Before the
FEDERAL TRADE COMMISSION
Washington, D.C. 20580

COMMENTS OF THE

DIRECT MARKETING ASSOCIATION, INC.

AND THE

U.S. CHAMBER OF COMMERCE

TELEMARKETING RULEMAKING—COMMENT
FTC File No. R411001

(Proposed Amendments to the Telemarketing Sales Rule)

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I. Introduction, Summary, and Background Information

The Direct Marketing Association ("The DMA") and the U.S. Chamber of Commerce ("the Chamber") are pleased to submit these comments on the Federal Trade Commission's ("Commission") proposed amendments to the Telemarketing Sales Rule ("TSR" or "Rule"). Telemarketing Sales Rule; Proposed Rule, 67 Fed. Reg. 4492 (proposed January 30, 2002) (to be codified at 16 C.F.R. pt. 310) ("NPRM," "Notice," "proposal," or "proposed Rule"). These proposed amendments could significantly impact telemarketing activities of The DMA's and the Chamber's vast memberships. As the Commission considers its proposed amendments, it is critical to strike the appropriate balance between consumer choice and burdens on businesses. Telemarketing is a vital and important element of the economy. Efforts should be directed to curbing fraudulent and abusive practices and not legitimate business practices. We look forward to working with the Commission as it explores these important issues.

A. The Direct Marketing Association

The Direct Marketing Association is the largest trade association for businesses interested and involved in interactive and database marketing, with approximately 5,000 member companies from the United States and more than 50 other nations. Founded in 1917, its members include direct marketers from every business segment, as well as the non-profit and electronic marketing sectors. Quite importantly, all aspects of the teleservices industry are represented in The DMA's membership. Accordingly, any change in the legal requirements for that segment necessarily will have an impact on The DMA and its members.

B. The U.S. Chamber of Commerce

The U.S. Chamber of Commerce is the largest federation of business companies and associations in the world. With substantial membership in each of the 50 states, the Chamber represents an underlying membership of more than three million businesses and organizations of every size, in every sector and region. An important function of the Chamber is to represent the interests of its members in important matters before the courts, the United States Congress, the Executive Branch, and independent regulatory agencies of the federal government.

The Chamber of Commerce joins in the policy issues presented in these comments. The Chamber, however, does not have the expertise to address the specific requirements of the TSR. It has relied upon The DMA for the development of the industry's response to the specific requirements of the proposed Rule.[1]

C. Summary of Arguments

In the NPRM, the Commission presents its proposed changes to the TSR as intended to "protect consumers from deceptive and abusive business practices, including practices that may be coercive or abusive of the consumer's interest in protecting his or her privacy." 67 Fed. Reg. at 4494. However well intentioned, the Commission's proposal unlawfully exceeds the Commission's jurisdiction; even if such a proposal were lawful, it fails to achieve its goals. The Commission's proposal would result in an unworkable scheme that would disappoint and frustrate consumers and seriously curtail and harm an entire sector of the economy that employs millions of people and brings goods and services to consumers. It also contradicts congressional intent and delegation of authority in this area. Moreover, it hinders charities' ability to raise funds for beneficial purposes, and raises serious constitutional issues under the First Amendment. The DMA and the Chamber respectfully submit that,

[1] The Chamber of Commerce has filed a separate set of comments exclusively on the constitutional issues in this proceeding.

irrespective of their superficial appeal, the Commission's proposals need much more careful review in light of their policy, statutory, and constitutional implications.

At the heart of the Commission's proposed Rule is the creation of a national do-not-call list. A national registry would be unnecessarily duplicative of The DMA's existing national database, which provides coverage exceeding the scope of the Commission's jurisdiction. It also would be an unwieldy and costly proposal that exceeds the Commission's jurisdiction in the Telemarketing and Consumer Fraud and Abuse Prevention Act ("Telemarketing Act")[2] to limit "deceptive" and "abusive" telemarketing practices. Further, the proposal disregards Congress' instruction not to burden legitimate telemarketing activities and is inconsistent with consideration of a national do-not-call registry by the Federal Communications Commission ("FCC").

More importantly, consumers, unless they execute a cumbersome consent, would be prevented from receiving calls from trusted businesses with which they have existing relationships. Consumers who place their names on a national do-not-call list cannot reasonably expect not to receive communications from businesses with which they do business. The FTC should include a prior business relationship exception as do most Federal and state do-not-call provisions.

The rulemaking also fails to provide preemption, which is necessary to avoid the burden of compliance with at least an additional 22 state laws. In order for there to be a single list, the differing and burdensome requirement of complying with many state laws must be eliminated through preemption.

The Commission's additional proposed amendments to the TSR itself suffer from similar deficiencies, ranging from lack of statutory authority to unworkable practical effects. For example, when a consumer initiates a call and additional products are offered, the Commission proposes to treat the portion of the call offering the additional products as an outbound call. This would not only mean

[2] Pub. L. No. 103-297, 108 Stat. 1724 (codified at 15 U.S.C. §§ 6101 *et seq*.).

requiring disclosures, it would mean application of time of day restrictions and the impossible application of the do-not-call list. Additionally, the transfer of preacquired account information should not in all cases be prohibited and certainly should not extend to upselling situations where the consumer has consented to the use of the particular payment mechanism. These situations where the customer has initiated or consented to an upsell do not present the potential for abuse or confusion that the proposed prohibition is intended to address.

The Commission's proposed regulation of predictive dialing and Caller ID mechanisms exceeds its statutory authority and intrudes on existing regulatory jurisdiction of these devices by the FCC. The proposed prohibition on blocking Caller ID devices should not require the use of equipment that must display the telephone number of the calling party. Further, the proposed inclusion of business-to-business (B-to-B) sales of Internet or Web services within the Rule's scope would create a competitive imbalance and is unnecessary in light of existing tools available to combat fraud in this area.

In addition, in the event the Commission pushes ahead and adopts its proposed changes to the TSR, certain clarifications are needed to ensure that legitimate business practices are not unnecessarily handicapped. The Commission should make clear that debit cards, which are subject to alternative dispute resolution and other anti-fraud measures, are not subject to the "express verifiable authorization" requirement. Further, the Commission should include e-mail and fax within the existing "direct mail" exemption to the Rule and clarify that e-mail or fax disclosures may be provided by phone instead. Finally, to match the text and intent of Section 1011 of the USA PATRIOT Act,[3] and to lessen constitutional implications, the Commission should apply only the disclosure provisions of the TSR to charities that employ professional fundraisers and to for-profit firms soliciting contributions for charitable purposes.

[3] Crimes Against Charitable Americans Act of 2001, Pub. L. No. 107-56, 115 Stat. 272, 396 (2001) (codified at 15 U.S.C. § 6102).

Set forth below is an overview of the telemarketing industry and The DMA's telephone preference service, followed by specific comments on the Commission's proposed amendments to the TSR.

II. The Telemarketing Industry Is a Major Contributor to the U.S. Economy and Confers Substantial Benefits to Consumers

Many American consumers respond favorably to telemarketing. This fact is evident in the dollar amounts consumers spend purchasing products through telemarketing sales. In 2001, consumer telephone marketing generated $274.2 billion in sales, accounting for 27.3% of all consumer direct marketing sales.[4] It is expected that consumer telemarketing will grow by 8.0% per year to an expected $402.8 billion in 2006. These numbers are from a forthcoming WEFA Group study, *Economic Impact, U.S. Direct and Interactive Marketing Today, 2002 Forecast*. In fact, outbound telemarketing alone generated almost four percent of all U.S. consumer sales in 2001.

Employment and employment growth rate in the telemarketing industry are equally impressive. In 2001, the telemarketing industry that markets to consumers was estimated to employ 4.1 million workers. *Id.*

In addition, certain trends in the composition of the telemarketing workforce became evident in a recent e-mail survey conducted by The DMA. This survey is based on 31 responses to e-mails sent to 200 of the largest telemarketing outbound operations. The 31 respondents are all telemarketing agencies that typically provide outbound telemarketing for other companies.

This survey indicates that 60% of teleservices sales representatives are female, of which 25% are single working mothers. Of the total, 26% are students, 33% are minorities, and 5% are

[4] This number solely represents sales that result from outbound telemarketing.

handicapped (one company reported that 20% of its employees are handicapped). Moreover, 10% of the sales representatives were reported to be immediately off welfare. Therefore, it is clear that in addition to employing many people, telemarketing, through flexible hours and workplace, allows for great diversity in employment opportunities. Many use telemarketing as a first job opportunity when entering the workforce from school or welfare.

Outbound telephone marketing expenditures, by a large margin, represent the largest category of media spending for direct marketers. *Id.* Telephone marketing ad spending was expected to grow to $76.2 billion in 2001 and to comprise 38.7% of all direct marketing expenditures. *Id.* It also is an enormously valuable medium in business-to-business ("B-to-B") direct marketing, although DMA recognizes that sales generated in that segment largely are outside the scope of the Rule.

Telemarketing also adds competitiveness to the U.S. economy. It provides information on new products and services and on prices, and clearly sparks consumers' interests to buy. As one example, telemarketing is a valuable resource to rural families and others without access to certain products or services. Also, by making information about prices widely available, it promotes price competition in the marketplace. Likewise, telemarketing provides access to goods and services not generally sold in the retail market. As a means of advertising, telemarketing is a cost-effective means of introducing new products into the marketplace.

Additionally, attached hereto as Exhibit A is an economist's report commissioned by a major DMA member.[5] According to this report, any policy limiting telemarketing will raise costs to companies of attracting rival companies' consumers. "This cost increase, in turn, reduces incentives to 'guard' their existing customers by moderating prices. . . . [P]olicies that increase the effective costs of recruiting

[5] T. Randolph Beard, Ph.D., Associate Professor of Economics, Auburn University, *Telemarketing and Competition: An Economic Analysis of "Do Not Call" Regulations*, March 2002. While this report is focused on the telecommunications industry, the conclusions apply equally to all industries engaging in telemarketing.

customers from rival firms can be expected to result in general increases in prices and a reduction in the vigor of price competition."[6]

It is clear that telemarketing continues to be an enormously successful, effective and legitimate medium in the U.S. economy. Any regulation to stop abusive and deceptive practices must be balanced with these significant benefits to the economy and the consumer.

III. The FTC's Proposed Do-Not-Call List

A. The DMA's Telephone Preference Service Provides an Effective Tool for Consumers who Elect Not to Receive Telemarketing Calls

The DMA has had its Telephone Preference Service ("TPS") in place since 1985. There are currently 4.5 million consumers on the TPS do-not-call list. The TPS covers all consumer telemarketers with no exceptions or exemptions. Any consumers who want to reduce the amount of unwanted national telemarketing calls they receive can have their names placed on the TPS list for that purpose free of charge. Individuals register with the TPS by mail, fax, or over the Internet by sending their name, home address, and home telephone number to The DMA. Names remain on the file for five years, after which time consumers may register again. Consumers must register with the TPS directly; second-party requests cannot be processed.

Although the TPS is available to all telemarketers, members of The DMA and non-members alike, all DMA members are required to use the TPS before engaging in outbound prospect solicitations. The use of the TPS in that manner is a condition of DMA membership. Marketers are not, however, required to use the TPS on their own customer files before contacting their *own* customers. The TPS files are updated monthly, and subscribers (*i.e.*, telemarketing companies that use

[6] *Id.* at 2.

the TPS) have the option of receiving the suppression file every month or on a quarterly basis. Subscribers must agree to use The DMA's TPS only for the purpose of removing consumers' names from calling lists and for no other purposes.

Use of the TPS complements the in-house suppression requirements of the Telephone Consumer Protection Act ("TCPA")[7] and the TSR under which marketers must offer consumers the opportunity to be removed, upon request, from their company telemarketing lists. Information about how consumers can register with the TPS is provided in most telephone book white pages. Consumers also can learn about the availability of the service through state and local consumer agencies and print and broadcast advertising.

All telemarketers are subject to the TCPA and must maintain "in-house" or individual company suppression files. DMA members have to comply with the TPS. Moreover, approximately 22 states have some form of statutory do-not-call list. The FTC proposal simply adds another list to an already crowded territory.

The increasing number of consumers who have chosen to have their names listed on the TPS is strong evidence that consumers are aware of this service and, for those who choose to, know how to take advantage of it. In 1995, the TPS had fewer than one million listings. Following promotion by The DMA, the list has grown to 4.5 million, with one million new numbers having been added in the past year.

B. An FTC-Administered National Do-Not-Call List Would Fail To Achieve Its Intended Goal

1. As Currently Conceived, the Do-Not-Call List Would Not Work

[7] Pub. L. No. 102-243, 105 Stat. 2394 (codified at 47 U.S.C. § 227).

While the Commission's proposed list on its face may appear to provide consumers with the ability to put themselves on one list and receive no telemarketing calls, this in fact would not be the case. The Commission states that its proposed national do-not-call list is "mindful of the criticism that the company-specific approach in the current Rule's 'do-not-call' provision is cumbersome and burdensome for those consumers who do not wish to receive any telemarketing calls at all."[8] Further, the Commission states that "[t]hese consumers would benefit from a national registry they could contact to receive no telemarketing calls from or on behalf of any seller, or on behalf of any charitable organization, whatsoever."[9] The list that the Commission proposes would not achieve this goal.

Under the Commission's proposal, consumers would continue to receive many of the existing telemarketing calls because the Commission's jurisdiction is extremely limited in its coverage over numerous industries that engage in a significant percentage of current telemarketing calls. Likewise, the Commission cannot regulate calls that are entirely intrastate, also composing a significant percentage of all telemarketing.

The Commission's limited jurisdiction would result in disparate treatment of companies that offer identical services. Such a result would have a significant negative competitive impact. For example, some providers of high-speed and other types of Internet services to consumers would be subject to a national do-not-call list while others provided by exempt common carriers would not.

The Commission has no legal authority to regulate many of the industries that offer their products and services through a significant amount of telemarketing. Specifically:

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[8] 67 Fed. Reg. at 4518.

[9] 67 Fed. Reg. at 4519.

- The Telemarketing Act states that no activity that is outside the jurisdiction of the Federal Trade Commission Act, 15 U.S.C. §§ 41 *et seq.* ("FTC Act"), shall be affected by the Telemarketing Act. 15 U.S.C. § 6105(a)[10];

- The FTC Act does not apply to "banks, savings and loan institutions described in section 18(f)(3), common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Federal Aviation corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended, except as provided in section 406(b) of said Act." 15 U.S.C. §§ 41 *et seq.;* and

- The FTC Act does not apply to insurance companies to the extent that such business is regulated by State law. It also does not apply to any entity that is not "organized to carry on business for its own profit or that of its members."

The Telemarketing Act is limited to calls "which involve(s) more than one interstate telephone call." 15 U.S.C. § 6106. This definition excludes all calls that are intrastate in nature. Regulation of calls that occur wholly intrastate would have difficulty surviving a constitutional challenge.

In contrast, The DMA's TPS is a much more effective national do-not-call list for those consumers who elect to place their names on such a list because it covers a much greater scope of telemarketing calls than would the national list proposed by the Commission. The DMA membership, in addition to those industries that fall within the Commission's jurisdiction, includes all of the industries specifically exempted from the Commission's statutory authority. All of the members of these industries that are members of The DMA are subject to the TPS. Additionally, many non-DMA businesses utilize the TPS. Likewise, many service bureaus that engage in telemarketing on behalf of non-members

[10] Further, the legislative history of the Telemarketing Act specifically instructs that "the bill does not apply to any activity outside of the jurisdiction of the FTC Act." H.R. Rep. No. 103-20, at 11 (1993), *reprinted in* 1993 U.S.C.C.A.N.

subscribe to the TPS. Thus, a consumer who signs up for The DMA's TPS would receive much broader suppression from a diversity of industries that engage in telemarketing. Also, The DMA list, as a self-regulatory list, is able to cover both intrastate and interstate calls. Likewise, many of the states that have enacted lists have broader jurisdictional reach over the covered industries than does the Commission. Again, the result is that if a consumer signs up for the TPS and state lists, then a broader range of calls would be covered than under the Commission's proposal.

Ironically, if the Commission creates a government-administered do-not-call list, The DMA may ultimately be left with no choice but to stop its list. The price of administering the list and the additional burden of complying with two different national lists would make it very difficult for our members to justify its continued operation. The result would be a further reduction of telemarketers that comply with a national list (beyond that caused by the inherent limitations of the FTC list) and less consumer choice, the antithesis of the Commission's goals.

For these reasons, if the Commission really is interested in promoting a national do-not-call list that could limit the great majority of telemarketing calls to individuals who sign on to the list, it should recognize its limitations and look to the TPS. As justification for the need for a list, the Commission in the Notice discusses the success of The DMA's list describing its growth of one million numbers in the past year now totaling four million. If 4.5 million individuals have signed up, clearly the TPS is working. Nowhere does the Commission describe why a new government-administered list is necessary when there already is a successful list providing consumers a broad opt-out option.

If there is a "problem" with consumers having their preferences addressed, it is not the lack of a national list, but rather a lack of knowledge of the availability of the list. The DMA has always worked with the Commission to publicize the TPS and would commit to exploring further means to increase publicity for the TPS.

1626, 1636 ("House Report").

2. An FTC-Administered Do-Not-Call List Would Be Expensive Beyond the Commission's Estimates and as Currently Conceived Would Not Work

Unlike The DMA's TPS, the national do-not-call list proposed by the Commission will not work. The Commission's proposed list would not accurately reflect individuals who place their names on the list because society is highly mobile, with telephone numbers changing regularly. Likewise, the Commission's means of authenticating individuals using ANI information will not work. Finally, the Commission's forecasted cost of administering a national do-not-call list far underestimates the true costs of administering such a list.

Unlike the TPS, which requires name, address, and telephone number, has a five-year renewal period, and regularly checks the individuals' information against the U.S. Postal Service's National Change of Address List, the Commission's proposal takes no similar measure to ensure an accurate list. It is not clear from the NPRM how the Commission intends to maintain an accurate national do-not-call list. The Commission indicates that the national list will be created through a person's placement of his or her "name and/or telephone number" on the Commission-maintained registry.[11] An approach that solely captures this information would require some type of renewal to afford meaningful choice. Phone numbers change for 16 percent of the U.S. population on an annual basis. Phone numbers are usually reassigned approximately 90 days after an individual has moved and is no longer using the number. A list with solely name or phone number would be outdated annually, if not sooner. Such a scenario would not honor consumers' preferences. In fact, it could result in individuals who did not place their names/numbers on the list not receiving calls. As a practical matter, this will not work.

Likewise, the Commission's proposed verification measures will not work. Unlike the TPS, which requires that the consumer provide a name, address, and telephone number, the verification

[11] 67 Fed. Reg. at 4543.

mechanism proposed would be based upon the capture of the Automatic Number Identification ("ANI") information. In some instances, however, as a result of the age of certain elements of the phone network, the ANI may not be transferred. As a result, for those individuals who live in the many areas where ANI is not transferred, the national do-not-call list will not function as envisioned by the Commission. Such individuals will not have the technological ability to place their numbers on the list.

In order to address these practical implementation problems for both accuracy and verification, name and address information would have to be captured by the Commission for a national do-not-call list as well as additional requirements such as regular renewal by individuals. The Commission bases its costs in the low millions to compile the list solely or the costs associated with collecting name and number in an automated manner. This is in conflict with the FTC request for $5 million in its fiscal year 2003 budget to Congress for a national do-not-call list. In a 1994 FCC rulemaking, the most conservative estimates were that establishment of a national do-not-call list would cost $20 million in the first year alone. It is unclear how the Commission arrives at its forecasted low number, particularly given the fact that the Commission has not yet even announced in detail how the list would function and has a request for information to the public on this very issue.

It will be far more expensive to compile a list that is capable of being accurate and authenticated because obtaining additional information beyond name and/or number cannot be automated. For example, Experian, Inc. a company that offers marketing lists to businesses, offers a consumer opt-out from being placed on marketing lists that result from "prescreening." In order to ensure accuracy and verification to honor the opt-out, Experian uses automated technology that confirms an individual's telephone number, address and SSN. Experian estimates the cost per person solely to collect and input a consumer's information to be $1.28. This does not account for the costs of administering the list. If,

as some project, the Commission's proposed list will result in 64 million names,[12] using the $1.28 figure, such a list would cost more than $80,000,000.

The Commission proposes that the costs in the initial two years will be paid by the government. Thus, operation of a do-not-call list would cost in the tens, if not hundreds, of millions of dollars per year to taxpayers. This is an extraordinary cost for what the Commission sets forth as a two-year trial experiment. The alternative of having business bear these costs as well as operational costs of administering the lists is unacceptable. Ultimately, in this scenario too, such costs would be borne by the consumer.

These facts regarding accuracy and authentication strongly argue for utilizing The DMA's TPS, a much more effective and efficient list, rather than create a Commission-administered do-not-call list. At a bare minimum as the Commission evaluates the mechanics of a national list, the Commission must allow companies that have knowledge that a number is no longer applicable to the list to remove the number from their application of the do-not-call list. Such changes would limit the Commission's Rule from having the effect of preventing companies from communication with those who have not placed themselves on the national list.

C. No Federally Established National Do-Not-Call List Should Be Created Without Preemption of State Laws

Any government-mandated national do-not-call list that is established must preempt state laws so that companies could comply with one list. In the past several years, many states have enacted do-not-call lists. The current framework, in which telemarketers are required to comply with more than 20 state laws, creates significant burdens on businesses. A preferable approach would limit such burdens

[12] Caroline E. Mayer, *FTC Anti-Telemarketer List Would Face Heavy Demand*, THE WASHINGTON POST, March 19, 2002, at A7.

by creating one list to which marketers could subscribe that would encompass state lists and a national list.

Under the Commission's proposal, covered telemarketers could, in the future, be subject ultimately to 50 state laws (as well as Puerto Rico), a Commission-administered national do-not-call list, the FCC's TCPA individual company do-not-call lists, and The DMA's TPS. It is extremely costly and burdensome for businesses to comply simultaneously with up to 53 different and potentially inconsistent do-not-call lists in multiple jurisdictions where individuals to whom they telemarket are located, particularly for many new and small businesses. Likewise, a myriad of state do-not-call lists with differing obligations for telemarketing has the effect of eliminating the national capabilities of this medium of communication. For example, 53 different lists, some of which have different requirements for frequency of updating, will result in significant confusion to both consumers and businesses.

The Commission's stated intention is to "enable consumers to contact one centralized registry to effectuate their desire not to receive telemarketing calls." 67 Fed. Reg. at 4516. The Commission does not have the authority to preempt state law and create one list that would incorporate all state lists.[13] The Telemarketing Act does not contemplate Commission preemption of state lists with the creation of a national do-not-call list.[14] The DMA, using its TPS, is not limited by the Telemarketing Act. The DMA could create such a "one stop" list and could work with the Commission and the states to adapt the TPS to a central clearinghouse, to which a business could go to scrub its list against the DMA list and all state lists.

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[13] 15 U.S.C. § 6103(f)(1).

[14] We note that Congress considered preemption of state do-not-call lists in the context of the TCPA and directed the FCC that if the FCC required the establishment of a single national database of telephone numbers of subscribers who object to receiving telephone solicitations, a State or local authority may not, in its regulation of telephone solicitations, require the use of any database, list, or listing system that does not include the part of such single national database that relates to such state. 47 U.S.C. § 227(e)(2).

If, in fact, the Commission does determine that it has preemptive authority, it should preempt state laws as they apply to interstate phone calls. With preemption, a telemarketer would then be subject to the national list and the law of the state from where the telemarketing call is initiated for calls to individuals in that state (purely intrastate calls). Compliance with two legally required lists would be significantly more predictable to businesses than compliance with 52 lists.

D. The NPRM Exceeds the Commission's Statutory Authority

In the NPRM's proposal for a national call registry, the Commission quickly departs from its recognition of the fact that the "jurisdictional reach of the Rule is set by statute, and the Commission has no authority to expand the Rule beyond those statutory limits." 67 Fed. Reg. at 4497. The Commission proposes a national do-not-call list to regulate "abusive" practices based on the Telemarketing Act's instruction to prohibit "telemarketers from undertaking a 'pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy.'" *Id.* at 4518, *citing* 15 U.S.C. § 6102(a)(3)(A). From this statutory text, the Commission justifies its proposal to severely limit *all* telemarketing—including legitimate activities—as "promot[ing] the [Telemarketing Act]'s privacy protections." As demonstrated below, the proposed national list represents a dramatic and impermissible expansion of the Commission's limited jurisdiction over deceptive and abusive telemarketing practices and ignores Congress' intent that any regulations balance the interest in not burdening legitimate telemarketing.[15]

1. The Telemarketing Act Does Not Authorize the Creation of a National Do-Not-Call List or Registry

The Telemarketing Act authorizes the Commission to promulgate rules to "prohibit[] deceptive telemarketing acts or practices and other abusive telemarketing acts or practices," and then instructs the

[15] "An agency has the power to resolve a dispute or an issue only if Congress has conferred on the agency statutory jurisdiction to do so." Richard J. Pierce Jr., *Administrative Law Treatise*, Section 14.2 (4th Ed. 2002) at 935.

Commission to include a definition of deceptive telemarketing. 15 U.S.C. § 6102(a)(1), (2). Under Commission jurisprudence, deception occurs *"if, first, there is a representation, omission, or practice that, second, is likely to mislead consumers acting reasonably under the circumstances, and third, the representation, omission, or practice is material*." 67 Fed. Reg. at 4503, *citing Cliffdale Associates*, 103 F.T.C. 110, 165 (emphasis added). We note for the record that the legitimate telemarketing activities necessarily encompassed within the national registry are not within the Commission's jurisdiction over deceptive practices because they lack the second element of deception (to mislead). Accordingly, the Commission does not have the authority to justify (nor does it attempt to justify it in the NPRM) the creation of a national do-not-call list on the basis of the jurisdiction it was granted in the Telemarketing Act to regulate "deceptive" telemarketing acts or practices.

The Telemarketing Act further instructs the Commission to define "other abusive telemarketing acts or practices." The Telemarketing Act specifies that the Commission's rules to prevent abusive telemarketing acts or practices should include: (a) a prohibition of a "pattern of unsolicited telephone calls"; (b) restrictions on the hours of the day and night when unsolicited telephone calls can be made to the consumers; and (c) a requirement of prompt disclosure by telemarketers. 15 U.S.C. § 6102(a)(3). Neither the statute nor the legislative history mentions do-not-call lists, let alone a national registry.

Neither the term "abusive" nor the term "pattern" is defined in the Telemarketing Act. However, according to its plain meaning,[16] a "pattern" cannot consist of one call to represent a prohibited practice under Section 6102(a)(3). Nor can the Commission plausibly argue that *all* telemarketing swept in by a national database reasonably can be interpreted as "abusive," which, as noted in the NPRM, commonly means "wrongly used," "perverted," and "misapplied."[17] Therefore, purely as a matter of statutory construction, there is nothing to authorize the Commission to limit or

[16] In fact, the legislative history clarifies that this statutory reference to a "pattern" was not intended to address "a pattern or practice of telemarketing, per se." House Report at 9.

[17] 67 Fed. Reg. at 4511 n.176, *citing* Webster's International Dictionary, Unabridged, 1949.

prevent through a national do-not-call list *one* non-deceptive telephone call that is made within the hours set by the Commission and that is accompanied by the requisite disclosures.

However, that is precisely what the Commission's national do-not-call registry aims to do: limit legitimate, non-abusive telemarketing calls made according to the Commission's rules. The Commission's reasoning appears to exclusively lie in its conclusion that because each of the three enumerated examples in the statute "implicates consumers' privacy," 67 Fed. Reg. at 4510, Congress intended to grant the Commission authority to "reign in" any non-deceptive business practices that "impinge" on consumers' right to privacy. *Id.* at 4511. While the statutory examples demonstrate that Congress intended to grant authority to regulate egregious telemarketing practices (such as a pattern of several calls made late at night or calls that are abusive), the proposed national do-not-call registry encompasses legitimate telemarketing firms and practices within its scope, irrespective of whether they meet any reasonable definition of an "abusive" practice. The Commission should not use a very attenuated consumer privacy interest to bootstrap the focused jurisdiction Congress granted it over "abusive" practices to support a national registry limiting non-abusive, legitimate activities.

2. The Legislative History of the Telemarketing Act Does Not Support the Commission

There is nothing in the legislative history of the Telemarketing Act to justify that telemarketing calls are abusive or that a national do-not-call list would address deception or abusive practices. Clearly there is no basis to indicate that Congress thought a do-not-call list was necessary to limit deceptive practices. Moreover, the legislative history leaves no doubt that the Commission's proposed national do-not-call list curtails activities that Congress instructed should not be included within the scope of "abusive" practices under the Telemarketing Act. Specifically, Congress explained that "[i]n directing the Commission to prescribe rules prohibiting abusive telemarketing activities, it is *not* the intent of the Committee that telemarketing practices be considered *per se* 'abusive.'" H.R. Rep. No. 103-20, at 4 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1626, 1629 ("House Report") (emphasis

added).[18] Indeed, in a passage cited in the NPRM, the House Report goes on to list the kinds of activities that would be considered abusive: threats or intimidation; obscene or profane language, "continuous or repeated" calling, or "engagement of the called party in conversation with an intent to annoy, harass, or oppress." House Report at 8, *cited* at 67 Fed. Reg. 4511 n.174. With respect to the "pattern of unsolicited telephone calls" reference in 15 U.S.C. § 6102(a)(3), the House Report clarifies that "the phrase 'a pattern or practice of telemarketing' in . . . the bill refers only to a pattern or practice of telemarketing activities that violate the Commission's rules . . . not to a pattern or practice of telemarketing, per se. The Committee does not intend to limit legitimate telemarketing practices." House Report at 9.

According to the Commission, its proposal for a national do-not-call registry "directly advances the Telemarketing Act's goal to protect consumers' privacy" and thus is within the scope of the Commission's jurisdiction. 67 Fed. Reg. at 4517. The Commission also appears to base its proposal on the fact that surveys show that *some* consumers consider telemarketing calls to be "intrusive" and "annoying." *Id.* at 4518.[19] But as the cited passages from the legislative history illustrate, Congress did not grant the Commission authority to adopt *any* measure that the Commission believes advances a privacy interest or that combats a perceived annoying business practice among some concerns. Rather, Congress intended to strike an "equitable balance between the interest of stopping deceptive . . . and abusive telemarketing activities and not unduly burdening legitimate businesses." House Report at 2. The national do-not-call database does not balance these interests because it sweeps in all legitimate, non-deceptive, non-abusive telemarketing practices within its parameters.

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[18] This concern that the Commission's rules not limit "legitimate telemarketing practices" is repeated subsequently in the House Report. House Report at 9.

[19] Nowhere in the Commission's proposal is there any factual evidence that the rate of complaints has increased since the FTC's 1995 proceeding on this issue, or any other factual evidence describing what has changed since 1995 that justifies a national do-not-call list. Likewise, the Commission does not make the case that company-specific do-not-call lists do not work.

3. *If Congress Had Intended to Grant the FTC Authority to Establish a National Do-Not-Call List, It Would Have Done So Explicitly in the Telemarketing Act*

There is no reference to a do-not-call list—let alone a national registry—in either the statutory text or the legislative history of the Telemarketing Act. However, the TCPA demonstrates that where Congress wanted an agency to consider such a mechanism, it did so in a statute. Specifically, the TCPA authorized the FCC to conduct a rulemaking proceeding in which it was to consider a number of measures to protect residential telephone subscriber rights in an "efficient, effective, and economic manner and without the imposition of any additional charge to telephone subscribers."[20] According to the statute, these regulations could "require the establishment and operation of a single national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations, and to make that compiled list and parts thereof available for purchase." 47 U.S.C. § 227(c)(3). Congress proceeded to enumerate 11 specific factors for the FCC to evaluate in determining whether to require such a database.[21] As matters of administrative law and logic, it is implausible that only four years after passage of the TCPA, Congress sought to make this specific mechanism of a national registry available to the Commission without any mention in the statutory text or legislative history and without the express limitation in the TCPA that such a database must be efficient, effective, and not result in costs to subscribers.

Not only is there no authority for the Commission to do this, but the exercise of jurisdiction is precluded by the specific grant of authority to the FCC. Further, the Commission's proposal would directly contradict the FCC's consideration—and rejection of—a national call registry in its rulemaking implementing the TCPA in 1992. In its rulemaking, the FCC found that such a national do-not-call list would be "costly and difficult to establish and maintain in a reasonably accurate form." *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd 8752, ¶

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[20] 47 U.S.C. § 227(c)(2).

[21] 47 U.S.C. § 227(c)(3)(A)-(L). The legislative history also references the national database. *See generally* H.R. Rep. No. 103-317, LEXSEE 102 h. rpt 317, 23-28 (1991).

14 (1992) (the "TCPA Order"). Specifically, the FCC found that the high costs of such a database, ranging from $20 million to $80 million in the first year, and $20 million per year thereafter,[22] made it likely that such costs would be passed through to consumers, in direct contravention of the TCPA's instruction that a national database not result in additional charges to residential subscribers, and as against public policy. *Id.* at ¶ 14 n.24. Accuracy, time lag, privacy[23] and consumer choice concerns also weighed against creation of a national registry. *Id.* at ¶ 15. Accordingly, the FCC determined that it could not justify such a database as meeting the statutory requirements that it be an "efficient, effective, and economic" means of preventing unwanted telephone solicitation. The FCC concluded, "In view of the many drawbacks of a national do-not-call database, and in light of the existence of an effective alternative (company-specific do-not-call lists), we conclude that this alternative is not an efficient, effective, or economic means of avoiding unwanted telephone solicitations."[24] Rather, the FCC selected company-specific do-not-call lists, which more effectively preserve consumer choice without overly burdening legitimate telemarketing activities. *Id.* Certainly, another independent regulatory agency with at best very general authority should not do what the specifically charged agency has decided not to do.

In the NPRM, the Commission offers only a conclusion that its proposed national database is "consistent" with the FCC's regulations,[25] but does not provide any attempt to explain how the absence of any mention of a national registry in the Telemarketing Act's text or legislative history is consistent with specific textual references in the TCPA. More conspicuously absent from the NPRM is an explanation of how the database is consistent with the explicit instruction in the legislative history to the Telemarketing Act that "[t]he [Commission] also should take into account the obligations imposed upon all telemarketers by the Telephone Consumer Protection Act of 1991 *to avoid adding burdens to*

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[22] TCPA Order at ¶ 11.

[23] It would indeed be ironic if the Commission's proposed national do-not-call registry were to threaten the privacy of the very consumers whose privacy interests the Commission purports to advance through its proposal.

[24] TCPA Order at ¶ 15.

[25] 67 Fed. Reg. at 4519.

legitimate telemarketing." House Report at 8 (emphasis added). In other words, any regulations adopted by the Commission under the Telemarketing Act may not add any burdens to legitimate telemarketing activities in addition to those measures promulgated by the FCC pursuant to the TCPA. As explained more fully elsewhere in these comments, it is obvious that the enormous cost and administrative difficulties for telemarketing firms to purchase, administer and update a national database adds burdens *substantially beyond* those created by the FCC's requirement of company-specific databases in the TCPA Order. Accordingly, the Commission's proposed national registry defies Congress' instruction that it not *add* any burdens to legitimate telemarketing activities beyond those imposed pursuant to the TCPA.

Notwithstanding the Commission's assertion, its proposed national database would be anything but "consistent" with the FCC's approach. For example, the proposed two-year trial period for the Commission's national database, after which time it promises to "review the registry's operation to obtain information about the costs and benefits of the central registry, as well as its regulatory and economic impact in order to determine whether to modify or terminate its operation," 67 Fed. Reg. at 4517, is utterly *inconsistent* with the approach Congress set forth for consideration of a national registry in the TCPA. The FCC was bound to, and did, consider costs of a national database *before* ordering that such a database be established. It would be entirely inconsistent for the Commission in this rulemaking to ignore the conservative cost estimates of $20 million to $80 million and the administrative difficulties of a national do-not-call list considered in the FCC's rulemaking and promise to examine those costs *after* imposing them on legitimate telemarketing activities for two years. As the TCPA's text shows, Congress wanted these costs considered *before* any such database is established pursuant to a rulemaking at the FCC. This guidance given to the FCC should be considered by the Commission. The NPRM proposal of a two-year review sets up an "experiment phase" during which there could be costly implications to the industry and frustration to consumers should it be reversed.

If the FCC were to initiate a subsequent rulemaking reversing its position that a national do-not-call registry would be costly and administratively unworkable, the FCC would face a burden in justifying

its changed position[26] and, of course, would have to adhere to the statutory instruction that such a database not result in costs to subscribers. However, whatever the merits of such a proceeding, it is clear that when Congress wanted an agency to consider a national do-not-call registry, it stated so explicitly in legislation. As such reference is absent from the Telemarketing Act, the Commission's assertion of authority to impose such a database is inconsistent with the congressional approach to determine the need for a national do-not-call database.

4. Existing Business Relationship: Effect of National Do-Not-Call Registry, Relation to Company-Specific Registry

The Commission attempts to reconcile its disregard for congressional intent not to curtail legitimate telemarketing activities by arguing that in the case of consumers with existing business relationships its national database preserves a customer's choice to receive calls from specific companies through "express verifiable written authorization." 67 Fed. Reg. at 4519. However, in addition to being largely duplicative of The DMA's existing database, this proposed "solution" violates congressional intent not to burden legitimate telemarketing. Implementing a system for consumers with specific existing business relationships to opt in to telemarketing calls from those companies would be cost prohibitive in time, development, and maintenance. It ignores the very essence of telemarketing as a business practice, which presents options both to customers who are familiar and to consumers who may be unfamiliar with the specific company or product offered. The national call registry would negatively impact sales that would have occurred to both to categories of consumers, penalizing both the legitimate telemarketing firm that Congress sought to protect and the customer or consumer who might want to consider or receive a specific product of which he is unaware. This is particularly the case with

[26] Under Section 553 of the Administrative Procedure Act, 5 U.S.C. § 553, an agency choosing to alter its regulatory course "must supply a reasoned analysis indicating that its prior policies and standards are being deliberately changed, not casually ignored." *Greater Boston Television Corp. v. FCC*, 143 U.S. App. D.C. 383, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923, 91 S. Ct. 2233, 29 L. Ed. 2d 701 (1971); *accord Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983). A change in policy must be supported by record evidence. *Fox TV Station, Inc. v. FCC*, No. 00-1222 (D.C. Circuit February 19, 2002).

customers who had previously chosen to do business with a specific company. In a $274.2 billion industry, these losses to legitimate telemarketing could have a very negative impact. As the legislative history demonstrates, these kinds of losses from legitimate telemarketing practices were not what Congress envisioned in granting the Commission limited authority over deceptive and abusive practices.

Legitimate telemarketing is preserved by the more targeted nature of company-specific do-not-call lists in the current Rule. In an apparent effort to create the perception that an individual could elect those specific companies that the individual gives permission to call, the Commission proposes to allow consumers to remove themselves from the national do-not-call list with respect to individual companies. The ability of consumers to exempt specific companies from the database is not the surgical tool the Commission presents it to be,[27] but rather a burdensome and unwieldy instrument that exceeds the Commission's circumscribed jurisdiction over legitimate, non-fraudulent, non-deceptive and non-abusive telemarketing. Managing these "opt-in" lists alone and in combination with the multiple other lists would be a significant expense to business. This would be even more complex if businesses must obtain "opt ins" from their own customers.

Management of the Commission's proposed selective day and time opt-out would add even further complexity. The use of "opt-in" lists will not be a realistic option for many companies. It will be particularly unmanageable for retail operations to manage a do-not-call list with an opt-in as a result of the coordination that would need to occur between clerks at stores and the larger corporate structure. It would be impractical for all but the most sophisticated data processors to cost effectively integrate these lists in a way that produces a list of individuals whom they are able to call. It also is unlikely that consumers will remember to whom they gave permission, which will result in confusion for consumers and for enforcement authorities.

E. The Proposed National Do-Not-Call List Unconstitutionally Restricts Commercial Speech

[27] Industry generally supported the more targeted nature of company-specific do-not-call lists. *See, e.g.*, DMA comments in the Commission's prior telemarketing rulemaking proceedings.

The FTC proposes significant restriction upon advertising and promotions by means of telephone calls. Commercial speech, including marketing appeals, is, of course, protected by the First Amendment. *See, e.g.*, *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988) (striking down ban on attorney solicitations); *Central Hudson Gas & Elec. Corp v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980) ("*Central Hudson*").[28]

The proposed Rule would fail scrutiny under the First Amendment's commercial speech doctrine for two reasons.[29] First, as was the case with the statutory restrictions on broadcast advertising of gambling struck down in *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173 (1999) ("*Greater New Orleans*"), and with the alcohol advertising regulatory regime struck down in *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995) ("*Rubin*"), the proposed Rule is "so pierced with exemptions and inconsistencies" by virtue of the numerous limits on the Commission's jurisdiction "that the government cannot hope to exonerate it."[30] A core concern of the *Central Hudson* analysis is that government not restrict commercial speech in a highly selective fashion that distorts the marketplace. *See Rubin*, 514 U.S. at 481; *Virginia Board of Pharmacy*, 425 U.S. at 765 (1976). The proposed Rule suffers from precisely this defect. The gaping exemptions and inconsistencies in the regulatory scheme prevent the proposed Rule from sufficiently advancing the government's stated purpose of protecting privacy.

Second, the proposed Rule fails to "carefully calculate the costs and benefits associated" with imposing its regulatory do-not-call list. *See City of Cincinnati v. Discovery Network*, 507 U.S. 410,

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[28] *See also Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976) ("people will perceive their own best interests if only they are well enough informed, and . . . the best means to that end is to open the channels of communication rather than to close them.").

[29] Although these comments focus on First Amendment infirmities of the proposed Rule's do-not-call list requirement, other aspects of the proposed Rule, such as its ban on the use of preacquired account information, also violate the First Amendment.

[30] *Greater New Orleans*, 527 U.S. at 189, *citing Rubin*, 514 U.S. at 488.

417 n.13 (1993) ("*Discovery Network*"); *U.S. West v. Federal Communications Commission*, 182 F.3d 1224, 1235 (10th Cir. 1999), *cert. denied*, 120 S. Ct. 2215 (2000) ("*U.S. West*") (striking down FCC privacy regulations that limited commercial speech where the agency failed adequately to explain why it rejected less stringent options for accomplishing a statutory mandate to protect privacy).[31] The proposed Rule would impose an extensive, costly regulatory regime that would be particularly onerous for communications with existing customers. Moreover, this onerous regime would apply selectively to only a limited segment of the telemarketing industry because of the FTC's jurisdiction. The Commission has not explained, and cannot adequately explain, why it would choose this approach, rather than relying upon self-regulatory commitments that are enforceable under the Commission's unfair and deceptive trade practice authority and that cover a far greater percentage of telemarketing calls.

Government regulation of commercial speech that does not mislead or relate to illegal activity is subject to a three-part test. *Central Hudson*, 447 U.S. at 564. First, the government must show a substantial interest it intends to achieve through the regulation. Second, the regulation must directly advance the asserted interest. Third, the regulation must be narrowly tailored and no more extensive than necessary to serve the government's substantial interest. *Central Hudson*, 447 U.S. at 566. The commentary to the proposed Rule does not claim that it is designed to reach misleading telemarketing or telemarketing relating to illegal activity, and the Commission has a wide range of other tools to address such deception. The proposed Rule's national do-not-call list fails most egregiously the second and third prongs of the *Central Hudson* analysis, which we therefore discuss in greater detail.

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[31] *See also State of Missouri et al. v. American Blast Fax, Inc., et al.*, Case No. 4:00CV933 SNL *slip opinion* 2002 U.S. Dist. LEXIS 5707 (E.D. Mo., March 13, 2002). (This recent case invalidates on First Amendment grounds § 227 of the Telephone Consumer Protection Act, 47 U.S.C. § 227, as it relates to the prohibition on sending unsolicited advertisements by fax absent an express recipient opt in. The court holds that the government failed to meet its burden under any of the prongs of the *Central Hudson* test described below).

1. The Proposed Rule Contains So Many Exceptions that it Fails to Advance its Stated Interest

The Commission bears the burden under the second prong of *Central Hudson* to demonstrate that a speech restriction "directly and materially advances the governmental interest asserted." *See, e.g., Greater New Orleans*, 527 U.S. at 188; *Edenfield v. Fane*, 507 U.S. 761, 770 (1993). The government must show that a "ban will *significantly*" advance the government's interest, *44 Liquormart Inc. v. Rhode Island*, 517 U.S. 484, 505 (1996) (plurality opinion) (emphasis added), and "that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield*, 507 U.S. at 770-71. In this case, as in *Greater New Orleans* and *Rubin*, the government's stated interest in protecting privacy is undermined directly and fatally by the significant exceptions in the statute that prevent the proposed Rule from "directly and materially advanc[ing]" this goal. *See Greater New Orleans*, 527 U.S. at 188, *citing Central Hudson*, 447 U.S. at 564; *see also Rubin*, 514 U.S. at 487.

A national do-not-call list imposed by the Commission would be riddled with exceptions and would be far too selective in scope to accomplish its goal materially. Although the proposed Rule would saddle FTC-regulated industries with extremely costly barriers to commercial speech accomplished through telephone communications with customers, it would not, and cannot, cover many other entire industries. Banks, savings and loan institutions, common carriers (such as domestic and international telephone companies), insurers regulated by state law, domestic and foreign airlines and other industries subject to Federal Aviation Administration regulation, companies subject to the Packers and Stockyards Act, as described in Section II.C above, would be wholly unaffected by the proposed Rule. *See* 15 U.S.C. §§ 41 *et seq*. Moreover, the proposed Rule would have no effect whatsoever on intrastate telemarketing calls.

As the Supreme Court warned in *Greater New Orleans*, "decisions that select among speakers conveying virtually identical messages are in serious tension with the principles undergirding the First Amendment." 527 U.S. at 194. The proposed Rule suffers from precisely this problem. Significant

portions of the telemarketing industry would remain completely unaffected by the Rule, free from the heavy burdens that FTC-regulated marketers would face, even though they were delivering virtually the same message. The resulting incentives would "merely channel [telemarketers] to one [industry] from another." *Id.* at 189.

The result is the same sort of "overall irrationality" that led the Court in *Rubin*, 514 U.S. at 486, to strike down a regulatory regime that selectively prohibited listing alcohol strength on beer labels for the purpose of discouraging "strength wars" and thus curbing alcoholism, *id.* at 483-85, while separate regulations permitted (in some cases, required) labeling of alcohol content on other types of alcoholic beverages, and allowed a variety of other methods of advertising alcohol content in various beverages. *Id.* at 488. As was the case in *Rubin* and *Greater New Orleans*, the regulation proposed here, riddled with a variety of gaping holes in its application and inconsistent regulatory regimes, reveals Congress' "decidedly equivocal" attitude toward adopting a regulatory do-not-call list, *Greater New Orleans*, 527 U.S. at 187, assuming that Congress ever intended to give the Commission such authority. The necessary "fit" between the proposed Rule and the government's interest simply does not exist here. *Rubin*, 514 U.S. at 490.

2. The Proposed National Do-Not-Call List Is Not Narrowly Tailored and Is Far More Extensive Than Necessary

To survive scrutiny under the third prong of the *Central Hudson* analysis, restrictions on commercial speech must be narrowly tailored to achieve the government's purpose. *See Central Hudson*, 447 U.S. at 566; *see also Rubin*, 514 U.S. at 486.[32] The proposed Rule clearly does not satisfy this standard. The Supreme Court held in *Discovery Network* that restrictions on commercial speech must "carefully calculate the costs and benefits associated" with the restriction. 507 U.S. at 417 n.13. Careful analysis of "costs and benefits" associated with the burdens on speech created by the

[32] *See also 44 Liquormart*, 517 U.S. at 529 ("The availability of less burdensome alternatives to reach the stated goal signals that the fit between the legislature's ends and the means chosen to accomplish those ends may be too imprecise to withstand First Amendment scrutiny.").

proposed national do-not-call list is completely absent from the statute, its legislative history, the proposed Rule, or the Commission's commentary.

In *U.S. West*, the Tenth Circuit struck down FCC rules implementing the customer privacy provisions of the Telecommunications Act of 1996, 47 U.S.C. § 222, because those rules violated the First Amendment. Section 222 requires a telecommunications carrier to obtain customer "approval" in most circumstances before using, disclosing, or permitting access to certain customer information. The FCC implemented the statute by imposing an opt-in requirement, with a significant exception for marketing within the scope of a prior business relationship. The Tenth Circuit struck down the FCC's privacy rules.

The *U.S. West* decision makes clear that stringent restrictions on commercial solicitation are vulnerable to challenge under the Supreme Court's *Central Hudson* test. The court explained that "when . . . alternatives are obvious [and] restrict substantially less speech," choice of a more stringent rule indicates a lack of narrow tailoring and is far less likely to withstand First Amendment scrutiny.[33] It is noteworthy that the privacy restriction at issue in *U.S. West* was less onerous than the do-not-call requirement in the proposed Rule. In *U.S. West*, the invalidated privacy rules exempted marketing offers for any category of service that an existing customer received from a carrier, and they allowed carriers to obtain approval either orally, electronically or in writing. In distinct contrast, the proposed Rule does not provide for any established customer relationship exemption, and existing consumers who have placed their names on the national do-not-call list could only resume receiving calls if they opt-in in writing. 67 Fed. Reg. at 4519 (requiring "express verifiable authorization").

[33] *U.S. West*, 182 F.3d at 1238 and n.11 ("We do not . . . strike down regulations when *any* less restrictive means would sufficiently serve the state interest. We merely recognize the reality that the existence of an obvious and substantially less restrictive means for advancing the desired government objective indicates a lack of narrow tailoring.").

U.S. West also underscores that if a government agency restricts commercial speech, it bears a significant burden of proof to defend the restriction. The regulator must demonstrate "that [the alternative] strategy would not sufficiently protect consumer privacy [employing] the careful calculation of costs and benefits that our commercial speech jurisprudence requires." *U.S. West*, 182 F.3d at 1239. The government must build a clear record that justifies its policy choice. It must offer specific evidence, and may not rely upon "mere speculation" to justify its decision to impose a more restrictive regulatory scheme. *Id*.[34]

The commentary to the proposed Rule defends its national do-not-call list proposal based upon evidence such as consumer comments "unanimously" disfavoring telemarketing calls and the purported "burden" on consumers imposed by the existing company-specific do-not-call rule. 67 Fed. Reg. at 4518. The commentary also states that "[c]onsumers have demanded more power to determine who will have access to their time and attention while they are in their homes." *Id.* Although the commentary notes that "consumers would benefit from a national registry," as a "one stop" mechanism, 67 Fed. Reg. at 4519, it fails to offer evidence to show why this would enhance privacy as compared with existing do-not-call registries such as the large registry currently operated by The DMA. This showing is plainly insufficient to justify the proposed Rule under *U.S. West* and *Discovery Network*.

The Commission has not considered that voluntary do-not-call lists already exist and provide effective limits on unwanted telemarketing calls. The proposed Rule notes that The DMA's Telephone Preference Service lists over 4 million consumers, and that DMA members are "required to adhere to the list" under threat of expulsion. 67 Fed. Reg. at 4517 and n.241. As discussed above, The DMA membership accounts for approximately 80% of the telemarketing market, across all industries and

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[34] *See also State of Missouri et al. v. American Blast Fax, Inc., et al.*, Case No. 4:00CV933 SNL *slip opinion* 2002 U.S. Dist. LEXIS 5707 (E.D. Mo., March 13, 2002) (finding *inter alia* that while the *opt in* requirement of the statute prohibiting unsolicited fax advertisements failed to meet the *Central Hudson* standard, an *opt out* strategy might have met the requirement that the regulation on speech "promote the government's interest, yet be less intrusive to First Amendment rights," *id*. at *39, and that the legislative history as to the burden imposed by such faxes was too speculative to show the government's substantial interest, *id*. at *34).

covering intrastate as well as interstate calls beyond the jurisdiction of the FTC. In fact, the FTC web site refers consumers to The DMA service on a page titled "Federal Trade Commission Consumer Alert: Privacy: What You Do Know Can Protect You." *See* <http://www.ftc.gov/bcp/conline/pubs/alerts/privprotalrt.htm>. Yet, the proposed Rule does not offer any evidence that the proposed do-not-call list would be more effective than enforceable self-regulation. "[C]onjecture . . . is inadequate to justify restrictions under the First Amendment." *U.S. West*, 182 F.3d at 1238 (*citing Edenfield*, 507 U.S. at 770-71).

The proposed Rule also fails to analyze the very significant costs it would impose in the context of communications by businesses to consumers with whom they have a prior business relationship, as required by *Discovery Network*, 507 U.S. at 417 and *U.S. West*, 182 F.3d at 1238-39. The proposed Rule is on particularly shaky ground because it would create a very costly regulatory regime for any commercial speech offered via telecommunications to existing customers when other "obvious less burdensome alternatives" exist. *See Discovery Network*, 507 U.S. at 417 n.13.

As discussed above, the proposed national do-not-call list does not cover intrastate calls, nor can it, given the inherent limitations of the regulatory scheme and the FTC's jurisdiction. Yet, unless state-specific lists are preempted, businesses will be forced to bear a very significant administrative burden of complying with multiple inconsistent and overlapping state and federal regulations on a per-call basis. Companies with multiple call centers would need to track which center calls which household on a state-by-state basis, and assign such calls according to the more favorable regulatory regime. This would be very costly compared to today's methods. In addition, the current Rule will continue to require companies to honor existing company-specific do-not-call opt out lists, and the proposed Rule would require frequent scrubbing of call lists, and maintenance of lists of individuals opting in to receive calls through their "express verifiable written authorization" despite their general national opt out. 67 Fed. Reg. at 4519. This morass of restrictions would impose new costs on both businesses and consumers and would decrease legitimate and beneficial communication between consumers and businesses. As a result of these increased costs to business, consumers' access to truthful information

relevant to their shopping and spending decisions would be curtailed as fewer companies are able to afford telemarketing as a form of advertisement.

The proposed Rule also fails to study the inconvenience and the costs to consumers of losing access to valuable information and opportunities from companies with which they already do business. The Commission would require that businesses' existing customers provide "express verifiable written authorization" to opt back in to communications after they have been placed on the national do-not-call list. *Id*. By requiring consumers on the proposed national do-not-call list to opt in to receive information from any particular business, the proposed national do-not-call list would create a substantial barrier to existing customers receiving information and opportunities they would value from businesses they know and trust. For example, the proposed national do-not-call list would prevent sellers from informing consumers with whom the seller has an established business relationship about special sale price offers or other promotions and product information consumers would welcome.[35] Consumers would lose opportunities to save money through access to special sales and to other beneficial information that informs their purchasing decisions.[36] Society-at-large benefits significantly from information available from the commercial speech that the proposed national do-not-call list would restrict. Economic efficiencies for consumers and businesses result from better-informed consumers.

These costs to both business speakers and consumer listeners must be weighed in the analysis of costs and benefits as required by *Discovery Network* and *U.S. West*.

3. Rowan v. U.S. Cannot Justify the Proposed Restriction

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[35] *Cf. Virginia Board of Pharmacy*, 425 U.S. at 765 ("It is a matter of public interest that [consumer] decisions, in the aggregate be intelligent and well-informed. To this end, the free flow of information is indispensable.").

[36] *See 44 Liquormart*, 517 U.S. at 1504 (stating, "Advertising has been a part of our culture throughout our history. Even in colonial days, the public relied on 'commercial speech' for vital information about the market. . . . [T]own criers called out prices in public squares. Indeed, commercial messages played such a central role in public life prior to the Founding that Benjamin Franklin authored his early defense of a free press in support of his decision to print, of all things, an advertisement for voyages to Barbados." [internal citations omitted]).

If the Commission intends to use *Rowan v. United States*, 397 U.S. 728 (1970) to defend the proposed Rule, such reliance would be misplaced. The statute at issue in *Rowan*, 39 U.S.C. § 4009, allows recipients of postal mail "which the addressee in his sole discretion believes to be erotically arousing or sexually arousing" to identify a specific source of offensive material to the Postmaster General. The Postmaster General must order the sender and its agents to delete the named addressee from all mailing lists owned or controlled by the sender, and to refrain from mailings to the named addressee as well as any exploitation of mailing lists bearing the named addressee. The statute under review in *Rowan* is a *company-specific* opt-out requirement that relates to a *specific individual* for a *specific type of content*. By contrast, the proposed Rule would establish an across-the-board opt-out for communications from all FTC-regulated companies, and would allow anyone dialing from a phone number on a network capable of sending the telephone number to opt an entire household out of such calls.

The *Rowan* court did not have before it and did not address the constitutionality of a broad universal opt-out scheme, applicable to established business relationships and individuals who would not have chosen to discontinue receipt of such solicitations. In fact, in their concurring opinion, Justices Brennan and Douglas specifically raised constitutional objections to the possibility that parents could include the name of a "minor" child under 19 as an additional named addressee in an opt-out request, despite the fact that 18 year olds had obtained majority, but acknowledged that the issue was not raised in this case and therefore not addressed or resolved. *Rowan*, 397 U.S. at 741.

The *Rowan* court made dear that an "affirmative act by an addressee" must be directed to "*that* mailer" before the right to communicate could be circumscribed. *Rowan*, 397 U.S. at 737 (emphasis added). This differs markedly from the universal opt-out in the proposed Rule. The individualized single-mailer opt out permitted under *Rowan* allows a recipient to stop objectionable material after the recipient has determined that material already received from a particular advertiser is objectionable. The universal opt-out in the proposed Rule, in stark contrast, would have the effect of stopping all telemarketing to a household, without regard to whether the recipient would find individual

solicitations or promotions objectionable, useful, entertaining or welcome, and without regard to consumers' legitimate expectations of ongoing commerce with trusted and established business relationships.

F. An Exception for Contacting Customers When a Pre-established Business Relationship Exists Should Be Created if a National Do-Not-Call List Is Established

The proposed Rule's failure to include an exemption for businesses to contact individuals with whom they have an existing business relationship is a glaring omission. If a national do-not-call list ultimately is created by the Commission, it should preserve the ability of businesses to communicate with individuals with whom they have a pre-established business relationship but who register for the do-not-call list.

In the Notice, the Commission relies on its rationale from the 1995 rulemaking to support its conclusion in 2002 not to exempt telephone calls made to any person with whom the caller has a prior or established business or personal relationship.[37] The stated rationale is that such an exemption would be "unworkable in the context of telemarketing fraud." Under the Commission's rationale, a prior business relationship exemption "would enable fraudulent telemarketers who were able to fraudulently make an initial sale to a customer to continue to exploit that customer without being subject to the Rule." 67 Fed. Reg. at 4532.

Nowhere in the Notice does the Commission contemplate how business implementation of a national do-not-call list would be affected by the lack of an established business relationship exception. There is no analysis or even a mention by the Commission of the potential economic impact of not allowing businesses to contact their customers who have placed themselves on a national do-not-call list. Nor does the Commission evaluate whether by placing themselves on a national do-not-call list,

[37] 67 Fed. Reg. at 4532.

consumers would realize that they could no longer be contacted by trusted businesses with which they have long-standing business relationships. Further, the Commission's 1995 rationale fails to account for the fact that, if a telemarketer is engaging in fraudulent activity in the first instance, the Commission already possesses authority to prosecute such actions. Likewise, the consumer at any time under existing law could request to be placed on a company's individual do-not-call list and such a request would have to be honored. Further, if a perpetrator engaged in fraud in the first instance, being subject to the TSR is unlikely to serve as a disincentive to subsequent calls. This potential scenario of concern raised by the Commission, which is not likely to occur frequently, and ultimately rests on a technical defense to the rule, should not stand in the way of legitimate businesses contacting customers where the customers themselves have initiated relationships.

In other areas of the law governing marketing, exemptions exist for contacting individuals when a relationship exists. For example, the FCC in its rules implementing the TCPA provides for marketing to established customers using both fax and telemarketing. The FCC concluded in the rulemaking that "a solicitation to someone with whom a prior business relationship exists does not adversely affect subscriber privacy interests. Moreover, such a solicitation can be deemed to be invited or permitted by a subscriber in light of the business relationship."[38] This reasoning is equally applicable under the TSR.

While businesses should always be able to contact those individuals with whom they have an established relationship, this is critical in the context of a national do-not-call list. The consequences for businesses of not being able to contact consumers who have placed themselves on a national do-not-call list with whom they have a pre-established business relationship would be far more significant than under the existing TSR. Such contact should include communication with all individuals in which a business relationship exists, including those with whom the business may only have periodic contact such

[38] TCPA Order at ¶ 34. The sponsors of federal legislation to regulate unsolicited commercial electronic mail have incorporated a similar established business relationship exemption in their bills, including H.R. 3113, which passed the U.S. House of Representatives by a vote of 427 to 1 in 2000.

as is the case with many subscribers of services in which a consumer would periodically, but perhaps not continuously, purchase services from the same seller.

Under the 1995 rule, companies are not able to market to existing customers who specifically indicate to that particular company that they do not wish to receive further telemarketing calls. This is significantly different from the current Commission proposal in which a company would not be able to contact any consumers with whom they have an established relationship who sign on to a Commission-administered do-not-call list. It is unrealistic to expect that consumers who sign on to a national do-not-call list to understand that by doing so businesses with which they have relationships will no longer be permitted to contact them to offer goods and services. It is for this reason that almost all of the states that have implemented do-not call lists have established exemptions for customers with a pre-established business relationship.

G. The Do-Not-Call List Violates the First Amendment Rights of Charities

The do-not-call list violates the First Amendment rights of charitable organizations to solicit contributions through professional fundraisers. The proposed list is not sufficiently narrowly tailored to withstand the "exacting" scrutiny with which the Supreme Court has analyzed restrictions on the protected speech of charitable organizations conducted on their behalf by for-profit firms under its decisions in *Riley v. National Federation for the Blind*, 487 U.S. 781 (1988) ("*Riley*"), *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980) ("*Schaumburg*"), and *Secretary of State of Maryland v. Munson*, 467 U.S. 947 (1984) ("*Munson*"). These decisions make clear that restrictions on charitable solicitations—whether conducted by professional fundraisers or the charities themselves—are analyzed under strict scrutiny, not the intermediate scrutiny applicable to commercial speech.

The Commission makes no showing—nor could it—that its proposal (which restricts more speech than did the statutes struck down in *Riley, Schaumburg, and Munson*) meets the demanding

test of strict scrutiny. The do-not-call list unnecessarily sweeps in a large amount of protected activity (*i.e.*, non-fraudulent, non-abusive solicitations), rendering the proposal constitutionally overbroad. At the same time, it is limited by the Commission's lack of jurisdiction over nonprofit entities, which the USA PATRIOT Act did nothing to expand. The result is a complete lack of the required narrow tailoring to advance the interests in fraud prevention and protection of privacy. Further, the do-not-call list is a prior restraint on speech, which is presumptively unconstitutional. In spite of the constitutional infirmity of its proposal, the Commission makes no attempt to demonstrate how it could survive the most demanding level of scrutiny under which it would be analyzed.

For more detail on this reasoning, see the comments of the DMA Nonprofit Federation in this proceeding.

IV. The Proposed Additional Obligations on Telemarketers in Instances When Consumers Initiate Calls Should be Limited To Disclosures

The Commission proposes to modify the Rule's definition of "outbound telephone call" to clarify the Rule's coverage of outbound calls in two situations: (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 such as in the case of "upselling"; and (2) when a single telemarketer solicits purchases or contributions on behalf or two separate sellers the transactions would be treated as two separate calls for TSR purposes.[39] Upselling occurs when a consumer might initiate an inbound telemarketing call in response to a direct mail solicitation for a given product and, after making a purchase, be asked if he or she would be interested in another product or service offered by the same or another seller. The result of the proposed definitional change would be to subject a call to certain provisions of the TSR even though the initial part of the call would not have been subject to such provisions. The Commission's stated intent for this definitional change is to ensure that customers will

[39] 67 Fed. Reg. at 4500.

receive material disclosures. However, the effect of the proposed change would extend to the application of such obligations as the TSR time restrictions and the proposed national do-not-call list. Such an extension would be far too sweeping and result in regulatory obligations that are both impractical and unnecessary. These additional obligations could significantly hinder legitimate commercial offerings. The Commission should revise its proposal in a manner that is limited to requiring additional disclosures.

For example, it is an "abusive telemarketing act or practice and a violation of the rule for a telemarketer to engage in an outbound call to a person's residence at any time other than between 8:00 a.m. and 9:00 p.m. local time at the called person's location."[40] Applying the Commission's proposed amended definition of an "outbound call" in this scenario is entirely impractical. The Commission set these times in 1995 in response to the Telemarketing Act's directive that the rule should include "restrictions on the hour of the day and night when unsolicited telephone calls can be made to consumers."[41] In the event that the original call is placed by the consumer, there is no unsolicited call to the individual. The phone on the consumer's end will never ring. Moreover, in a situation where the consumer initiates the call, in most instances, particularly in an upsell situation, the business will not be in a position to know the local calling time of the consumer.

A similarly absurd result occurs with respect to dealing with the TSR's restriction on initiating "outbound calls" to persons who have indicated that they do not wish to receive calls from the seller whose goods or services are being offered or the charitable organization on whose behalf a charitable contribution is being requested or to individuals who have placed their names and/or number on a national do-not-call list. Under the proposed amendment, that would include the second company in an upsell situation. It is impractical to require that, prior to transfer of a call initiated by an individual, a company must run the ANI for that consumer against a do-not-call list. Moreover, if the individual is

[40] 16 C.F.R. § 310.4(c).

initiating the call, then it is difficult to assert that a do-not-call list should apply. It is equally impractical in an upsell to require a business to run the ANI against the TPS or company-specific opt-out lists.

V. The Prohibition on Transfer of Preacquired Account Information Should Not Extend to Upsells

The Commission proposes to prohibit "receiving from any person 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 any person for use in telemarketing."[42] The Commission bases its proposed prohibition on the transfer of preacquired billing information on the belief that "the sharing of consumers' preacquired billing information causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or competition."[43] The Commission's proposal fails to evaluate the numerous legitimate practices by which information is transferred. As an alternative to the Commission's proposal of a flat prohibition on transfers, the Commission should instead require that notice of transfer of billing information be disclosed to the consumer and the consent be given by the consumer prior to the transfer. Indeed, although the Commission never defines "preacquired account information," it appears that this definition should exclude information obtained with the consent of the consumer and accompanied by sufficient disclosures. This type of informed consent will provide sufficient safeguards to consumers.

The Commission is concerned that consumers often do not know that the information is being used by the second merchant.[44] Notice and informed consent to consumers regarding the transfer of

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[41] 15 U.S.C. § 6102(a)(3)(b).

[42] 67 Fed. Reg. at 4514.

[43] *Id*.

[44] *Id*.

billing information satisfy this concern. Not even those commenters concerned with transfers of billing information propose a flat ban, as the Commission has.[45] Rather, these critics suggested improved disclosures to consumers or consent as a condition of using preacquired account information in telemarketing.[46] The Commission lacks the record evidence to prohibit such a prevalent sales practice, and this defect is not cured by its effort to shift to industry the burden of quantifying the efficiency gained by preacquired account telemarketing. *See* 67 Fed. Reg. at 4514 (questioning the benefits for industry because "the Commission has no data that identify or quantify specific efficiency gains").

While notice and informed consent of the consumer satisfy the Commission's concerns for all potential transfers of billing information, the logic of an informed consent requirement is particularly evident in the situation of an upsell. In an upsell situation, a consumer contacts a business to purchase a product or service (inbound call). After completion of the initial transaction, the consumer is offered another product or service from another merchant. Before the consumer's billing information is transferred to the second seller, the consumer must affirmatively consent to that transfer by accepting the upsell. The disclosures have already occurred for the first transaction. For example, a consumer calls and orders outdoor clothing from a merchant and is offered enrollment in an outdoor course (*e.g.*, rock climbing or fly-fishing) offered by another merchant. This informed consent evidence is patently different from the transfer of preacquired account information to a seller in an outbound call, prior to the consumer being contacted. In such an instance, the consumer has the added protection that the good will and reputation of the business with which the consumer has initiated contact will further reduce the potential of fraudulent or abusive transfers of such information. Similarly, the benefits to consumers from the transfer are substantially increased in an upsell because consumers generally are referred to offerings similar to what they have just purchased and that are highly likely to be of interest to them.

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[45] *Id*.

[46] *Id.* at 4513-14.

Likewise, it is a significant benefit to consumers for second businesses in an upsell to obtain and use information such as address and credit card information. This eliminates the need for a consumer to have to restate the information just provided. Transfer of information in such scenarios with informed consent is inherently efficient for both the merchant and consumer.

The effectiveness of disclosures also is apparent when evaluating the example cited by the Commission in which "particular dangers for consumers … arise when preacquired billing information is used in combination with free trial offers and/or negative option plans."[47] The concern in that scenario is that "[o]ften consumers consent to having additional information about an offered club membership mailed for their review, incorrectly assuming that since they have not provided their billing information, they will not be charged unless they affirmatively take some action to accept the offer."[48] Rather than prohibiting the transfer of information, the Commission should simply require businesses to disclose to consumers that they possess the credit card information from the previous sale on the same telephone call and that the credit card will be charged using such information at the end of the trial period unless the consumer cancels the service. Such disclosures directly address the Commission's concerns.

Finally, the Commission does not appear to have authority to regulate the transfer of preacquired account information. The Telemarketing Act authorizes the Commission to define rules that "prohibit deceptive telemarketing acts or practices and other abusive telemarketing acts or practices." The Commission does not have statutory authority to classify practices as violating the law based on an analysis of "unfairness," as it proposes.

Even if "unfairness" could be applied, there is no evidence that preacquired account information accompanied by consent and disclosures is "unfair" under FTC jurisprudence. The Commission did not use unfairness principles in 1995 when it issued the TSR. While the use of billing information in an upsell

[47] 67 Fed Reg. 4513.

is not an "unfair" practice as that term is analyzed by the Commission, the Commission has no authority to define "unfair" practices in the area of telemarketing. Regulation of the transfer of preacquired account information does not fit the Commission's deceptive practices authority. Such transfer is not one of the types of action contemplated as abusive. The Commission is attempting in its proposal to bootstrap unfairness into its abusive practices authority. The Commission cannot do what it is not permitted to do in the statute: regulate telemarketing using its unfairness authority, under the guise of its authority over "abusive" practices.

[48] *Id.*

VI. Use of Predictive Dialing Extends Beyond Telemarketing and Creates Significant Benefits for Both Businesses and Consumers

In the NPRM, the Commission proposes to regulate "predictive dialing" mechanisms as "abusive," and seeks comment on a maximum setting for abandoned calls. While abandoned calls should be limited, the use of predictive dialers provides tremendous efficiencies and benefits to both businesses and consumers. An appropriate balance must be struck between limiting abandoned calls and recognizing these benefits. The DMA has established guidelines for this purpose that strike this balance. While we support efforts aimed at furthering responsible use of predictive dialers, the Commission does not have statutory authority to regulate predictive dialers through the TSR. The Commission also asserts that telemarketers who abandon calls are violating the TSR, which requires that prompt and clear disclosure of information about the telemarketing call. The Notice is an inappropriate vehicle for the Commission to essentially announce what effectively would constitute new law.

A. The DMA Guidelines Provide the Appropriate Maximum Setting for Abandoned Rates

Predictive dialers automatically dial telephone numbers in a manner designed to have a potential customer answer the phone when an operator is available to speak with the customer. By matching live operators with answered calls, predictive dialers produce significant efficiencies for businesses. These efficiencies enable small and large companies to reach more prospective customers who could not otherwise be reached. Likewise, the use of predictive dialers allows smaller telemarketers to compete with larger competitors. Without the use of this efficient technology, smaller companies would not be able to telemarket in a cost effective manner. These efficiencies also result in the provision of a greater number of services at lower prices than otherwise possible. Likewise, predictive dialers allow for segmenting of data and phone numbers to better target consumers most likely interested in telemarketing offers.

In addition to the efficiencies that result from predictive dialers that must be preserved, there are practical limitations on the ability to limit abandoned calls. For example, there are limits on how quickly an available service representative can be connected to an answered call. Likewise, there always will be abandoned calls irrespective of the use of predictive dialers because calls also are abandoned when placed manually. Additionally, there are limits on some predictive dialer equipment as to how low an abandoned rate is technically possible.

In evaluating the maximum setting for abandoned call rates, any standard must take into account the significant efficiencies and practical limitations on limiting abandoned calls. The goal should be on limiting abandoned calls as much as possible without compromising efficiencies. The DMA *Guidelines for Ethical Business Practice* achieve this goal. These Guidelines state that abandoned calls "should be kept as close to 0% as possible, and in no case should exceed 5% of answered calls per day in any campaign." Likewise, the Guidelines state that telemarketers should "not abandon the same telephone number more than twice within a 48-hour time period and not more than twice within a 30-day period of a marketing campaign." While The DMA's Guidelines should serve as effective guidance for businesses to limit abandoned calls, the Commission should not intervene in this area as it lacks statutory authority.

B. Predictive Dialing Is Not Within the Scope of the Telemarketing Sales Rule as Prescribed by the Telemarketing Act

The term "predictive dialing" (or other references for or descriptions of this capability) does not appear anywhere in the text of the Telemarketing Act or its legislative history. As evidence of its jurisdiction, the Commission offers only the legal conclusion—without support—that "using predictive dialers in a way that produces many abandoned calls is a practice that clearly 'the reasonable consumer would consider coercive or abusive of such consumer's right to privacy.'" 67 Fed. Reg. at 4524, *citing* 15 U.S.C. § 6102(a)(3)(A). According to the Commission, in the minority of instances when predictive dialing results in an abandoned call to a consumer, telemarketers violate Section 310.4(d) of

the Rule because they do not make the requisite disclosures under the Rule. *Id.* According to the Commission, the consumer "receives the call" when he or she picks up the telephone. *Id.*

First, the Commission assumes—without support and without adhering to notice and comment requirements on the subject—that use of a predictive dialing mechanism is within the scope of the Rule. However, it is not clear that predictive dialing qualifies either as an "outbound telephone call" or that it results in a "consumer receiving the call" for purposes of Section 310.4(d) of the Rule. "Outbound telephone call" is defined as "a telephone call initiated by a telemarketer to induce the purchase of goods or services." § 310.2(n). It is not clear that a "telephone call" has occurred or that a consumer has "received the call" until the telemarketer is on the line with the consumer. Clearly, no "induce[ment]" to purchase has occurred absent a telemarketing operator describing the product and making an offer to a consumer. Rather, the more logical interpretation is that predictive dialing prepares for an "outbound telephone call" to occur, thus requiring no disclosures in the event an operator is not available when a consumer picks up the handset. By contrast, according to the Commission's flawed logic, a misdialed number or a call made to an individual who is not at home or is unavailable, both of which result in a hang-up before disclosures are made, violate the TSR because they lack disclosures. As it strains credulity to assert that an "outbound telephone call" triggering disclosures has occurred in those situations, it is at least equally implausible to assert that a predictive dialer violates the TSR because no disclosures are made. Predictive dialing was not addressed in the Commission's 1995 rulemaking proceeding adopting the TSR. Accordingly, the Commission may not simply announce in the NPRM that predictive dialing results in an "outbound call" that is "received" by the consumer for purposes of the Rule.[49] Moreover, requiring disclosures for abandoned calls will not be favored by consumers. For example, under the Commission's assertion, use of predictive dialers would require that disclosures be left on voicemail when individuals are not home rather than abandoning the call. This could, however, be in violation of the FCC's TCPA.

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[49] *See generally*, Richard J. Pierce, Jr., *Administrative Law Treatise* (4th edition 2002) at § 7.3, discussing notice and comment requirements under Section 553 of the Administrative Procedure Act.

Second, Congress was very specific in allocating jurisdiction over automatic dialing to the FCC, with whose rules the Commission's proposals would conflict. Specifically, "automatic telephone dialing systems" are the subject of Section 227 of the TCPA, 47 U.S.C. § 227(b)(1)(A)-(D) and the existing FCC rules promulgated pursuant to that statute. 47 C.F.R. § 64.1200. Section 227 bars "automatic telephone dialing systems" from placing calls in a limited set of circumstances: (a) to an emergency line; (b) to a hospital or related health care institution; (c) to a radio common carrier service or service for which the called party is charged for the call; and (d) such that two or more lines of a multi-line business are simultaneously engaged. 47 U.S.C. § 227(b)(1)(A)-(D). With respect to *how* automatic dialing mechanisms function, the TCPA addressed the time needed to hang up after prerecorded messages and otherwise required that automatic dialing mechanisms adhere to technical standards promulgated by the FCC. 47 U.S.C. § 227(d)(1)(A). The legislative history to the TCPA supports the limited circumstances regarding automatic dialing that Congress intended to address.[50]

In the TCPA Order, the FCC adopted the statutory proscriptions and clarified their application. TCPA Order, at ¶¶ 27-51. With respect to technical standards, the FCC limited its requirement to the statutory text that automatic dialing mechanisms that transmit artificial or prerecorded messages (not predictive dialing as discussed in the NPRM) hang up within five seconds of being notified of the called party's hang up. *Id.* at ¶ 52.[51] The FCC did not, as the Commission proposes to do, go beyond the TCPA's text and enact specific regulations on what the technical specifications of predictive dialing mechanisms that do not result in calls between a telemarketing operator and the consumer (such as maximum settings) should be.

Further support for the limited authority Congress intended to bestow on the FCC is found in Section 227(c)(1)(D), which requires the FCC, in its rulemaking implementing the TCPA, to "consider

[50] *See generally* H.R. Rep. No. 103-317, LEXSEE 102 h. rpt 317 (1991).

whether there is a need for *additional* [FCC] authority to further restrict telephone solicitations." 47 U.S.C. § 227(c)(1)(D) (emphasis added). This provision clarifies that Congress envisioned that any additional restrictions on solicitation, presumably including further regulation of automatic dialing mechanisms, would (a) be governed by the FCC and, more importantly, (b) require a *separate* grant of authority by Congress to the FCC.[52] For the Commission now to assert that the Telemarketing Act—which makes no mention of predictive dialing—somehow grants it implicit authority to regulate automatic dialing mechanisms well beyond the limited scope of the FCC regulations is entirely inconsistent and unsupported by rules of statutory interpretation.

C. Predictive Dialing Mechanisms are Customer Premises Equipment (CPE) Committed to FCC Jurisdiction

The Commission's proposal to regulate the technical standards for automatic dialing mechanisms would conflict squarely with the commitment to FCC jurisdiction of technical standards for customer premises equipment ("CPE") and the well-established right to attach CPE absent a showing of harm to the network, and the specific provisions of Part 68 of the FCC's existing rules. CPE is defined in the Communications Act as "equipment employed on the premises of a person[53] (other than a carrier) to originate, route, or terminate telecommunications." 47 U.S.C. § 153(14).[54] This definition is reiterated in the FCC's rules. *See* 47 C.F.R. § 6.3(e).

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[51] These requirements are set forth in Section 64.1200 of the FCC's Rules, 47 C.F.R. § 64.1200.

[52] The FCC considered, but found no need to request additional authority to accomplish the TCPA's goals. TCPA Order at ¶ 58.

[53] "Person" is defined expansively in the Communications Act to include "an individual, partnership, association, joint-stock company, trust or corporation." 47 U.S.C. § 153(32).

[54] Note that the Communications Act provides two explicit grants of jurisdiction to the FCC over CPE: for the manufacture of CPE by a Regional Bell Operating Company, 47 U.S.C. § 273, and to ensure access to CPE for persons with disabilities, 47 U.S.C. § 255.

It is elementary to point out that the FCC has broad authority to regulate the equipment connected to the public switched telephone network ("PSTN"), including CPE. The FCC has explained its jurisdiction over CPE as "provid[ing] the technical and procedural standards under which direct electrical connection of customer-provided telephone equipment, systems and protective apparatus may be made to the nationwide network without harm and without a requirement for the interposition of telephone company-provided protective circuit arrangements (PCAs)." *Petitions Seeking Amendment of Part 68 of the Commission's Rules Concerning Connection of Telephone Equipment, Systems and Protective Apparatus to the Telephone Network*, 94 FCC 2d 5, ¶ 1 (1983). The scope of this part of the FCC's rules is explicitly broad; in general, these rules "apply to direct connection of *all terminal equipment* to the public switched telephone network for use in conjunction with all services other than party line services." 47 C.F.R. § 68.2(a) (emphasis added).

The commitment to FCC jurisdiction of technical regulation of CPE is well established, dating back to a seminal decision in which the FCC sought to open the market for CPE by requiring telecommunications carriers to provide access to transmission services to customers with non-carrier-provided CPE. *Use Of The Carterfone Device In Message Toll Telephone Service*, 13 FCC 2d 420 (1968) ("*Carterfone*"). *Carterfone* has long stood for the broad proposition that a customer has an affirmative *right* to make beneficial use of customer-provided equipment in the absence of a showing of harm to the telephone company's operations provided the equipment complies with Part 68 of the FCC's rules. *See, e.g., W. P. Keliipio v. The Telephone Co., Inc.*, 54 FCC 2d 549, ¶ 7 (1975). So fundamental a principle is this that some commenters have described this right as establishing the deregulatory climate fostering creation of the Internet. *FCC Staff Paper: The FCC and Unregulation of the Internet*, 1999 FCC LEXIS 3370 (July 1999). Further, inconsistent state regulations over CPE are preempted. *See, e.g., Public Utility Commission of Texas v. FCC*, 886 F2d 1325 (DC Cir. 1989). The Commission's proposed additional layer of regulations flies in the face of this decades-old jurisprudence.

With respect to automatic dialing, Section 68.318(b) of the FCC's rules imposes a series of requirements on "registered terminal equipment with automatic dialing capability," including limits on the number of attempts made to an specific number, return of the system to its "on-hook" status within 15 seconds in the event of a busy or reorder signal, and within 60 seconds in the event there is no answer. 47 C.F.R. § 68.318. In short, these rules set forth very specific technical requirements for automatic dialing devices that do *not* incorporate the items under consideration by the Commission, including restrictions on abandoned calls.

The Commission defines a predictive dialer as "an automatic dialing software program," 67 Fed. Reg. at 4522. According to the Commission's own categorization, therefore, predictive dialers meet the statutory definition of CPE (equipment employed to originate, route or terminate telecommunications) and fall squarely within the well-entrenched jurisdiction explicitly set forth in Section 68.318 of the FCC's rules over all terminal equipment connected to the PSTN. A separate set of Commission technical requirements over such equipment (*e.g.*, the Commission's proposed limitation of predictive dialers to those telemarketers able to transmit Caller ID) would plainly contravene the commitment of jurisdiction over such equipment to the FCC and the right to attach CPE, absent a showing of harm to the PSTN.

VII. The Blocking of Caller ID Information Should Not Be Extended to Include Affirmative Disclosure of Caller Information by a Telemarketer

The Commission proposes to "prohibit blocking, circumventing, or altering the transmission of, or directing another person to block, circumvent or alter the transmission of, the name and telephone number of the calling party for purposes of caller identification ("Caller ID") purposes."[55] If Caller ID is functioning, it provides another means of consumer choice with respect to those contacting them. As such, businesses should not block Caller ID. Nevertheless, as described below, the Commission is

[55] 67 Fed. Reg. at 4514.

embarking into an area outside of its jurisdiction. With respect to the substantive proposal, limiting the blocking of Caller ID services is appropriate, so long as the proposal does not extend to affirmatively requiring disclosure and display of Caller ID.

The FCC's rules contain explicit and detailed regulation of Caller ID services. Indeed, the Commission demonstrates its awareness of this fact in its repeated references to the fact that the FCC has set rules in this area.[56] Likewise, the Commission references legislation in Congress that propose to do specifically what the Commission proposes, prohibit telemarketers from interfering with or circumventing the consumer's Caller ID service.[57] This is a clear indication that with respect to specifically blocking Caller ID, not contemplated in either the Telemarketing Act or the TSR, a separate grant of congressional authority would be required.

A functioning Caller ID service provides another means of consumer choice. For this reason, business should not block Caller ID. Likewise, the proposed amendments should not be extended to affirmatively require disclosure of Caller ID. As the Commission cites in the commentary, it is technically impossible given the current architecture of the public switched telephone network for many telemarketers to transmit Caller ID information because of the type of telephone system that they use. As emphasized by the Commission in the Notice, many telemarketers use a large "trunk side" connection (also known as a trunk or T-1 line), because it is cost effective for making many calls, but which is not capable of transmitting Caller ID information.[58] Likewise, in many instances, the Caller ID information is not of any use to the consumer because it shows the number of a telemarketer's central

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[56] *See* 67 Fed. Reg. at 4515 n.228, Rule Tr. at 39-40; 47 CFR § 64.1601(b). *See Rules and Policies Calling Number Identification Service—Caller ID, Memorandum Opinion and Order on Reconsideration, Second Report and Order and Third Notice of Proposed Rulemaking*, FCC 95-187, CC Docket No. 91-281, 10 FCC Rcd 11700, 11708 (1995) ("Second Report and Order").

[57] *See* 67 Fed. Reg. at 4515 n.227. The Commission cites H.R. 90, the "Know Your Caller Act of 2001" introduced by Rep. Frelinghuysen, H.R. 3180 introduced by Rep. Salmon, H.R. 232 introduced by Rep. King, and S. 272 introduced by Senator Frist.

[58] 67 Fed. Reg. at 4515.

switchboard or trunk exchange. In fact, in many cases, even if the telemarketer disclosed Caller ID, the information would not be transmitted over the network, never ultimately reaching the consumer, if the local carrier's network is not capable of passing Caller ID. These are other examples of the technical limitations of consumers' ability to identify the caller.[59]

The option for substitution of the actual name of the seller or charitable organization and phone number for the number used in making the call has merit. In such instances it is not the telemarketing service bureau that a consumer would want to contact or know who is calling them, but rather the business that actually offers the good or service.

VIII. Telemarketing of Internet and Web Services Should Not be Excluded from the B-to-B Exemption

The Commission proposes changing the TSR to subject B-to-B sales of "Internet services" and "Web services" (as those terms are defined in the proposed rule) to the provisions of the TSR while continuing to exempt most other B-to-B sales from the TSR. As explained below, this proposal would give common carriers that operate outside of the TSR an unfair advantage over other providers of Internet and Web services regulated by the Commission, is unnecessary and overbroad, and should not apply to the proposed national do-not-call list obligations.

A. The Proposed Exception Would Give Common Carriers an Unfair Competitive Advantage Over Other Providers of Internet and Web Services

The vast majority of telemarketing of Internet and Web services concerns legitimate commerce. The proposed rule would place significant restrictions on B-to-B providers of "Internet services" and "Web services," yet leave unregulated any common carriers that compete in the provision of those very same services. This is due to the limited jurisdictional reach of the TSR and the absence of any

[59] *See* 67 Fed. Reg. at 4514-4515.

comparable regulation under the statutory scheme administered by the FCC.[60]

The Telemarketing Act, under which the TSR was promulgated, unequivocally provides that "no activity which is outside the jurisdiction of [the FTC Act] shall be affected by [the Telemarketing Act]." 15 U.S.C. § 6105(a). Under the FTC Act, the Commission is empowered to regulate "persons, partnerships, or corporations, except[, among others,] … common carriers subject to the Acts to regulate commerce…." 15 U.S.C. § 45.[61] The applicability of this exemption depends on an entity's *status* as a "common carrier," rather than on an entity's *activities in its capacity* as a common carrier. Indeed, a "common carrier" is exempt from the provisions of the FTC Act even when it engages in activities that are not "common carrier" activities, such as the provision of Internet and Web services. In other words, "[t]he exemption is in terms of status as a common carrier subject to the Interstate Commerce Act, not activities subject to regulation under that Act." *FTC v. Miller*, 549 F.2d 452, 455 (7th Cir. 1977).

Non-common carriers currently offer numerous services that also are offered by common carriers including, for example, Web hosting, Web publishing, and access to electronic mail. As a result of the Commission's proposal, simply by keeping their telemarketing operation in-house, common carriers could avoid all the restrictions that the proposed rule would impose upon B-to-B providers of Internet and Web services. Thus, imposing this aspect of the proposed rule would distort the marketplace by giving common carriers a substantial competitive advantage over other B-to-B providers of the very same services. This competitive distortion would be unwarranted and unfair, and could have a major anti-competitive effect on the Internet industry.

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[60] As the Commission itself acknowledges in its commentary to the proposed rule, it does not have jurisdiction over common carriers even when they engage in non-common carrier activities such as the provision of Internet and Web services. *See, e.g.*, 67 Fed. Reg. at 4497.

[61] These "Acts to regulate commerce" include, among others, the Interstate Commerce Act (49 U.S.C. §§ 10101 *et seq*.), which governs common carriers such as those engaging in the provision of Internet and Web services in the B-to-B context. *See* 15 U.S.C. § 44.

B. The Proposed Exception Is Unnecessary and Overbroad

The DMA is concerned that the Commission's proposal to broadly remove B-to-B Internet and Web offerings from the current B-to-B exemption to the TSR could impose significant and unnecessary burdens and costs on this industry.

Based upon an apparent finding that small businesses increasingly have been the target of a *narrow range* of fraudulent Internet-related practices, the Commission proposes to subject to the TSR *all* B-to-B providers of *any Internet-related services*. 67 Fed. Reg. at 4531-2. In support of this proposal, the Commission cites only four recent cases it has brought against so-called "Internet crammers."[62] These cases fail entirely to support the need for the proposed rule because, on the one hand, governmental agencies' success in these and similar cases demonstrates that the Commission's current enforcement powers are more than sufficient to address the stated problem and, on the other hand, the cases do not warrant the type of sweeping regulation currently under review.

1. Existing Enforcement Powers Are More than Sufficient to Address the Problem

The record evidence demonstrates that the Commission and other governmental entities have a track record of successfully combating a very narrow range of fraudulent Internet practices (*i.e.*, "web cramming") that recently have arisen in the B-to-B context. The record, however, provides *no* support at all for the conclusion that a broad, all-encompassing regulation of B-to-B offerings is necessary or appropriate. In July 1999 Jodie Bernstein, then Director of the Commission's Bureau of Consumer Protection, reported to the Committee on Small Business of the U.S. Senate on recent developments in

[62] *See id.* at n.398, *citing FTC v. U.S. Republic Communications, Inc.*, Case No. H-99-3657 (S.D. Tex. filed Oct. 21, 1999); *FTC v. Shared* Network *Svcs., LLC*, Case No. S-99-1087-WBS JFM (E.D. Cal. June 12, 1999); *FTC v. WebViper LLC d/b/a Yellow Web Services*, Case No. 99-T-589-N (M.D. Ala. June 9, 1999); *FTC v. Wazzu Corp.*, Case No. SA CV-99-762 AHS (Anx), (C.D. Cal. filed June 7, 1999).

efforts to combat "Web site cramming." *See* Jodie Bernstein, Prepared Statement of the FTC on "Web Site Cramming" (Oct. 25, 1999) (hereinafter "Web Cramming Report").[63] Ms. Bernstein emphasized the efforts of several governmental agencies, including the Commission, the FCC, and state law enforcement agencies, in fighting "cramming" practices in general, and Web site cramming in particular.

The Commission's ability to fight Web site cramming has not diminished in recent years. Indeed, since filing the four cases cited in support of the proposed regulation (*see* footnote 62), the Commission has continued vigorously to combat Web site crammers. *See, e.g., FTC v. Mercury Marketing of Delaware, et al.*, (E.D. Pa. filed June 28, 2000); *FTC v. YP.Net, Inc., et al.*, Case No. 00-1210 PHX SMM (D. Ariz. filed June 26, 2000); *FTC v. WebValley, Inc., et al.*, Case. No. 99-1071 DSD/JMM (D. Minn. filed July 14, 1999). The Commission similarly continues its vigorous campaign against other, much less frequent forms of Internet fraud targeted at small business owners. *See, e.g., FTC v. Darren J. Morgenstern, et al.*, Case No. 01-CV-0423 (N.D. Ga. filed February 12, 2001). In addition, the agency has deployed targeted education programs designed to raise small business owners' awareness of their potential vulnerability to fraudulent Web site cramming practices. *See, e.g.*, FTC Business Alert, Website Woes: Avoiding Web Service Scams (hereinafter "Website Woes") (describing the general characteristics of Web site crammers' scams, strategies to protect small business owners, and a variety of sources of assistance in the event that a particular business is targeted).[64]

Accordingly, the record does not support the conclusion that any rulemaking is necessary to address the narrow cramming problem identified by the Commission, as existing enforcement authority already provides the necessary tools to combat these practices. Indeed, beyond cramming, there is no record of abuses to justify the sweeping conclusion in the NPRM. One narrow set of fixable problems by a few bad actors should not impugn an entire industry.

2. Sweeping Regulation Is Not Necessary To Curb Web Cramming

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[63] This report can be found at http://www.ftc.gov/os/1999/9910/websitecrammingtestimony.htm.

[64] These materials may be found at http://www.ftc.gov/bcp/conline/pubs/alerts/webalrt.htm.

According to the Commission, the practice of Web site crammers essentially consists of contacting small businesses and offering them an introductory 30-day free-trial Web site, then fraudulently charging the small businesses either through their phone bill or through a direct invoice.[65] Each of the cases cited by the Commission in support of lifting the B-to-B exemption from the TSR with respect to Internet and Web services involved such a pattern, with minor variations. (*See* footnote 62.) Thus, the problem identified by the Commission concerns, at most, a very narrow range of conduct relating to certain forms of free-trial Web hosting or Web publishing offers.

By contrast, the definitions of "Internet services" and "Web services" in the B-to-B context that the Commission proposes are so broad as to encompass virtually every kind of service offered in connection with the Internet. The Commission proposes that the term "Internet services" be defined as "the provision, by an Internet Service Provider, or another, of access to the Internet." 67 Fed. Reg. at 4500. According to the Commission, this definition would include "the provision of whatever is necessary to gain access to the Internet, including software and telephone or cable connection, as well as other goods or services providing access to the Internet." *Id.* This would encompass far more than Web hosting or Web publishing, and include services wholly unrelated to the Web site cramming problem the Commission cites, such as, for example, broadband access to the Internet.

Similarly, the Commission proposes to define B-to-B "Web services" as "designing, building, creating, publishing, maintaining, providing, or hosting a Web site on the Internet." *Id.* at 4501. Again, this definition far exceeds the narrow confines of Web site cramming practices cited and reaches a broad range of totally legitimate Web-related B-to-B services, such as, for example, the provision of full-service Web site design capability for businesses. Frequently, businesses outsource Web site design functions to firms that specialize in cutting-edge electronic design. The ability of these often small firms to maintain a competitive edge could be significantly affected by having to comply (unnecessarily) with

[65] *See* Website Woes at 2.

the requirements of the TSR. Furthermore, companies that offer Internet-related services to businesses would be placed at a disadvantage vis-à-vis companies that offer similar services in the offline world.

Moreover, the proposed exception would force B-to-B Internet and Web services providers to comply with the proposed national "do-not-call" registry rules. These rules, and the national do-not-call registry itself, are explicitly aimed at the protection of *consumers*, not businesses. Thus, to subject B-to-B providers to the proposed do-not-call registry rules would exceed the mandate behind the proposed rulemaking and run counter to the Commission's own recognition that B-to-B sales generally should be exempt from the TSR. A substantial volume of entirely legitimate business activity is likely to be chilled by the onerous requirements of the proposed national "do-not-call" registry rulemaking.

Should the Commission ultimately elect to regulate a category of services that it determines is so commonly fraudulent as to merit excluding from the B-to-B exemption, the category should be defined narrowly to include solely the area of concern that the Commission has cited as problematic.

IX. Novel Payment Systems Should Not Be Subject to Preauthorization Requirements

The Commission proposes to require the consumer's express verifiable authorization when payment is made by any method that "does not impose a limitation on the customer'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 and Lending Act, as amended." 67 Fed. Reg. at 4507.

Many consumers pay for telemarketing goods and services using debit cards much in the same way as they use credit cards, and they appear the same to merchants. The use of such cards would not be subject to additional preauthorization requirements under the proposed amendment, because use of such cards are subject both to alternative dispute mechanisms, as well as the consumer being limited in liability. For example, it is our understanding that the Visa system applies its ADR system to debit

cards. Likewise, we understand that under the Visa system, individuals are not liable for any monies for debit cards that are used fraudulently. We assume that the other major payment services that utilize debit cards follow similar procedures and also would not be subject to the Commission's additional requirements.

The Commission should confirm that the type of debit cards that are used in an identical way as credit cards will not be subject to additional and unnecessary regulatory requirements. Currently, most telemarketers accept credit and debit cards for purchases resulting from telemarketing. Under the proposed Rule, use of novel payment systems would require the additional burden of either express written authorization that includes a signature or a recorded and saved oral authorization. There is nothing new about the use of a debit card that it should be treated as "novel" and subject to additional regulatory burdens. Such an additional authorization requirement could result in significant additional costs on telemarketers with little or no reduction in abusive practices. Such a finding as applied to commonly used debit cards would be arbitrary.

X. E-Mail and Fax Should Fall Within the Direct Mail Exemption

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 that otherwise satisfy the TSR's disclosure requirements set forth in § 310.3(a)(1). These communications should be added to the exemption. However, the Commission should clarify that the required disclosures can be provided either through the e-mail or fax *or* over the phone.

Disclosures in the text of an e-mail or a facsimile fall outside the scope of the TSR. Separate regulatory schemes and practices already appropriately deal with fax and e-mail. The sending of fax

communications is governed by the TCPA[66] and the FCC's rules[67] implementing this Act. The TCPA and implementing rules prohibit the sending of any unsolicited fax that advertises "the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission." Non-fraudulent and non-deceptive e-mail communications are subject to industry self-regulation.[68]

Congressional deliberations in this area further underscore the conclusion that the regulation of unsolicited commercial e-mail, including what disclosures should be required in such communications, are not currently governed by the Commission. Only in areas where businesses have asserted statements within an e-mail or privacy policy does the Commission have authority to act, to the extent that such practices fall under the "deceptive" or "fraudulent"
legal standards. After much careful consideration, Congress has not enacted legislation to date giving authority to the Commission in this area.[69]

Moreover, if the intent were to mandate disclosures, the Commission in the Notice does not evaluate the effect of requiring such disclosures in commercial electronic mail, including the associated costs. The types of disclosures proposed by the Commission are worthwhile, so long as they can be provided over the phone by the telemarketer. The Commission should clarify that it does not require

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[66] 47 U.S.C. § 227.

[67] 47 CFR § 64.1200.

[68] *See* The DMA's web site, www.the-dma.org.

[69] *See* testimony of Eileen Harrington of the Federal Trade Commission's Bureau of Consumer Protection on "Unsolicited Commercial Email" before the Subcommittee on Communications of the Committee on Commerce, Science and Transportation of the United States Senate, April 26, 2001. *See also* testimony of Eileen Harrington before the Subcommittee on Telecommunications, Trade and Consumer Protection of the Committee on Commerce of the United States House of Representatives, November 3, 1999. "The Commission has steadfastly called for self-regulation as the most desirable approach to Internet policy. The Commission generally believes that economic issues related to the development and growth of electronic commerce should be left to industry, consumers, and the marketplace to resolve. For problems involving deception and fraud, however, the Commission is committed to law enforcement as a necessary response. Should the Congress enact legislation granting the Commission new authority to combat deceptive UCE, the Commission will act carefully but swiftly to use it."

the disclosures in the text of the e-mail or facsimile. This is not the appropriate forum to extend disclosure requirements in the text of the electronic mail, particularly, or other forms of direct mail, generally.

XI. The USA PATRIOT Act Amendments to the Telemarketing Act Only Apply Disclosure Requirements to Charitable Solicitations by For-profit Entities

In the wake of September 11, as the legislative history to Section 1011 of the USA PATRIOT Act[70] indicates, Congress was concerned that unscrupulous for-profit entities would solicit fraudulent donations for their own benefit. Accordingly, Congress amended the Telemarketing Act by requiring that solicitations made by for-profit firms (either on behalf of charities or by for-profit firms for their own charitable causes) be accompanied by certain disclosures. However, Congress did not apply all of the TSR's restrictions to solicitations on behalf of charities. Had Congress intended to apply all of the Rule to charitable solicitations, as the Commission hypothesizes, it would have said so in the text of the USA PATRIOT Act, which only mentions disclosures. Indeed, charitable organizations are already subject to federal and state regulations to maintain their nonprofit status, suggesting at most that it is for-profit firms soliciting contributions for their own charitable causes that Congress intended to address.

Further, the application of the do-not-call list to professional fundraisers on behalf of charities is unconstitutional. Supreme Court precedent illustrates that such restrictions on such solicitation are subject to strict constitutional scrutiny. The do-not-call list represents anything but the least restrictive means to satisfy the government interest in deterring fraud and protecting privacy. The proposed exemption for religious organizations from the definition of "charity" is inconsistent with the Commission's reading of the statute, but also demonstrates the constitutional infirmity of the do-not-call list, as restrictions on speech by religious organizations also are subject to strict constitutional scrutiny.

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[70] Crimes Against Charitable Americans Act of 2001, Pub. L. No. 107-56, 115 Stat. 272, 396 (2001) (codified at 15 U.S.C. § 6102).

Further, the do-not-call list represents a prior restraint on speech, which is presumptively unconstitutional.

In addition, subjecting charitable solicitations by professional fundraisers on behalf of charities to the proposed do-not-call list would have a severe negative impact on charities' philanthropic missions. It would impose burdensome recordkeeping responsibilities on charities, decreasing funds available for charity. The do-not-call list also would create an administrative burden by requiring regular scrubbing of customer lists.

For further analysis on these points, see the comments of the DMA Nonprofit Federation in this proceeding.

XII. Conclusion

We thank the Commission for the opportunity to submit these comments. We believe that the Commission's proposals would significantly burden telemarketers, and that the Commission can ultimately adopt less restrictive regulations that do not eliminate the valuable benefits of telemarketing. We look forward to continuing to work with the Commission to strike the appropriate regulatory balance on these issues.

THE DIRECT MARKETING ASSOCIATION, INC.

THE U.S. CHAMBER OF COMMERCE

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EXHIBIT A

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Telemarketing and Competition: An Economic Analysis of "Do Not Call" Regulations

March 2002