CONSUMER MORTGAGE COALITION

April 9, 2002

Mr. Donald S. Clark
Secretary
Federal Trade Commission
Room 159
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

Re: Telemarketing Rulemaking — Comment (FTC File No. R411001)

Dear Mr. Clark:

The Consumer Mortgage Coalition ("CMC"), a trade association of national residential mortgage lenders, servicers and service providers, appreciates the opportunity to submit its views concerning the proposed amendments (the "Proposal") to the Telemarketing Sales Rule (the "Rule"), 16 C.F.R. Part 310, which the Federal Trade Commission (the "Commission" or "FTC") recently published. *See* 67 Fed. Reg. 4491-4546 (January 30, 2002), FTC File No. R411001.

For the CMC's members, as for most businesses and indeed most consumers, the telephone is a vital medium of communication. Our members use the telephone both to inform consumers about new products and other opportunities available to them that they might not otherwise learn of, and to allow consumers direct access on demand to product information, account information and customer service. The telephone has come to occupy an important place in our members' business plans because it is so well-adapted to multiple purposes: it is easy to use, flexible, fast and inexpensive for businesses and consumers alike. The CMC supports reasonable regulation of telemarketing so long as it does not harm these important qualities of telephone communications between businesses and consumers. Appropriate regulations add to the value of telephone communications by strengthening consumer confidence and comfort with the medium.

For those reasons, we support the FTC's proposal of a national "do not call" registry, subject to the modifications described below. We also generally applaud the Commission's effort to review the Rule in light of developments in the marketplace. Our comments on the Proposal are limited to provisions of the Proposal that are of particular concern to our members, and should not be interpreted as relating to the many other issues raised by this extensive and complex Proposal.

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Summary

The CMC would support a properly designed national do-not-call registry that addressed two issues:

- **The national registry should replace any state do-not-call lists.** The FTC should make clear that the Rule preempts state do-not-call list requirements. We believe that the Commission has ample authority to do so under well-established principles of federal preemption.

- **Companies should be allowed to contact their own customers (and those of their affiliates) even if the customer has placed his or her name on the do-not-call list.** This exception is needed to allow companies to interact effectively with their customers and to provide consistent treatment under the Telemarketing Rule and the Gramm-Leach-Bliley Act, 15 U.S.C. §§ 6801 *et seq.* ("GLBA").

We also have the following concerns about other aspects of the Proposal:

- The proposal to extend the Rule to cover many inbound as well as outbound calls appears to go beyond the Commission's statutory mandate to target deceptive and abusive telemarketing practices and would prohibit practices that benefit consumers.

- The proposed "express verifiable authorization" requirement for transactions not covered by the Fair Credit Billing Act ("FCBA") and Truth in Lending Act ("TILA") also exceeds the Commission's authority and is unworkable in its present form.

- Limitations on information-sharing should be consistent with the GLBA and its implementing regulations.

The Proposed Federal Do-Not-Call List

The CMC believes that the current Rule, which allows consumers to block future telemarketing calls on a company-specific basis, has worked well for most consumers. But burgeoning state do-not-call requirements, including requirements to observe do-not-call requests made to a centralized state registry rather than directly to the company placing the telemarketing call, have undermined the effectiveness of the federal Rule. For that reason, we would support a workable federal do-not-call registry.

<u>If There Is a Federal Do-Not-Call List, It Should Be the Only Do-Not-Call List</u>

The Commission asks what the "interplay" should be between the national do-not-call registry set forth in the Proposal and the various do-not-call provisions of state law. 67 Fed. Reg. at 4539, Question 6. The CMC's answer is simple: there should be preemption of all state do-not-call list requirements (including those aimed at intrastate calls) rather than interplay.

As nationwide lenders and servicers, the CMC's members are more aware than most of the costs created by widely varying state laws. Where the state laws merely restate the same basic limitations on telephone solicitations, in forms various enough to be difficult to comply with but ultimately without substantive significance, nothing is gained for consumers that justifies the additional costs of compliance. Those costs include fees imposed by the states to operate separate, duplicative do-not-call registries, which, as most states enact do-not-call requirements, may well dwarf the cost of a single, national registry.

The state do-not-call rules all try to give the consumer power to determine whether or not telemarketers will be able to call him or her. That is the same result the Proposal is trying to reach. That being the case, no purpose is served by maintaining multiple do-not-call lists in many states as well as at the federal level.

If the states are allowed to continue to maintain their state lists, several problems could arise:

- **Differences between state and federal requirements and among state laws.** For example, a state law might provide different procedures from the federal Rule — or no procedures at all — for a consumer who has placed her name on a do-not-call list to later "opt-in" to receiving calls from certain companies or certain types of callers. States may maintain different information in their databases, have different or no expiration dates for the do-not-call request, or have different procedures for tracking changes in telephone numbers.
- **Inconsistent database errors.** Any database with a significant number of entries in it is likely to have errors. One or more states or the FTC might improperly record a consumer's name or number, leaving telemarketers to guess whether the consumer had in fact made a do-not-call request. Consumers themselves might make inconsistent choices on different lists. If a state fails to maintain accurate do-not-call lists, consumers could conclude that telemarketers are not complying with the Rule — or that the FTC is not properly maintaining its nationwide registry.
- **Consumer confusion and negative competitive impact.** Consumers should have a clear understanding of the effect of placing their names on the do-not-call list. For example, if the Commission adopts its proposal for a national registry, then consumers who opt-out of calls should understand that they may still receive calls from some types of entities. But if the state do-not-call lists are allowed to remain in effect, then consumers who place their names on the national registry may still receive calls from local telemarketers who are operating on an intrastate basis. This situation would create particular problems in the mortgage industry, in which large, nationwide lenders, including CMC members, compete with many small mortgage brokers who would often be exempt from the federal rule because they operate solely within one state. A few unscrupulous brokers engage in what might be called "mortgage slamming," in which they attempt to mislead the consumer into thinking that the broker represents the consumer's existing mortgage lender who is offering to refinance the consumer's loan. If those brokers were exempt from the FTC do-not-call registry and could continue to make calls to consumers who had placed their names on the FTC list, our customers might believe that CMC members were

violating the law.

The Commission can best serve the interests of the telemarketing industry and the other industries that rely on it, without harming the interests of consumers, by simplifying and centralizing the compliance process. Preemption of state do-not-call list requirements by a single federal rule will be a significant step in that direction.

The Commission Has the Power to Preempt State Do-Not-Call List Requirements

In contrast to many other federal consumer protection laws, the Telemarketing and Consumer Fraud and Abuse Prevention Act ("Telemarketing Act") does not specify its effect on state laws. In the Telemarketing Act, Congress has only expressly reserved to the States the right to enforce rules created by the Commission, not the right to create competing rules of their own. *See* 15 U.S.C. § 6103 (Telemarketing Act enforcement by states); *cf., e.g.,* the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. § 1691d(f) (state laws preempted only to the extent they are inconsistent with ECOA).

Because the Act does not address the effect of the Commission's Rule on state laws, the Commission's power to preempt state laws in the Rule is determined under the Supremacy Clause of the Constitution. U.S. Const., Art. VI, cl. 2. As described by the Supreme Court in *Barnett Bank v. Nelson,* 517 U.S. 25, 31 (1996)—

> "This question [of preemption] is basically one of congressional intent. Did Congress, in enacting the Federal Statute, intend to exercise its constitutionally delegated authority to set aside the laws of a State? If so, the Supremacy Clause requires courts to follow federal, not state, law."

The *Barnett* Court went on to note that there are three types of preemption—(1) where the federal statute explicitly preempts state law; (2) where it is impossible to comply with both statutes (and, therefore, the federal law controls); and (3) where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Barnett,* 517 U.S. at 31, *quoting Hines v. Davidowitz,* 312 U.S. 52, 67 (1941). *See also New York v. Federal Communications Commission*, 486 U.S. 57, 64 (1988) (a properly authorized federal agency "may determine that its authority is exclusive and pre-empts any state efforts to regulate in the forbidden area").

We believe that the national do-not-call registry falls into the third category discussed in *Barnett*. Although it may not be impossible to comply with both the proposed federal do-not-call list and similar state laws, the state laws clearly would be an obstacle to the accomplishment of Congress's objectives in delegating to the Commission the power to issue the Rule. Even when the state law did not directly conflict with the federal law and the information on the state list matched that on the federal list, complying with the state law would impose additional costs on telemarketers and be of little or no benefit to consumers. Moreover, Congress specifically found that the interstate aspects of telemarketing and telemarketing fraud warranted a federal solution. *See* 15 U.S.C.

§ 6101(1) and (2). Thus, we believe that the courts would uphold a decision by the Commission that companies that are subject to the federal do-not-call registry requirement need not also honor state do-not-call lists.

The Commission's Preemption Power Extends to All State Do-Not-Call Lists

As noted, we believe that, in addition to preempting state do-not-call list laws for interstate telemarketers, the Commission should also make the federal registry the sole list for intrastate telemarketers. Under this approach, existing state lists might be integrated into the new federal list. We recognize that the Telemarketing Act does not literally apply to purely intrastate telemarketing campaigns. It applies only to "telemarketing," which is defined as "a plan, program, or campaign" that, among other things, "involves more than one interstate telephone call." 15 U.S.C. § 6106(4).

Because federal jurisdiction is determined on the basis of the entire "plan, program, or campaign," intrastate calls in the course of a campaign that involves two or more interstate telephone calls are subject to the federal Rule. But even a nationally-oriented telemarketer may have some telemarketing programs that are conducted wholly within the state in which the telemarketer is based, and, therefore, are not subject to the existing federal Rule. It is no less burdensome for a national company to comply with state law in an intrastate campaign than in a national campaign, particularly when most of the company's activity is interstate. Moreover, as noted, allowing intrastate telemarketers to disregard the federal list would create consumer confusion and place nationwide telemarketers at an unfair competitive disadvantage.

Since the problems created by the dual statutory do-not-call schemes are similar for interstate and intrastate calls, the FTC should have the power to preempt state law for intrastate calls, to the limited extent needed to create a single, national do-not-call list. There is ample precedent for preemption by a federal agency of state regulation of purely intrastate activities when the state regulation frustrates the congressional intent in enacting a federal statute. For example, in *New York v. Federal Communications Commission, supra,* the Federal Communications Commission ("FCC") issued a regulation containing technical standards for cable television systems that preempted more stringent state or local requirements. In upholding the FCC regulation, the Supreme Court noted that:

> "[E]ven in the area of pre-emption, if the agency's choice to pre-empt 'represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.'"

New York v. Federal Communications Commission, 486 U.S. at 64, *quoting United States v. Shimer,* 367 U.S. 374, 383 (1961). Assuming that "do-not-call" requirements were committed to the care of the FTC by the Telemarketing Act, the power to pre-empt state requirements that frustrate the purpose of a national registry follows from the power to issue the Rule. Preemption in this instance represents a "reasonable accommodation of conflicting policies," and it seems clear that, if Congress would have authorized the Commission to create a national registry, it also would have authorized it to preempt the power of states to mandate their own lists.

<u>Calls to or from Existing Customers Should Not Be Subject to the National Do-Not-Call List</u>

Under the Proposal, once a consumer placed her name on the national do-not-call registry, she could indicate that she was willing to receive telemarketing calls only by "opting-in" to each company through an express verifiable authorization. Although this procedure may be appropriate for companies with which the consumer has no ongoing relationship, it would create problems in many companies' dealings with their existing customers and would often not reflect the consumer's actual intent.

Companies often have good reasons to want to contact their existing customers. For example, in a period of declining interest rates, a mortgage lender may wish to use direct mail, e-mail, or telephone calls to contact existing customers who have high-rate mortgages and suggest that they consider refinancing. These contacts can benefit both the lender (who has a chance to keep the customer) and the consumer (who may be offered lower closing costs, a better rate, or other incentives to stay with the lender).

Under the existing Rule, a consumer who does not wish to receive calls from her mortgage lender may make a "do-not-call" request to that specific company. When a consumer does so, both the consumer and the company understand that the consumer does not wish to receive calls from that company. But consumers are unlikely to understand that placing their name on the national do-not-call registry precludes not only "cold calls" from companies with which they have no relationship, but also "warm calls" from companies with which they have chosen to do business. As discussed below, calls that the consumer makes to a company with which she does business could also become "outbound" telemarketing calls if the company transfers her to a corporate affiliate, and the company could not do so if she had placed her name on the national registry.

To prevent this type of consumer confusion, companies with an existing customer relationship with the consumer should not be subject to do-not-call requests placed on the centralized registry. For consistency with the GLBA, a "customer relationship" should be defined in a similar manner as in the Commission's privacy regulations — *i.e.* as "a continuing relationship between a customer and a telemarketer under which the telemarketer provides one or more products or services to the customer." *See* 16 C.F.R. § 313.3(i). Such customers could still request to have future calls blocked using the existing company-specific procedure.

Since a company may still have a need to communicate with its customers for some time after the formal relationship ends, a company should be allowed to treat a consumer as a customer (*i.e.,* disregard the national do-not-call registry with respect to that customer) for 12 months after the "customer relationship" ends. This would also be consistent with GLBA requirements. *See* 16 C.F.R. § 313.5(b)(2)(vi).

Inbound Calls Should Not Be Treated Like Outbound Calls

Under the Proposal, an inbound call from a consumer to a telemarketer would be considered an outbound call subject to the Rule if the call "is transferred to a telemarketer other than the original telemarketer; or involves a single telemarketer soliciting on behalf of more than one seller or charitable organization." Proposed 16 C.F.R. § 310.2(t)(2), (3). A telemarketer is defined as a "person . . . who, in connection with telemarketing, initiates or receives telephone calls to or from a customer or donor," and a "person" includes, among other things, "a corporation . . . or other business entity." Proposed 16 C.F.R. § 310.2(u). Thus, apparently, transferring a call from one corporate entity to another, even if they are affiliates within a holding company, would amount to transferring the call "to a telemarketer other than the original telemarketer" and would be treated as an outbound call from the second entity.

This Proposal would create an administrative nightmare for many mortgage lenders and other companies, even those that do not engage in what is commonly considered "telemarketing." Companies would have to institute procedures to check the national do-not-call registry at every step in which the consumer is transferred to a different "telemarketer." In contrast to the current Rule, which essentially applies to traditional "outbound" telemarketing, the Proposal could bring a company's entire retail workforce under the Rule.

<u>Clarify the Definition of Separate Telemarketers and Sellers</u>

As a preliminary matter, the Commission should clarify when a transfer of a call from individual to another is deemed to involve more than one seller or telemarketer. Although we oppose the Proposal to expand the definition of an outbound call, if the Commission does so, it should address these issues:

- The revised definition of an "outbound" call could be read to apply to referrals from one employee to another within the same corporate entity. This reading would be based on the fact that the definition of a "person" also includes an "individual," which could include each individual telemarketing employee. This interpretation is clearly not intended, since the Proposal makes it clear that it is intended to apply only to "external" calls, and the Commission should clarify this point.

- There is a suggestion in the preamble to the original Rule that separate "corporate divisions" — apparently meaning unincorporated divisions of the same corporate entity — can be treated as separate "sellers" under the Rule under certain conditions. *See* 60 Fed. Reg. 43842, 43844 (Aug. 23, 1995). This interpretation may make sense when applied to a company-specific "do-not-call" request, but it would create operational havoc if applied to the mortgage industry or other companies that train specialists in marketing complex products. For example, one element of the test in the preamble to the original Rule for whether separate "corporate divisions" are

> different sellers is whether they sell different products. Is a HELOC a different product from a first mortgage loan? Many if not most mortgage lenders assign the marketing of HELOCs to a different division from the company that markets first mortgages, but they do so because the consumer benefits from the specialized expertise of trained personnel. It makes no sense to restrict this practice under the guise of preventing deceptive or abusive *telemarketing* calls.

Consumers would not gain if they could not be transferred to the individual within a company who is best able to serve them. The Commission should clarify that, for purposes of the definition of an "outbound call," neither a separate division of the same company nor an affiliate of that company is a separate seller.

<u>Consumer-Requested Transfers Should Not Be Covered</u>

It is common in the mortgage industry for various services to be provided by different corporate entities. For example, in some diversified banking organizations, conventional mortgages may be provided by one (or more) mortgage companies, FHA mortgages by another mortgage company, and Home Equity Lines of Credit ("HELOCs") by an affiliated bank or thrift. This corporate structure is often virtually invisible to the customer and has no impact on her. For example, a customer may call a bank in response to an advertisement that promotes various products, including mortgage products. The bank itself is exempt from the Telemarketing Act under 15 U.S.C. §§ 6105(a) and 45(a)(2), and processing calls in response to an advertisement would be exempt in any case under both current and proposed 16 C.F.R. § 310.6(e). But if the bank, *in response to the consumer's own inquiry*, transfers the call to a mortgage company affiliate, the call could thereby be transformed into an "outbound" telemarketing call subject to all the requirements of the Rule.

Even when an unrelated firm offers the product, there is no reason to treat an inbound, voluntary call as equivalent to an outbound, unsolicited telemarketing call. A mortgage company may not offer a full array of products and may transfer the consumer to an unaffiliated marketing partner that can meet her needs. For example, a mortgage lender that does not offer a particular type of loan, such as a HELOC might, as a matter of practice, transfer all requests for HELOCs to another lender that does offer that product. Even if neither lender ever initiates a telemarketing call, they could both be subject to the Rule as proposed.

The Proposal to restrict such transfers is analogous to placing restrictions on a company's use of links to its affiliates or to other companies that offer products not available on the company's own web site. The customer's decision to click on the link is voluntary, and if the customer does not like the products offered on the target site, he can simply leave it. Similarly, if a customer who initiates a call and is transferred to another seller does not like the second "telemarketer's" wares, she can simply hang up.

Transfers of Inbound Calls Are Not Deceptive or Abusive

The Rule, as the Commission itself points out, is intended to satisfy the requirement of the Telemarketing and Consumer Fraud and Abuse Prevention Act to target "deceptive and abusive telemarketing acts or practices." 67 Fed. Reg. 4492 (January 30, 2002); *see* 15 U.S.C. § 6102(a)(1). But while the Commission discusses a number of activities that take place in connection with inbound calls, it does not make the case that such activities are likely to involve deceptive or abusive acts or practices, nor would allegations of deception or abuse be credible, given the nature of inbound calls. The consumer calling a business voluntarily puts herself in a business environment and knows that she is doing so. It should come as no surprise to the consumer if, once in that environment, she is solicited for products and services provided by affiliates or partners of the business – any more than it would if she went into a physical place of business and received an offer to purchase something in addition to what she came in for.

It is neither deceptive nor abusive for a waiter to ask a customer who has ordered dinner if she wants to look at the wine list. The customer benefits if the waiter "transfers" the customer to a sommelier who is better able than the waiter to help the customer make a good choice of wine. It is of no consequence to the consumer if the sommelier happens to be employed by a different corporate entity. Rules crafted for outbound calls simply should not apply to inbound calls initiated by the consumer.

Attempting to force inbound calls to fit the regulatory model created for outbound calls creates unjustifiable – indeed absurd – consequences. For example, suppose the consumer initiates a call to a business and is put on hold, and the on-hold message includes a phone menu allowing the consumer to ask to be transferred to an affiliate that offers other products. The Proposal would appear to treat *the consumer's* pressing a number to transfer the call to the affiliate as an outbound telemarketing call by the company that receives the transferred call. If the consumer initiated such a call before 8 a.m. or after 9 p.m., would the call then be an outbound telemarketing call at an impermissible time and *per se* abusive? This seems to be the literal result of the proposal, despite the fact that the consumer would have chosen the time of the call and presumably would only have called at a time the consumer herself found acceptable. There is simply no reasonable basis for treating a call the consumer has initiated, at a time and to a recipient of the consumer's choosing, as being subject to the same panoply of limitations as a call over which the consumer has no such control.

The Commission represents that it has proposed this change to the definition of an outbound telephone call in response to a reported increase in the practice of "up-selling." 67 Fed. Reg. at 4500. But the new definition covers far more than merely up-selling: by the Commission's own definition, up-selling involves an attempt to sell additional products or services after the consumer has provided billing information and closed a sale, whereas the new definition of "outbound telephone call" is not even limited to situations where billing information has been provided, much less to those where a sale has been made.

These inconsistencies illustrate why the Commission should not attempt to extend the Rule beyond the subject matter assigned to it by Congress. In the Telemarketing Act, Congress directed the Commission to provide protections against "deceptive telemarketing acts or practices and other abusive telemarketing acts or practices," not wholesale regulation of telephone calls in general. 15 U.S.C. § 6102(a)(1). The only times the Telemarketing Act discusses "telephone calls," it specifies "unsolicited telephone calls" or calls made by the telemarketer "to the person receiving the call[.]" 15 U.S.C. § 6102(a)(3). There is no indication that Congress intended for the Commission to regulate anything but outbound calls in the sense meant by the Rule before the Proposal, and there is no reason to think that the Rule, well-adapted to outbound calls in that sense, should be applied to calls initiated by consumers and then transferred by the company that receives the call.

It may be that the Commission intended the "inbound" calling proposal to apply only to situations in which one telemarketer *initiates* a call (or is treated as having done so under the existing Rule), and then transfers the call to a second telemarketer. If that is the case, then the language of the Rule should be revised to make the point clear.

Express Verifiable Authorization Should Be Fair and Workable

Under the Proposed Rule, a telemarketer would have to obtain a consumer's express verifiable authorization before submitting billing information for payment or attempting to collect payment for goods, services or contributions "when the method of payment used to collect payment does not impose a limitation on the customer's or donor's liability for unauthorized charges nor provide for dispute resolution procedures pursuant to, or comparable to those available under, the Fair Credit Billing Act and the Truth In Lending Act, as amended." Proposed 16 C.F.R. § 310.3(a)(3). Prudent telemarketers, understanding their general obligations under the Federal Trade Commission Act to avoid unfair or deceptive acts or practices in interstate commerce, already obtain express authorization from consumers. It appears, however, that the Proposal is the Commission's attempt to create more rigid, explicit requirements that substitute for the liability limitations and dispute resolution procedures of the Truth In Lending Act ("TILA"), including the Fair Credit Billing Act. But whereas these TILA provisions had the effect of increasing consumer confidence about the use of credit cards, we believe that these provisions of the Proposal will have the perverse effect of diminishing consumer enthusiasm for transacting business by telephone. The primary reason for this perverse effect is that it is unclear to what transactions the express verifiable authorization requirement applies – but it is clear how unscrupulous telemarketers will exploit this uncertainty.

With the additional requirements added by the Proposal, obtaining express verifiable authorization will be an expensive prospect for the ordinary telemarketer. "Express verifiable authorization" means:

> (i) Express written authorization by the customer or donor, which includes the customer's or donor's signature; or

(ii) Express oral authorization which is recorded and made available upon request to the customer or donor, and the customer's or donor's bank, credit card company or other billing entity, and which evidences clearly both the customer's or donor's authorization of payment for the goods and services that are the subject of the sales offer and the customer's or donor's receipt of all of the following information:

(A) The number of debits, charges or payments;

(B) The date of the debit(s), charge(s), or payment(s);

(C) The amount of the debit(s), charge(s), or payment(s);

(D) The customer's or donor's name;

(E) The customer's or donor's specific billing information, including the name of the account and the account number, that will be used to collect payment for the goods or services that are the subject of the sales offer;

(F) A telephone number for customer or donor inquiry that is answered during normal business hours; and

(G) The date of the customer's or donor's oral authorization[.]

Proposed 16 C.F.R. § 310.3(a)(3). Typically, the telemarketer realizes the greatest efficiencies by keeping its business interactions with consumers as much as possible confined to the telephone, and it will therefore avoid having to obtain express written authorization. But the express oral authorization requirement is scarcely less expensive to comply with. A telemarketer must be certain that the consumer receives a great deal of specific information – which involves up-front expense to the telemarketer in the form of training costs and on-going expense in the form of error-resolution costs, given that oral provision and confirmation of so much detailed information is bound to lead to regular errors. Then the telemarketer must make the information available "upon request" to both the consumer and the consumer's billing entity – which involves the expense of both maintaining sound records and retrieving them at irregular intervals. And the telemarketer will establish this authorization procedure knowing that the standard for its success will be that it "evidences *clearly*" the consumer's authorization, a high enough standard that the telemarketer must be prepared to tolerate few errors, or significant litigation, or both.

These expenses will constitute a strong incentive to telemarketers to avoid having to obtain express verifiable authorization by implementing limitations on liability and dispute resolution mechanisms comparable to those of TILA. But here the perverse effects arise:

- No express verifiable authorization is required when the "method of payment … impose[s] a limitation on … liability [and] provide[s] for dispute resolution procedures[.]" It is unclear from the Proposal whether the method of payment must so impose and provide as a matter of law, of regulation, or merely of the telemarketer's corporate policy. But it is clear that telemarketers more concerned with the bottom line than with legal compliance will be more likely to interpret this ambiguity to mean that appropriate corporate policies qualify, while those more concerned with limiting legal risk will interpret it to mean that they do not. Moreover, because the standard is simply one of "comparability," economic pressures will meet little resistance in convincing the less compliance-minded telemarketers to conclude that express verifiable consent is not required, because indeed their practices are "comparable" to TILA. Consumers will thus obtain the fewest protections in their dealings with the telemarketers from whom arguably they deserve the most.

- The proposal does not address whether other federal regulatory schemes are "comparable" to the FCBA and TILA. For example, Section 6(e) of the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2605(e), requires error resolution procedures for federally-related mortgage loans comparable to those for open-end credit in the FCBA. Limits on liability for unauthorized use are irrelevant in the context of a mortgage because a telemarketer cannot change the terms of the mortgage note. Similarly — and contrary to a suggestion in the Proposal — debit cards are subject to error resolution procedures and liability limits under the Electronic Fund Transfer Act ("EFTA") that differ only in small details from the FCBA/TILA provisions. *See* the EFTA's implementing Regulation E, Regulation E, 12 C.F.R. § 205.11. Congress cannot have intended, in enacting the Telemarketing Act, to give the Commission the power to rule on the adequacy of federally-mandated error resolution procedures. Thus, if the Commission decides to expand the express verifiable authorization requirement, it should, at a minimum, state that RESPA and the EFTA provide "comparable" protections to the FCBA and TILA.

If the Commission does not resolve the ambiguities in the Rule, telemarketing regulation will become not uniformly protective, but increasingly non-uniform in its treatment of consumers. Because consumer confidence is critical to the acceptance of any business technology, this increasing non-uniformity and the lack of confidence it will engender will mean that a Rule intended by Congress to eliminate deceptive and abusive telemarketing activities will end by hampering telemarketing in general, disproportionally harming the legally compliant telemarketers.

Limitations On Sharing Information Should Be Consistent With Gramm-Leach-Bliley Privacy Rules

Under the Proposed Rule, it would be an abusive act for anyone but the consumer to provide a telemarketer with the consumer's "billing information" unless "the consumer or donor has disclosed his or her billing information and has authorized the use of such billing information to process [a] payment for goods or services or a charitable contribution." Proposed 16 C.F.R. § 310.4(a)(5). The Commission explains that this is intended to curb the use of "preacquired billing information" to alter "the usual sales dynamic of offer and acceptance." 67 Fed. Reg. 4513 (January 30, 2002) (citing the comment letter of the National Association of Attorneys General).

Apart from the Commission's apparent acceptance at face value of an assertion that we think legally unjustifiable (the usual dynamic of offer and acceptance is precisely that: an offer, followed by a decision to accept, reject or counter-offer), we are concerned at the Commission's apparent willingness to solve an ostensible billing protection issue by imposing new privacy restrictions. If, as the Commission alleges, the chief abuse of preacquired billing information comes in the sale of products or services on a free trial basis for a limited time, followed by the immediate inception of billing for such products or services, *see* 67 Fed. Reg. 4513 (January 30, 2002), then the Commission should address that circumstance directly. If, on the other hand, the Commission really believes that the preacquisition of billing information is a privacy issue, it should address the problem in the context of privacy regulations rather than telemarketing regulations.

Instead of taking either of these approaches, the Commission – without comment and without apparent justification – replaces the GLBA privacy standard with a standard under which many activities explicitly permitted by the GLBA are now illegal, despite the fact that GLBA was enacted later in time than the Act and thus should be accorded some deference in any consideration of the reconciling of competing Congressional priorities.

We see at least three activities that the GLBA and the FTC's own privacy rule, 16 C.F.R. § 313, expressly permit, but that the Proposal's ban on sharing billing information would prohibit:

1. The GLBA expressly permits a financial institution to share customer information with its own agents without obtaining even the passive consent (that is, failure to "opt-out" after notice of right to do so) of the customer. 15 U.S.C. § 6802(b)(2); 16 C.F.R. § 313.13(a). Customer information clearly includes billing information, as defined by the Proposal. But the Proposal prohibits any institution, including a financial institution, from sharing billing information with its own telemarketing agent except with the prior *affirmative* consent (that is, "opt-in") of the consumer.

2. The GLBA also expressly permits a financial institution to share customer information with its fellow financial institutions for joint marketing purposes subject to appropriate safeguards, again without obtaining the customer's passive consent. 15 U.S.C. § 6802(b)(2); 16 C.F.R. § 313.13(b). Again, the Proposal prohibits such sharing without the consumer's prior affirmative consent.

3. The GLBA implicitly permits a financial institution to share encrypted customer information of any kind with any third party, so long as it does not share the encryption key as well, without obtaining the customer's consent. *See* 15 U.S.C. § 6809(4)(A). The FTC's privacy rule confirms this interpretation both in general, 16 C.F.R. § 313.3(o)(2)(G)(ii)(B), and specifically as regards account numbers, 16 C.F.R. § 313.12(c)(1). But the Proposal makes no exceptions for encrypted information of any kind, declaring any sharing of billing information without the consumer's affirmative consent illegal.

We see no reason why financial institutions should be subject to any more stringent rules in connection with the use of consumer information for telemarketing purposes than for other purposes, and for this reason we think the Rule should impose no more stringent limits on the sharing of billing information than the GLBA and the Commission's privacy rule impose.

The Rule Should Promote Responsible Telemarketing

In all of our comments, we are motivated by the desire to have a clear, logical rule to follow in our telemarketing activities. While we are aware that telemarketing can be abused, we are also aware of its tremendous potential as a tool for empowering consumers to make their own choices about the goods and services they want and the way they want to pay for them. We think the Rule can allow telemarketing to realize its full potential as a business practice, so long as it promotes responsible telemarketing practices without imposing undue burdens on telemarketers. We think that the Commission could point the Rule more firmly in that direction by acting on our comments, and we thank the Commission for the opportunity to comment in this way.

Please call me at (202) 544-3550 if you would like to discuss any of these issues further.

Very truly yours,

Anne C. Canfield
Executive Director