15 April 2002

Office of the Secretary, Room 159
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: Proposed Rulemaking to Amend the Telemarketing Sales Rule

On behalf of national direct marketers and publishers, we write to address the serious problems raised by the Federal Trade Commission's plan to establish a national "do-not-call" list. The proposed action is unconstitutional and may be violative of the National Environmental Protection Act.

The FTC's Proposed Action Violates The First Amendment to the Federal Constitution

The FTC's plan to create a national "do not call'' list is constitutionally infirm.

This country has a tradition of protecting the right to speak – a protection that extends beyond the political realm to the marketplace. The U.S. Constitution has long protected ***all*** speech from government restriction?including speech that simply proposes a commercial offer. ***See Virginia State Board of Pharmacy v. Virginia Citizens Council, Inc.***, 425 U.S. 748, 762 (1976); ***and see U.S. West, Inc. v. FCC,*** 182 F.3d 1224, 1237 (10th Cir. 1999) (telemarketing protected by First Amendment, as is mere exchange of marketing information). Under longstanding First Amendment jurisprudence, the government may regulate commercial speech ***only if*** 1) the government has a "substantial interest" in regulating the speech, 2) the regulation "directly advances" that interest; and 3) the regulation is "narrowly tailored" to achieving its asserted end. ***Central Hudson Gas & Elec. Corp. v. Public Sew. Comm.,*** 447 U.S. 557,563-6 (1980).

We seriously doubt the FTC will be able to establish that the interest it seeks to serve – with the creation of a national do-not-call list – is a "substantial one." The government "cannot satisfy [the 'substantial interest'] prong of the ***Central Hudson*** test by merely asserting a broad interest in privacy." *U.S.* ***West,*** 182 F. 3d at 1234-235. Moreover, as the judiciary has recognized, "privacy is not an absolute good because it imposes real costs on society" ***(id.,*** at 1235) – a truism particularly evident here. Therefore, the FTC must "specifically articulate" the substantial privacy interest that is served by its proposed list. In particular, the FTC must establish that, without the proposed restriction on speech, people will be subject to "specific and significant harm." ***Id.*** This is no small hurdle, and we seriously doubt the FTC can clear it.

Even assuming it can, the FTC's proposed do-not-call list will still fall to challenge because it is not "narrowly tailored" to achieving its asserted end. **A** regulation that burdens speech cannot be "more extensive than necessary." ***Central Hudson,*** 447 U.S. at 566. **A** regulation is "more extensive than necessary" – and thus, unconstitutionally overbroad – if less burdensome alternatives exist. ***City of Cincinnati v. Discovery Network, Inc.***, 507 U.S. 410,417 & n.13 (1993). Many less burdensome alternatives exist for people who wish to receive ***limited***

or even no calls from telemarketers. Indeed, a technological revolution has given life to myriad tools by which consumers can "protect" themselves from the telephone calls of unknown persons, including those of telemarketers. Indeed, telephone companies now provide services that enable consumers to easily avoid *all* unwanted calls.*

Furthermore, as for telemarketers for whom the consumer has no interest, the consumer can electronically instruct such callers to remove the consumer's name and telephone number from their sales lists. Under existing federal law, the telemarketers must honor such particularized requests for *ten years.* 47 C.F.R. § 64.1200(e). This alternative is far superior to the **FTC's** blanket do-not-call list, because it enables consumers to select the specific businesses from whom they do not want to hear, without compromising their right and ability to receive information from the businesses in which they may be interested. *Virginia State Board,* 425 U.S. *at* 756-57 (Constitution protects both right to communicate and right to receive communication); *Martin v. City of Struthers,* 319 *U.S.* 141, 143 (1943) (First Amendment "embraces the right to distribute literature and necessarily protects the right to receive it."); *U.S. West,* 182 *F.* 3d at 1232 ("effective speech" consists of a speaker and an audience, and "[a] restriction on either [] is a restriction on speech."). In other words, consumers can personalize their receipt of commercial information. See end note.

There are, of course, several other alternatives available to consumers seeking to avoid the calls of telemarketers (whether at particular times or at any time), none of which cost anything. Consumers can 1) list their name with the Telephone Preference Service, an industry-sponsored service that, upon request and for no fee, removes a consumer's name, telephone number and address from marketing lists; 2) screen calls, with the assistance of an answering machine; **3)** not answer; 4) or simply hang up. In sum, consumers already possess the tools necessary to avoid the calls of select or even all telemarketers. They are, therefore, not "captives" of telemarketers, and the FTC's proposed action is misplaced. *See Bolger v. Youngs Drug Products Corp.,* 463 *U.S.* 60, 72 (1983) (government restriction on speech only justified where " 'captive' audience" is subject to "intrusive" speech). On the contrary, consumers can easily and "effectively avoid further bombardment of their sensibilities" – *e.g.*, by simply screening their calls or by hanging up, which, much like the "journey from mail box to trash can," is "an acceptable burden, at least so far as the Constitution is concerned." *Id.,* quoting *Lamont v. Commissioner of Motor Vehicles,* 269 *F.* Supp. 880, 883 (S.D.N.Y.), *aff'd,* 386 F. 2d 449 (2d Cir. 1967). **As** such, the FTC's national, blanket do-not-call list is unjustified and unconstitutional.

The Proposed Action is Likely to Drive From Business The Companies Upon Which *Consumer-Initiated* Commerce Depends

The creation of a nationwide do-not-call list – offered for the sake of personal privacy – would not come without societal cost. Indeed, it would debilitate and likely drive from business the "call centers" upon which consumer-initiated "telecommerce" depends. This is because the businesses that provide inbound telecommunications service for consumers – *e.g.*, in connection with catalog and mail-order sales, subscription/cancellation services, and insurance services – require "outbound projects" in order to remain in business. That they do so makes sense. Meeting the demands of consumer-initiated calls is seasonal, peaking during certain holidays. **A**

company whose employees are devoted to handling inbound work between October through December needs outbound work to keep those same workers employed in January, when the inbound work falls off. Therefore, if outbound projects – *e.g.*, telemarketing work – dramatically decrease as a result of the FTC's proposed blanket ban, the call centers may not survive. At a minimum, their cost of operation will increase, and costs will be passed on to consumers. Indeed, a recent survey of telephone service bureaus confirms that, in order for such businesses to provide inbound service at reasonable price, they must have a sufficient amount of outbound work. The FTC's effort to restrict the ability to telemarket will adversely affect that balance.

In sum, the FTC's proposed do-not-call list will have serious repercussions for the telemarketing industry, not to mention the consumers who affirmatively seek to purchase goods **and** services by telephone. The government's effort to restrict telemarketing is short-sighted, and in the end, will only harm the consumers it seeks to protect.

The Proposed Action Will Adversely Affect The Environment, Necessitating The Preparation of an Environmental Impact Statement

Targeted marketing via the telephone is the most economical and environmentally-friendly way to sell goods and services to American consumers. This is because it obviates the need for consumers to physically travel to shops or stores in search of products or services, saving both time and gas. This efficiency results from telemarketing's incredible success: direct marketing (via telephone or mail) works because it targets consumers who have demonstrated an interest in a particular product or service. The telephone is particularly ideal for ordering and renewing subscriptions, memberships, and service contracts. As such, consumers have come to increasingly rely upon direct marketing for the purchase of goods and services. This increased reliance has dramatically reduced the need for physical storefronts, which themselves require more energy and impose greater environmental burdens than do telephone calls followed by the "carpooled" delivery of purchased products.

For obvious reasons, the FTC's proposed action may drastically reduce the ability to sell goods and services via telemarketing. In addition, and for reasons stated above, consumers' ability to themselves purchase via catalogs may be compromised as well, as "call centers" are forced to close in the face of insufficient "outbound telemarketing work." Either event would force consumers to climb into their cars and return to the mall for their wares, a result that itself would increase gas consumption and cause more air pollution. In light of the cumulatively serious effects on the environment, the FTC's restriction on telemarketing may "significantly affect[] the quality of the human environment," requiring the preparation of an Environmental Impact Statement under the National Environmental Protection Act. **40** C.F.R. 1508.18; *and* ***see*** FTC Rules of Practice, § 1.82 (detailing NEPA requirements). At a minimum, and *before* approving the implementation of a national do-not-call list, the agency must prepare an Environmental Assessment that fully evaluates the possible environmental effects of its proposed action, including the potential effects identified here. Only after conducting a meaningful environmental analysis, and concluding that the proposed action presents no serious environmental effects, may the agency decide to proceed with it.

The Federal Government Should Be Educating Consumers About Existing Protections, Not Eliminating A Means of Communication Needed Now More Than Ever

The irony of the FTC's proposal is that it is completely unnecessary and it comes at a time when telemarketing is needed more than ever.

The proposed do-not-call list is superfluous because federal law ***already protects*** consumers from the unwanted calls of telemarketers. Under the federal Telephone Consumer Protection Act of 1991 – which applies to "any person within the United States" (47 U.S.C. $227) – a consumer has the right to ask a telemarketer not to call again, and if the consumer so requests it, the caller must place the consumer's name and telephone number on its own "do not call" list. The request must be honored for 10 years. 47 C.F.R. §64.1200(e). Congress enacted the TCPA after lengthy and detailed consideration. Indeed, the TCPA was the culmination **of** nearly **a** year of hearings and congressional deliberations, aimed at creating a legislative scheme to protect consumers from unwanted telephone solicitation without unduly interfering with commerce and speech.

In addition to the TCPA, there are other protections for consumers seeking to avoid all telemarketing. Consumers can take advantage of the telemarketing industry's voluntary program, called Telephone Preference Service, that, upon request and at no charge, removes the names of consumers from marketing lists. The FTC should be educating consumers about existing laws, and existing protections, rather than burdening the industry with excessive and unnecessary laws. Instead, the agency is clearly committed to promoting its blanket ban, thereby encouraging consumers to sever convenient ties with businesses that would seek to reach them with **a** commercial proposal in which they may have an interest. This is not the proper role of the government.

Indeed, the FTC's proposal for telephone marketing could not be more ill-timed. Since the tragic events of September 11th, the American consumer has been understandably distracted, and an increasing number of companies have turned to the telephone to reach their customers, to invite them back, with special offers. Such businesses continue to struggle, however. Indeed, many sectors **of** the economy continue to suffer, due in no small part to the continuing uncertainty in the world, and the need for businesses to re-connect with customers, new and old, remains high. The government should be facilitating commerce, and easing this need to re-connect with the American consumer.

Respectfully Submitted,

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Endnote

*. For example, under Pacific Bell's "privacy manager" service, the consumer's telephone automatically screens all incoming calls whose numbers are 1) specifically "blocked" by the consumer; 2) "unavailable" (*i.e.*, not previously listed by or unknown to the consumer) or **3)** "out of the area." (Telemarketers would fall under one of the latter two categories). Under this service, the caller whose number satisfies one of the identified categories must then electronically identify himself or herself by way of a "caller id box," at which point, the consumer can accept the call, reject the call, or let it default to voicemail or an answering machine. The beauty of this service is that it enables consumers to avoid the calls of ***unwanted*** telemarketers, but take the calls of those offering products in which consumers believe they may have an interest. In other words, it is more narrowly tailored to achieving the stated end than a blanket-do-not-call list, with much less negative impact on speech. (This type of service is not unique to Pacific Bell; it is offered by companies nationwide).