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Executive Director

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Office of the Secretary
Room 159
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, D.C. 20058

RE: In the matter of the Telemarketing Sales Rule, 16 C.F.R. Part 310
FTC File No. R411001

To Whom it May Concern:

The American Bankers Insurance Association (ABIA) is pleased to provide the following comments on proposed changes amending the Federal Trade Commission's (FTC) Telemarketing Sales Rule (Rule), 16 CFR Part 310, released January 22,2002. ABIA is a separately chartered trade association and nonprofit affiliate of the American Bankers Association (ABA) comprised of national and state-chartered depository institutions, insurance companies and other companies that market insurance products on behalf of banks. ABIA's mission is to develop positions and strategies on bank-insurance related matters, represent those positions before state and federal governments and in the courts, and support bank-insurance related programs and activities through research, education and peer group information sharing.

ABIA believes it is important to recognize that the FTC's rule does not necessarily remedy a deficiency in privacy or consumer protection; there is a significant body of privacy law that has been in place for some time, specifically including the extensive requirements of the Gramm-Leach-Bliley Act (GLBA) of 1999. Under that body of law, financial institutions have developed marketing programs with their affiliates and nonaffiliated third parties with whom they have established service provider or joint marketing relationships. ABIA is concerned that the proposed rule would disrupt these existing marketing operations.

Nevertheless, ABIA supports the idea of a national "do not call registry," but believes that changes in the proposed rule are needed to ensure that compliance with the requirements of such a registry do not increase the operational costs of banks' marketing programs. We have the following specific comments:

Pre-acquired billing information: To the extent the proposed rule would affect the marketing operations of financial institutions, the Rule is contrary to the Gramm-Leach-Bliley Act.

Although financial institutions such as banks are exempt from the Federal Trade Commission Act,[1] the proposed rule would affect bank operations to the extent it restricts the telemarketing activities of nonaffiliated third parties and subsidiaries the bank uses to market its products and services. Such restrictions on legitimate marketing activities involving financial institutions and their subsidiaries, as well as nonaffiliated third parties with whom they have service provider and joint marketing arrangements, would contravene the privacy provisions of GLBA,[2] including the authorized disclosure of nonpublic personal information for marketing purposes.

Congress, in drafting GLBA, incorporated the concept of "functional regulation," which directed several federal agencies to coordinate their rulemaking operations and urged the states to establish and enforce a comprehensive privacy framework. Specifically, Section 504(a) of the GLBA requires several federal regulatory agencies, ***expressly including the FTC***, to "consult and coordinate" among themselves and with representatives of state insurance authorities "to assur[e], to the extent possible, that the regulations prescribed by each such agency and authority are ***consistent and comparable*** with the regulations prescribed by the other such agencies and authorities." (emphasis added) Such coordination has occurred, resulting in privacy regulations being issued by the various federal regulatory agencies and the development by the National Association of Insurance Commissioners of a model privacy act, which has been adopted in many states. The proposed rule would, therefore, disrupt a coordinated body of federal and state privacy laws and regulations enacted since passage of GLBA.

GLBA specifically addressed the use of account numbers for billing purposes. Generally, Section 502(d) prohibits a fmancial institution from disclosing customer account numbers to a nonaffiliated third party for telemarketing and other marketing purposes. This prohibition does not prohibit such disclosure to affiliates, however, and the implementing regulations permit the disclosure of encrypted account numbers to nonaffiliated third parties. Moreover, the FTC's own regulations implementing GLBA[3] permit the disclosure of encrypted account numbers to nonaffiliated third parties and permit the sale of a business's own products through its agent as well as through affinity programs.

This substantial body of privacy law is the backdrop against which the FTC has proposed its amendments to the Telemarketing Sales Rule. GLBA does not limit the authority of a financial institution to disclose nonpublic personal information

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1 15 U.S.C. § 45(a)(2). A recent federal court decision held that a subsidiary of a national bank, such as a mortgage company, falls within the FTC's jurisdiction, see Minnesota v. Fleet Mortgage Corp., 181 F. Supp.2d 995 (D. Minn. 2001).

2 Pub. L. 106-102.

3 16 C.F.R. § 313.12.

to an *affiliate* for marketing via any medium – including telemarketing – assuming the financial institution has provided affected customers with the notice required by Section 502(a). See **GLBA § 502(b)(**1). It would be inconsistent with GLBA's statutory framework for the FTC to now modify its existing telemarketing regulations to prohibit the use of customer billing information that is clearly permitted by **GLBA,** the coordinated implementing regulations and the FTC's own regulations!

A financial institution is permitted to disclose nonpublic personal information to a ***nonaffiliated thirdparty*** without providing a customer with a notice of the customer's opportunity to "opt out" of such disclosure for the nonaffiliated third party "to perform services for or functions on behalf of the financial institution, including marketing of the financial institution's own products or services or financial products or services offered pursuant to" a joint agreement. **GLBA § 502(b)(2).** While **GLBA** Section 502(d) limits the disclosure of account numbers to nonaffiliated third parties for marketing purposes, it provides some exceptions to that limitation. The **GLBA** authorizes a financial institution to disclose customer account numbers in an encrypted form (which numbers are not considered to be "account numbers"). It also authorizes a financial institution to disclose customer account numbers to market products in certain limited scenarios.

For example, privacy regulations issued by the Office of the Comptroller of the Currency (OCC) provide that the limit on sharing account number information for marketing purposes set forth in GLBA § 502(d) –

> does not apply if a bank discloses an account number or similar form of access number or access code:
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> (1) To the bank's agent or service provider solely in order to perform marketing for the bank's own products or services, as long as the agent or service provider is not authorized to directly initiate charges to the account; or
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> (2) To a participant in a private label credit card program or an affinity or similar program where the participants in the program are identified to the customer when the customer enters into the program.[4]

FTC proposed rule section 310.4(a)(5), however, would prohibit a financial institution from engaging in several activities the **GLBA** expressly authorizes. **The** proposed rule provides:

> Abusive conduct generally. It is an abusive telemarketing act or practice and a violation of this Rule for ***any seller or telemarketer*** to engage in the following conduct:
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> . . . .

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4 16 C.F.R. Part 313.

5 12 C.F.R. § 40.12(b).

(5) Receiving *from* ***anyperson*** other than the consumer or donor for use in telemarketing any consumer's or donor's billing information, or disclosing any consumer's or donor's billing information ***to anyperson*** for use in telemarketing. . . .

FTC proposed rule section 310.2(c) defines the term "billing information" to mean "any data that provides access to a consumer's or donor's account, such as a credit card, checking, savings, share or similar account, utility bill, mortgage loan account or debit card." Under the proposed Rule, for example, a bank would be prohibited fiom disclosing certain customer nonpublic personal information, notably an account number, to a mortgage subsidiary for the subsidiary to contact the customer via telemarketing – a practice that is clearly authorized under the GBLA. As a result, proposed section 301.4(a)(5) should be deleted, or it should be modified so as not to prohibit marketing activities permitted by the GLBA.

Creation of a "Do Not Call Registry"

FTC proposed rule section 310.4 establishes a national do not call list, and telemarketers are prohibited from initiating telemarketing sales calls to individuals on the list unless the individual has provided the telemarketer with "express verifiable authorization" to do so. State statutes creating state do not call lists would not be preempted, so that a telemarketer will have to monitor more than one do not call list. To ensure continued compliance with the requirements of the national do not call list, telemarketers will have to periodically purchase lists of the names of individuals who have elected to be on the do not call list.

As a way to reduce the burden and expense of complying with this requirement, state statutes must be preempted. There is no need for a telemarketer to have to contact as many as 51 different jurisdictions to determine whether a customer has placed his or her name on a do not call list. Additionally, we urge the FTC to exempt established customers from the do not call list requirements. This is especially important in the financial services context, in which customer relationships develop fiom various business transactions and often continue over many years.

Expanded definition of "outbound telephone call"

FTC proposed rule section 310.2(t)(2) would expand the definition of "outbound telephone call'' to include a customer-initiated telephone call that "is transferred to a telemarketer other than the original telemarketer." Because of this expanded defmition, financial institutions responding to a customer inquiry could inadvertently violate one of the restrictions on outbound calling and harm both themselves and the customer. If, in order to satisfy a customer request, an institution could only respond to the request by transferring the customer to another telemarketer, a breach of the Rule would occur.

An example would be a customer inquiry of a bank loan officer about the status of a mortgage. Assume the officer responding to the customer inquiry asks whether the customer would be interested in refinancing the mortgage, an option in which the customer expresses interest especially during a period of declining interest rates, and transfers the caller to the bank's refinancing group. Under the proposed Rule, that would be deemed to be an "outbound telephone call." We urge the FTC to delete this expansion of the definition of "outbound telephone call" or exempt from the outbound calling requirements banks, their affiliates, and nonaffiliated third parties who provide services on the bank's behalf or with whom the bank has a joint marketing relationship.

In conclusion, we urge the FTC to modify the proposed rule to recognize the substantial body of coordinated laws and regulations that has developed as a result of the GLBA and to recognize the importance of a bank being able to respond to customer inquiries in an efficient fashion.

Regards,

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