April 15, 2002

VIA HAND DELIVERY

Mr. Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: Telemarketing Rulemaking—FTC File No. R411001

Dear Secretary Clark:

The signatories to this letter include trade associations ("Associations") whose members will be directly impacted by the Federal Trade Commission's proposed changes to the Telemarketing Sales Rule ("TSR"). Some of these Associations have independently submitted comments in this proceeding. There are significant issues about which the Associations share common concerns regarding the Commission's proposal. For this reason, the Associations have determined that it would be useful to submit this letter collectively.

The Associations believe the Commission has laudable goals behind its proposal to amend the TSR and look forward to working with the Commission as this rulemaking proceeds.

We are concerned, however, that a number of the Commission's proposals such as the creation of a national do-not-call list, the proposed redefinition of upsells, the proposed ban on the use of pre-acquired account information, and the limitations on predictive dialers, to name just a few, exceed the scope of the Commission's rulemaking authority and/or fall outside the scope of the Commission's jurisdiction, are far more restrictive and burdensome than necessary to achieve the Commission's stated objectives, and will have a negative economic impact on the industry and the economy. Moreover, when a government agency seeks to restrict the speech, even in a commercial context, of a person, it must do so after significant scrutiny. We believe that certain of the proposed regulations will have the effect of severely restricting, if not functionally banning, legitimate telemarketing activities and marketing practices. Further, we believe that many, if not all, of the Commission's stated objectives can be achieved through more narrowly tailored proposals.

We look forward to further discussion of this at the June workshop.

It is critical for the Commission to strike the appropriate balance between consumer choice and burdens on businesses. Telemarketing is an important contribution to the U.S. economy. Consumer telephone marketing generated $274.2 billion in 2001 sales. In 2001, the

telemarketing industry was estimated to employ 4.1 million workers. Telemarketing is a vital and important element of economy. Efforts should be directed to fraudulent practices and not legitimate business practices.

Set forth below are comments aimed at assisting the Commission in striking this balance on the proposed national do-not-call list, predictive dialing and Caller ID services, disclosures for pre-acquired account information and upselling, the classification of Internet and Web services as outside of the B-2-B exemption, and the treatment of e-mail and faxes within the direct mail exemption.

The Proposed National Do-Not-Call List Should Contain Preemption, An Exception for Individuals With A Pre-Established Business Relationship, and an Annual Renewal.

An FTC national do-not-call list should not be established unless the list contains broad preemption, an exception for businesses to contact individuals who place themselves on the list with whom they have a pre-established business relationship, and a requirement that individuals annually renew their choice to be on the do-not-call list.

Any national do-not-call list that is established must preempt state laws so that companies will not have to face the significant burden of complying with many laws in the interstate call context. In the past several years, many states have enacted do-not-call lists, and numerous additional states are considering additional proposals for state do-not-call lists. An approach where there exists one list to which telemarketers could subscribe, which would encompass both state lists and a national list, should be evaluated. We note, however, that it appears that the Commission does not have statutory authority to create such a list.

If a national do-not-call list is ultimately created by the Commission, it must preserve the ability of a business to communicate with individuals with whom they have a pre-established business relationship but who register for the do-not-call list. Legitimate businesses should be able to contact customers who in many instances have themselves initiated relationships. Similarly, it is unlikely that consumers would realize that the result of placing themselves on a national do-not-call list is that trusted businesses with which they have had a long-standing business relationship would no longer be permitted to contact them. The consequences on businesses of not being able to contact those consumers who have placed themselves on a national do-not-call list but with whom they have a pre-established business relationship would be far more significant than under the existing TSR.

Finally, if an FTC-administered national do-not-call list is created, it must have a renewal period to better ensure the accuracy of the list. In our highly mobile society, it is estimated that 20% of the population moves on an annual basis. A national do-not-call list that collects solely telephone information or that makes name optional would require at least an annual renewal for the list to have any semblance of accuracy.

Predictive Dialing and Caller ID Services

The Associations are supportive of evaluating measures that will make predictive dialing more effective and limit abandoned calls. However, the Commission's conclusion that abandoned calls without disclosures violates the TSR will limit tremendous business efficiencies and will not be a result favored by consumers. Likewise, the Associations support limiting the blocking of Caller ID services, so long as the proposal does not extend to affirmatively require disclosure and display of Caller ID.

The use of predictive dialers is a common practice in industry, both for telemarketing and in other areas where businesses call consumers, such as bill collection. The use of predictive dialers for telemarketing results in only a very small percentage of calls being abandoned. It is not likely that consumers will desire that disclosures be required for abandoned calls, particularly on consumer voice mail or answering machines. Any proposed regulation of predictive dialers must recognize and allow to continue the tremendous economic efficiencies that result for business from the use of predictive dialers, ultimately passed on to consumers in less expensive goods and services.

The Associations support the Commission's proposal to limit the blocking of Caller ID services, so long as the proposal does not extend to affirmatively require disclosure and display of Caller ID. If Caller ID is functioning, it provides another means of consumer choice with respect to those contacting them. However, affirmative disclosure of Caller ID raises significant technical limitations. A requirement of display of caller ID may be both technically impossible given the current architecture of the phone system, as well as potentially very costly for businesses to implement. As emphasized by the FTC in the Notice, many telemarketers use a large "trunk side" connection, which is not capable of transmitting Caller ID information.

The Commission's Goals Behind its Proposal to Treat Upsell Calls as Outbound Calls Can Best Be Accomplished Through Disclosures.

The Commission proposes to expand its definition of "outbound calls" to include "(1) when, in the course of a single call, a consumer . . . is transferred from one telemarketer soliciting one purchase to a different telemarketer soliciting a different purchase, and (2) when a single telemarketer solicits purchases on behalf of two separate sellers." The Commission's stated goals for expanding the definition are to ensure that consumers receive material disclosures in such situations and, more specifically, that consumers understand that they are dealing with a separate seller and that they are being solicited for a separate purchase. The Commission can best accomplish its goal in these situations by specifically requiring the disclosures, designed to communicate the type of information the Commission deems relevant, rather than incorporating inbound upsell calls into a definition of "outbound call." Subjecting all upsell calls, particularly inbound upsell calls, to all of the Rule's requirements applicable to outbound calls will not only do little to advance the Commission's stated objectives, but may actually result in illogical consequences. For example, under the Commission's proposal, such calls would be subject to both calling time restrictions and the current and proposed do-not-call list requirements. Neither of these provisions makes sense in the inbound channel, and indeed it would be functionally impossible for a marketer to comply. Thus, the Commission's proposal

may well amount to a functional ban on these types of calls. If the Commission's goals are to ensure that consumers exposed to such calls understand that they are dealing with a separate seller and that they are being solicited for separate purchase transactions, these goals can best be achieved by requiring disclosure of such information on all upsell calls.

The Commission's Concerns About Pre-acquired Account Information Can Be Handled Through Notice and Consent.

The Commission's goals behind its proposal to ban any transfer or use of pre-acquired account information can likewise be achieved through far less draconian means. The sharing of consumer account billing information among marketers with disclosure to and consent from the consumer is a legitimate and valid marketing practice that provides enormous efficiencies, convenience, and benefits to marketers and consumers alike. Contrary to the Commission's allegations, such transfer with consumer notice and consent is not inherently abusive or unfair. The Commission's concerns appear to relate to situations in which the consumer's billing information has been transferred or used without the consumer's knowledge or consent. Therefore, the Commission's goals can be properly and directly advanced by requiring that consumers be notified prior to any transfer occurring, and requiring them to provide their informed consent.

The Telemarketing of Internet and Web Services Should Not Be Added to the Exception to the B-to-B Exemptions.

The Commission's current enforcement powers are more than sufficient to address the perceived problem. The problem identified in the cases cited by the Commission and in the majority of cases the Commission has brought in this area, focuses on the practices of "website crammers." These practices consist of contacting small businesses and offering them an introductory 30-day free trial Web site, then fraudulently charging the small business either through the phone bill or by direct invoicing. The definitions of "Internet services" and "Web services" in the B-to-B context that the Commission proposes to subject to the TSR are far broader than necessary to cover these practices, encompassing virtually every kind of service offered in connection with the Internet. If the Commission proceeds down this path, it should specifically limit the exception to the narrow area in which it perceives a problem. Likewise, a national consumer do-not-call list or time of day calling restriction should not be applicable to telemarketing to <u>businesses</u> as a result of the proposed exception to the B-2-B exemption.

Disclosures for E-Mail and Fax that Fall Within the Direct Mail Exemption Should Occur on the Telemarketing Call.

The Commission proposes in its rule that advertisements sent via facsimile machine or electronic mail be subject to the TSR's "direct mail" exemption. Under this exemption, the TSR does not apply to inbound calls resulting from such solicitations if the calls otherwise satisfy the TSR's disclosure requirements. The Associations support the addition of these communications to the exemption. However, the Commission should clarify that the required disclosures can be provided either through e-mail or over the phone. The proposal should not require disclosures

within the text of the e-mail for businesses that prefer to give the disclosures over the phone. This NPRM is not the appropriate forum to extend disclosure requirements in the context of electronic mail.

The Commission Should Apply the Disclosures in the USA PATRIOT Act Only to Professional Fundraisers Soliciting Contributions on Behalf of Charities and to For-Profit Firms Soliciting Contributions for Their Own Philanthropic Causes.

The do-not-call list and the other aspects of the TSR that the Commission proposes to apply to certain charities would severely hamper charities' ability to raise needed funds and impose burdens on those organizations least equipped to absorb such costs. The legislative history to the USA PATRIOT Act illustrates that Congress was concerned with preventing fraud by illegitimate charities, not curtailing solicitation on behalf of legitimate charitable organizations. Neither the text nor legislative history of the Act makes mention of a do-not-call list or the other requirements of the Rule, such as time of day restrictions, or otherwise gives any indication that Congress intended to subject charities or their agents to the entire TSR. Indeed, if the Commission is going to include professional fundraisers for charities within the TSR's scope, it may not exempt religious organizations, as it has proposed to do. In addition, the do-not-call list is unconstitutional because it is not narrowly tailored under the strict constitutional scrutiny with which the Supreme Court has analyzed restrictions on the ability of charities to solicit contributions through professional fundraisers.

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The undersigned Associations thank the Commission for its consideration of these comments. Please contact Ronald Plesser of Piper Rudnick LLP at 202/861-3969 for further information.

Sincerely,

American Teleservices Association
Direct Marketing Association, Inc.
Electronic Retail Association
Magazine Publishers of America
Promotion Marketing Association