing calls. All telemarketers would be required to "scrub" their lists against the national registry, removing all consumers who have placed their telephone numbers on the national registry. The proposed TSR revisions will virtually eliminate a charitable organization's ability to solicit charitable contributions from any person who has placed his or her name on the national registry.

While the proposed amendment to section 310.4(b)(1)(iii) provides that consumers who have placed their names on the national registry could allow telemarketing calls on behalf of specific charitable organizations by providing expressed verifiable authorization, this modification does not solve the problem created by the national registry. In order to effectuate their requests, consumers would have to provide written notice to the third parties soliciting for the charitable organization. This would require the consumers to know the third parties soliciting on behalf of the various charitable organizations.

The Commission's proposed amendments are very restrictive, and are likely to have a grim effect on charitable organizations by regulating the ability of charitable organizations to hire third parties to conduct fundraising protected under the First Amendment. As such, requiring third parties that solicit charitable contributions to comply with section 310.4(b)(1)(ii)-(iii) would be a violation of the First Amendment

protections afforded to charitable organizations and to those soliciting funds on their behalf.

VII. THE PROPOSED NATIONAL DO-NOT-CALL REGISTRY

We would strongly suggest that the Commission revisit and re-evaluate the legal and structural underpinnings for its proposed national do-not-call registry. As a legal matter, the statutory authority to create a national do-not-call registry was expressly vested by Congress in a federal regulatory agency other than the Commission. Moreover, the Commission's current proposal contains a number of practical operational deficiencies that must be remedied before the PMA can realistically consider supporting the proposal.

In sharp contrast to the Commission's proposed registry, many of our members have already used the Direct Marketing Association's ("DMA's") Telephone Preference Service ("TPS") for over a decade. Based on this experience, our members have confidence in the TPS and in the DMA's ability to manage the TPS in a manner that meets the needs of all of the stakeholders in the process. Many of our operational concerns regarding the Commission's proposed registry have already been addressed in the TPS and, to a lesser extent, in the various state-based do-not-call lists. The imposition of a layer of incomplete federal regulation over the existing layer of state and self-regulatory do-not-call lists appears to us to be both redundant and likely to confuse consumers.

To the extent the Commission believes that some federal action is needed to ensure compliance with the existing do-not-call lists, the Commission should consider certifying the DMA's TPS and/or any similar industry self-regulatory lists. The Commission could then make it an abusive practice to fail to subscribe to a certified list.

A. The Commission Does Not Have Legal Authority To Create A National Do-Not-Call Registry.

As an initial matter, the Commission's proposed national do-not-call registry appears to exceed the scope of the statutory authority granted to the Commission under the TCFPA, 15 U.S.C. § 6102, and to encroach upon the authority expressly granted by Congress to the Federal Communications Commission (the "FCC") in the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C.§ 227.

The Administrative Procedure Act makes it clear that a federal administrative agency may not issue a substantive rule "except within jurisdiction delegated to the agency and as authorized by law." 5 U.S.C. § 558(b). In the instant situation, Congress delegated to the Commission the right to promulgate rules "prohibiting deceptive telemarketing acts and practices and other abusive telemarketing acts or practices" 15 U.S.C. § 6102. However, nowhere in the TCFPA does Congress directly or indirectly grant to the Commission the authority to create a national do-not-call registry. The absence of such a delegation is especially important when viewed in light of the express language in the TCPA requiring the FCC to consider the creation of a national do-not-call database, 47 U.S.C. § 227.[5] The fact that the FCC, after reviewing the evidence, declined to create such a database does not give the Commission the authority to do so.

In fact, Congress, which was presumably aware of the FCC's 1992 decision not to establish a national do-not-call database, adopted the TCFPA in 1994, and did not delegate to the Commission the authority to do what it must have known the FCC had not done. "It is hardly conceivable that Congress—and in this setting, any Member of Congress—was not abundantly aware of what was going on." FDA v. Brown &

[5] Indeed, 47 U.S.C. 227 (c)(1) required the FCC to "initiate a rulemaking proceeding" that would, in part "(A) compare and evaluate alternative methods and procedures (including the use of electronic databases, telephone network technologies, special directory markings, industry-based or company-specific 'do not call' systems, and any other alternatives, individually or in combination) for their effectiveness in protecting such privacy rights, and in terms of their cost and other advantages and disadvantages."

Williamson, 120 S. Ct. 1291, 1313 (2000)(quoting Bob Jones University v. US, 461 U.S. 574, 600-01 (1983)). Given that the clear statutory authority to create a do-not-call list was expressly delegated by Congress to the FCC and was nowhere expressly granted to the Commission, the establishment of a national do-not-call registry appears to be outside the scope of the Commission's statutory authority.

The Commission's NPRM attempts to read into the TCFPA the authority to create a national do-not-call registry from one minor reference to consumer privacy in the portion of the statute covering "abusive" practices. However, the types of abusive practices impinging on consumer privacy cited by Congress include obscenities and threats. Based on the examples given by Congress, we believe that Congress clearly intended that any residual "privacy" authority granted to the Commission under the statute cover only a fairly narrow category of improper practices conducted by a small segment of the industry, rather than the uncontroversial practices conducted by the majority of responsible telemarketers.

Moreover, the Congressional decision to vest the authority to create a national do-not-call database with the FCC rather than the Commission is a logical one. The FCC's jurisdiction is based on the telephone lines themselves rather than upon the nature of the entity using the telephone lines. For that reason, the jurisdictional limitations that apply to the Commission, such as its lack of authority over banks, common carriers, most insurance companies, and others, would not apply to the FCC. Any regulation by the Commission in connection with a national do-not-call registry is inherently limited in its effectiveness because of the large numbers and types of commercial and noncommercial entities that will ultimately reside well outside of the Commission's jurisdictional reach.

B. The Commission's Current Do-Not-Call Registry Proposal Is Operationally Impractical.

The Commission's current proposal is impractical for a number of reasons related to the manner in which the Commission proposes to operate the registry. While the Commission has not provided the public with detailed information in the NPRM, the information that is provided in the NPRM raises a number of serious concerns. Our specific practical concerns are discussed in turn below.

1. An ANI-Based Verification Methodology Will Lead To Increased Consumer Confusion.

The verification mechanism in the proposal is based solely upon Automatic Number Identification ("ANI") technology. As the Commission knows, such technology can be unreliable in many cases. Certain local telephone companies do not transfer the ANI, which means that the Commission's registry will not be accessible for consumers residing in those geographic regions. It is also estimated that approximately fifteen percent of consumers[6] relocate each year, which means that a consumer's telephone number may remain on the registry long after the consumer has moved and changed her telephone number. Consequently, a consumer who relocates may be confused when he or she receives calls after having placed her name on the registry. Similarly, a consumer who acquires a reassigned number that had previously been placed on the registry may inadvertently find herself on that list against her wishes. As discussed below, to reduce the level of consumer confusion that would be created by an ANI-based approach, the Commission will be required to collect consumers' names and addresses, thus increasing consumers' concerns regarding the databases that the

[6] Fifteen percent of the United States population relocated between 1999 and 2000, according to the U.S. Census Bureau, Mobility Status of the Population by Selected Characteristics: 1980 to 2000, Statistical Abstract of the United States, 2001.

government maintains and also increasing significantly the costs associated with the maintenance of the registry.

2. A Prior Business Relationship Exemption Must Be Created.

The Commission's current proposal contains no exemption for prior business relationships. While industry is sensitive to the needs of those consumers who do not wish to be contacted by unfamiliar companies or entities, reputable marketers have a substantial interest in contacting consumers with whom they have an existing or prior business relationship. The needs of such reputable and responsible marketers should be taken into account by creating an exemption for established business relationships. The scope of the exemption should also fit existing business practices. For example, businesses typically consider themselves to have a prior business relationship with a consumer if the consumer has had any business contact with the marketer, including customer service contacts, change of address contacts, survey response contacts, and other similar contacts, in the previous two years.

3. The Registry Will Not Be Meaningful Without Federal Preemption.

Any federal registry must preempt state do-not-call lists to be meaningful. If the federal registry does not preempt the state lists, at least with respect to interstate calls, there is no practical reason to create a federal registry. Our members would be required to scrub their marketing lists against a large number of state, federal and self-regulatory do-not-call lists, each with its own set of exclusions, exemptions, and renewal periods. The process would be incredibly complex, and the associated costs would be likely to drive many smaller telemarketing businesses out of existence. Moreover, consumers will likely be confused about which of the many lists apply to them and how each such list affects them.

4. The Registry Must Contain A Renewal Period Requirement.

Any federal registry must contain an appropriate renewal period requirement. The Commission's current proposal is silent regarding the renewal period for do-not-call requests. If the Commission relies upon an ANI-based verification mechanism despite the existence of the practical problems described above, the renewal period should be appropriately short, for example, one year, to take the structural problems into account. If the Commission utilizes the same types of name and address verification requirements as the DMA's TPS, we believe that a longer renewal period requirement, at the most five years, would be appropriate. To that end, we note that the renewal period for the TPS is five years.

5. Only Individual Requests To Be Placed On The Registry Should Be Accepted.

Any do-not-call regulation must require that any requests to be put on the list come from the individual directly. In other words, requests from third parties should be prohibited. Otherwise, it is likely that a whole new industry, similar to the disreputable segments of the credit repair industry, will arise to offer, for a nominal fee, to put consumers on the list.

VIII. THE PROPOSED ZERO PERCENT ABANDONMENT RATE

The Commission's proposal to adopt a zero abandonment rate exceeds the scope of the statutory authority delegated to the Commission under the TCFPA, and encroaches upon the authority expressly granted by Congress to the FCC. In Section 227 of the TCPA, Congress delegated to the FCC the authority to regulate automatic

telephone dialing systems. The FCC adopted regulations in accordance with its statutory mandate, but did not impose a maximum abandonment rate. The Commission, no matter its good intentions, cannot now exercise authority in an area Congress expressly delegated to the FCC. "[N]o matter how 'important, conspicuous, and controversial' the issue, and regardless of how likely the public is to hold the Executive Branch politically accountable, . . . an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress." FDA v. Brown & Williamson, 120 S. Ct. at 1315.

Aside from the Commission's lack of statutory authority, there are other practical reasons to avoid imposing a zero percent abandonment rate for predictive dialers. Predictive dialers are vital to a telemarketing service's productivity because they minimize operator downtime. Imposing a zero abandonment rate removes these efficiencies and effectively imposes a de facto ban on the use of predictive dialers. Many smaller telemarketing call centers do not have the equipment necessary to achieve a zero abandonment rate. These companies would be required to incur substantial costs to upgrade their existing equipment. For smaller companies with limited resources, these costs may be prohibitive. Ultimately, the imposition of a zero percent abandonment standard is likely to result in many telemarketers, especially smaller ones, going out of business and in many workers losing their jobs.

The burden of this regulation would not be outweighed by the perceived benefit. Any regulation adopted by the Commission would reach only a segment of the industry using predictive dialers. Portions of the industry that are exempt from the Commission's jurisdiction, such as political fundraisers, financial institutions, and common carriers, are some of the most egregious offenders with very high abandonment rates. Thus, the Commission's adoption of a zero percent abandonment rate will not provide consumers the protection the Commission is seeking to achieve. Consumers will continue to experience the frustration of abandoned calls. Yet, the

imposition of a zero abandonment rate on a portion of the telemarketing industry will result in a severe adverse economic impact on that particular portion of the industry.

If the Commission is intent on adopting a maximum abandonment rate despite its questionable legal authority to do so, the Commission must impose a standard that avoids unduly harming the economic efficiencies presented by predictive dialer technology. The PMA believes that a five percent abandonment rate standard would be sufficient to meet the needs of those consumers who object to abandoned calls without imposing the egregious economic burden of a zero percent standard.

The imposition of a maximum abandonment rate standard must also take into account the fact that abandonment rates can vary depending on factors such as time of day and number of operators available. Therefore, abandonment rates must be measured over a sufficiently long period of time, such as thirty days, to allow for short-term fluctuations.

IX. CONCLUSION

The comments expressed above reflect the concerns and experiences of the PMA's membership and leadership. Although the PMA has attempted to present its comments in the most comprehensive manner possible, the undersigned would be pleased to respond to any questions the FTC staff may have regarding the forgoing during the June Public Forum, as well as provide any additional information the PMA can offer.

Respectfully Submitted,

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