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

COMMENTS OF INTUIT INC.

TELEMARKETING RULEMAKING — COMMENT
FTC File No. R411001

(Proposed Amendments to the Telemarketing Sales Rule)

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I. **Introduction**

Intuit Inc. ("Intuit") submits these comments in response to the Federal Trade Commission's (the "FTC's" or the "Commission's") Notice of Proposed Rulemaking (the "NPRM")[1] relating to the Telemarketing Sales Rule (the "TSR" or the "Rule").[2] Intuit is a leading provider of personal finance management, accounting, and tax preparation software and services for individuals and small businesses. Millions of Americans use Intuit's Quicken® software to manage their personal finances, TurboTax® or TurboTax for the Web software to prepare their income tax returns, and QuickBooks® software for their small business accounting needs. Many of these customers also take advantage of the additional online services provided by Intuit directly or through strategic marketing alliances via the Internet and through Quicken and QuickBooks desktop software products; such services include online credit card acceptance, online payments and data backup.

From its beginning in 1983, Intuit's corporate mission has remained simple: to revolutionize how people manage their financial lives by identifying common but complex customer problems and delivering simple, easy-to-use solutions. Intuit's overall goal of creating new and profoundly simple ways for its customers to manage their personal finances and small businesses guides the company's entire approach to managing the customer experience. In each area of its activities, Intuit seeks to empower customers to make choices regarding the manner in which their customer information is used and to deliver the products and services that customers want.

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[1] 67 Fed. Reg. 4492 (proposed Jan. 30, 2002) (to be codified at 16 C.F.R. pt. 310).

[2] 16 C.F.R. pt. 310 (2001).

For these reasons, Intuit supports the FTC's goals of providing greater personal privacy and protection against telemarketing abuses and fraud. However, as explained in the detailed comments below, Intuit believes that certain of the proposed changes described in the NPRM instead would interfere with Intuit's ability to provide its customers with choices regarding the use of their information and to offer them the products and services they want in convenient and efficient ways. Accordingly, Intuit respectfully encourages the Commission to:

(1) *Create an exemption to the proposed national do-not-call registry for telemarketing calls to consumers with whom the seller has an established business relationship*.

Although Intuit supports the goal of enabling consumers' to make privacy choices, the absence of an established business relationship exemption to the national do-not-call registry would actually *limit* consumer choice and significantly interfere with Intuit's ability to tailor its products and services to best meet customer needs.

(2) *Remove from the Rule the proposed definition of an "outbound telephone call" or, at a minimum, modify the proposed definition so that (a) internal up-selling and the up-selling of co-branded or bundled products and services, as well as of products and services of affiliated companies, are excluded from the Rule, and (b) covered inbound telephone calls trigger only the disclosure requirements of the Rule*.

The Commission's proposed definition of "outbound telephone call" would treat all forms of up-selling alike and would extend the Rule to situations where consumers are not at all likely to be deceived or misled. This sweeping regulation would hamper Intuit's ability to provide its customers with convenient and often expected access to reputable third-party products.

(3) *Retain the business-to-business exemption for telemarketing calls involving the sale of Internet and Web services*.

The FTC's proposal to subject business-to-business telemarketing of Internet and Web services to coverage by the Rule would unfairly and unconstitutionally handicap Intuit's ability to compete against unregulated competitors and would slow the growth of vital sectors of the Internet economy.

(4) *Ensure that the national do-not-call registry preempts state laws and is carefully designed to minimize implementation difficulties and costs.*

Intuit supports the Commission's goals in proposing a national do-not-call registry. In order to provide convenience to consumers and to avoid overly burdensome and costly lists suppression requirements, however, the FTC's proposed national do-not-call registry

should preempt state telemarketing rules and also should be carefully designed to address issues such as how to maintain the accuracy and timeliness of the list, how to capture the consumer's request to be added to the list, and, absent preemption, how to interoperate cost-effectively with the many state lists.

(5) *Retain the existing alternatives, including written confirmation, for providing express verifiable authorization for payments and either continue to limit the express verifiable authorization requirement to demand drafts, or, if the Commission insists on expanding the requirement, clarify that ACH payments and debit cards provide "comparable" protections to credit cards and are therefore exempt*.

II. Consumer Choice and Access to Desired Telemarketing Activities, Especially Those Involving an Established Business Relationship, Should Not be Restricted by the Creation of a National Do-Not-Call Registry.

The FTC proposes to create a national do-not-call registry that would enable a consumer to add his or her name or number to a list of persons who do not want to receive telemarketing calls.[3] Intuit supports the FTC's goal of providing consumers with additional tools for controlling their privacy-related choices. However, the absence of an established business relationship exemption to the national do-not-call registry would not further this goal and instead would limit consumer choice and add significant burdens and costs on businesses.

Under the proposed Rule, Intuit would be prohibited from contacting by telephone its existing customers whose names or numbers appear on the national do-not-call list unless it first obtains "express verifiable authorization."[4] The proposed rule does not allow for the fact that under many circumstances, outbound telemarketing calls, particularly to existing customers, are a very effective and convenient means of informing customers of new products or services, notifying them of expired service subscriptions or sunsetted products, and offering upgrades to customers' existing products or services. By presenting opportunities for customers to ask questions and to interact with Intuit customer sales representatives, telemarketing provides

[3] *NPRM*, 67 Fed. Reg. at 4516-21.

consumers with benefits not available through other forms of marketing. The ability to speak directly with customers is particularly helpful in explaining the features of more complex product offerings, such as products designed to help customers manage their personal finances and small businesses and meet their tax return preparation needs.

Intuit places great emphasis on tailoring its products, services and marketing to best meet customer needs, which includes allowing customers to assert their contact preferences. Furthermore, Intuit has no interest in making telephone calls to customers who have indicated a preference for not receiving such calls. As a result, Intuit offers its customers a variety of ways to opt out of receiving telemarketing calls or other forms of marketing information. Customers can opt out of phone contact from Intuit in several ways: 1) during a telemarketing call, by telling a telemarketer not to call them; 2) by opting out whenever they provide contact information, *i.e.*, when they register their product online, when they redeem a rebate, when they respond to direct mail, etc.; 3) by clicking on the "privacy link" at any of Intuit's Web sites that collect contact information; 4) by visiting any of Intuit's privacy statements on its Web sites or accessing its Web sites through any Intuit software (such as Quicken, Quicken TurboTax, and QuickBooks); and 5) by calling or writing Intuit customer service.

In enacting the Telemarketing Consumer Fraud and Abuse Prevention Act (the "Telemarketing Act"),[5] Congress was mindful of the importance of telemarketing and the need to avoid overly restricting "mutually beneficial activities."[6] The House Committee Report accompanying the Telemarketing Act specifically recognized "that legitimate telemarketing

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[4] Proposed Rule § 310.4(b)(1)(iii)(B).

[5] 15 U.S.C. §§ 6101-08.

activities are ongoing in everyday business and may provide a useful service to both businesses and their customers . . . ."[7] Moreover, in enacting the Telemarketing Act, Congress specifically instructed the FTC in promulgating its regulations to "take into account the obligations imposed by the [Telephone Consumer Protection Act] and avoid adding burdens to legitimate telemarketing."[8] The absence of an exemption for customers or others with whom the company has an established business relationship, when coupled with the proposed national do-not-call registry, imposes an unwarranted burden on businesses that is contrary to the legislative intent underlying the Telemarketing Act.

Absent a prior do-not-call request to Intuit, there is nothing inherently intrusive of consumer privacy when Intuit telephones an individual with whom it has an established business relationship. In fact, when enacting the Telemarketing Act, Congress noted that the purpose of the legislation parallels the purpose of the Telephone Consumer Protection Act (the "TCPA").[9] In its rulemaking proceedings implementing the TCPA, the Federal Communications Commission (the "FCC") concluded, based on the legislative history of the TCPA and the agency's findings during the rulemaking proceeding, that "a solicitation to someone with whom a prior business relationship exists does not adversely affect subscriber privacy interests."[10] The FCC further concluded that "any telephone subscriber who releases his or her telephone number

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[6] *House Report on the Telemarketing Act*, H. Rep. No. 103-20, pg. 2 (February 24, 1993).

[7] *Id*.

[8] *Id*.

[9] 47 U.S.C. § 227 (2001).

[10] *TCPA Report and Order*, 7 F.C.C.R. 8752, 8770 (1992).

has, in effect, given express prior consent to be called by the entity to which the number was released."[11] These findings are equally applicable to the circumstances underlying the TSR.

In proposing to establish a national do-not-call list without providing an established business relationship exemption, the FTC is in effect concluding that businesses such as Intuit should have the burden of demonstrating that calls to existing customers are not intrusive of privacy rights. In fact, the FTC proposes to require businesses to obtain express verifiable authorization before contacting customers who choose to be listed on the national do-not-call registry, even when those customers have previously provided Intuit with their telephone numbers and opted not to be placed on Intuit's do-not-call list. However, the FTC offers no evidence to support its determination that telemarketing calls to existing customers intrude on consumer privacy; nor does the FTC make any showing that the current company-specific do-not-call requirements fail to remedy that concern. Instead, the FTC merely concludes that shifting this burden to businesses is a desirable approach because it will allow consumers to pick and choose the businesses to which they wish to provide their consent.[12] While consumer choice is a laudable goal, the Commission's approach ignores the fact that, as a practical matter, customers likely will not realize the scope of their do-not-call request and will inadvertently preclude calls from companies from which they wish to hear. As a result, it will multiply the cost of obtaining authorizations and recordkeeping, which businesses will in turn pass along to consumers, with little benefit to those consumers who do not wish to receive telemarketing. Consumers who prefer the benefits of telemarketing either will face increased costs passed through by businesses or will be directed to less interactive media.

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[11] *Id.*

[12] *NPRM*, 67 Fed. Reg. at 4517.

III. <u>The Proposed Restrictions on Up-Selling Should Be Relaxed So As to Not Unnecessarily Inhibit Marketing Methods that Provide Convenience and Confidence to Customers</u>.

"Up-selling," which is the practice of offering consumers additional products or services following an initial sale, is a legitimate and mutually beneficial telemarketing practice. As noted in the NPRM, a telemarketer may offer consumers additional products or services from the same seller (internal up-selling) or offer the products or services of a third party (external up-selling).[13] Internal up-selling gives customers the benefit of hearing about the wide range of Intuit products and services, while external up-selling enables Intuit to provide products and services of third parties with which it may have strategic marketing relationships, which in turn provides efficiency and convenience to consumers. Customers often welcome internal up-selling, because it enables them to obtain additional products and services from a company they know and trust. In addition, by limiting external up-selling to third-party products and services from rigorously-screened, reputable companies, Intuit is able to offer its customers the same confidence in those products and services.

A. The Proposed Restrictions on Up-Selling Should Be Removed or At a Minimum Modified to Exclude From the Rule the Up-Selling of Co-Branded or Bundled Products or Services.

Up-selling involving a third party's products or services is a common marketing practice that offers unique benefits to customers. Offering additional products or services that are logically related to the underlying product or service ordered by the customer provides an efficient and convenient means of allowing customers to learn about other products and services that they may need. Particularly in the complex fields of tax, accounting and payroll, it is a common practice to provide third-party services in order to deliver complete solutions to

customers. For example, through its QuickBooks Internet Gateway program, and through service offerings featured in connection with Intuit's Quicken personal finance software, Intuit enables customers to purchase third-party products and services, such as credit card processing and data backup services, via the Internet through their Intuit personal finance or accounting software. These third-party products and services frequently are complementary to the products and services provided by Intuit and are designed to expand or enhance the functionality of those products. In addition, Intuit often provides access to third-party offerings through strategic marketing relationships with such third parties. The resulting bundling of service or product offerings frequently creates the need to transfer customers from one party's call center to another party's call center, and these calls often result in inquiries about additional product offerings or upgrades.

Intuit has found that customers very often are interested in learning more about third-party service offerings when contacting Intuit's customer service representatives. In addition, customers often are interested in learning about products and services offered by Intuit's affiliates or subsidiaries, such as Quicken Loans. In these up-sell situations, customers already associate the third-party offering with the products and services that are being offered by Intuit and, for this very reason, Intuit already imposes stringent customer service obligations on its strategic marketing partners in order to protect the value of its own brand. Treating such up-sell transactions as outbound calls, thereby triggering all of the obligations under the TSR, would unnecessarily restrict these practices and result in decreased efficiency and customer inconvenience. By extending the length of the calls in order to satisfy the disclosure

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[13] *Id.* at 4495 n.45.

requirements under the Rule, the proposed restrictions on up-selling would burden both consumers and telemarketers. Although the Commission speculates that additional disclosures are necessary in the context of up-selling in order to protect against telemarketing abuses, converting all calls in which an up-sell takes place to an "outbound telephone call" for purposes of the proposed Rule threatens to restrict proven marketing methods that meet consumer needs. Moreover, the Commission has failed to provide any objective information regarding the nature of the abuse that it seeks to redress through its proposed restrictions on up-selling. And imposing restrictions on up-selling may have the unintended effect of furthering the practice of sharing customer information between parties.

The infrequent number of customer complaints or returns resulting from Intuit's up-selling of third-party products and services suggests that customers find these initiatives very valuable and that restricting this type of marketing would inhibit Intuit's ability to conveniently offer more complete solutions to customers. In addition, in situations involving the marketing of bundled or co-branded services, market forces already provide incentives for businesses to protect against abusive telemarketing practices.

Intuit believes that the Commission's proposal to restrict internal and external up-selling of third-party products and services would significantly and unnecessarily limit the options and convenience available to customers, and therefore asks the Commission to delete these provisions from the proposed Rule. At a minimum, the Commission should modify the proposed restrictions on up-selling to exclude from the Rule up-selling of third-party products or services that are co-branded by the company, or bundled with the products or services of the company, initiating or receiving the original telephone call. Intuit also urges the Commission to clarify that

the up-selling of products or services offered by affiliated companies is not covered by the proposed Rule.

B. The Scope of the Proposed "Outbound Telephone Call" Definition Should Be Limited So That Up-Selling During the Course of an Inbound Telephone Call Triggers Only the Disclosure Requirements of the Rule

It appears that the Commission's goal in proposing the "outbound telephone call" definition was limited to ensuring that consumers are not deceived or misled about the nature and purpose of up-sell transactions or about the identity of the seller of the products or services offered in those transactions. Although the proposed definitional change certainly achieves the FTC's goal, it is not efficiently tailored to that goal. As a result, under the proposed Rule, telemarketers who up-sell during inbound calls will be subject to the additional regulatory obligations of the calling hour and proposed national do-not-call registry provisions, which are unrelated to the FTC's stated objective.

Even if the FTC's desire is to both minimize consumer deception and protect consumer privacy rights, placing calling hour and do-not-call restrictions on inbound up-sells would not make logical or practical sense. Unlike unsolicited calls that should be subject to calling hour restrictions, a customer-initiated call does not raise the same consumer privacy concerns. There is, therefore, no basis for the Commission to declare, as it has with the proposed definition of an "outbound telephone call," that a telemarketer is engaging in an abusive practice when it answers an inbound call and up-sells a product to a customer who has voluntarily elected to call outside the hours of 8 a.m. and 9 p.m., or has previously put his or her number on the national do-not-call registry. By initiating the call, the customer implicitly provides the necessary consent.

Intuit therefore encourages the Commission to revise the proposed Rule so that it imposes only the Rule's disclosure obligations on telemarketers who engage in up-selling during inbound telephone calls.

C. The Commission Should Clarify That the Proposed "Outbound Telephone Call" Definition Does Not Apply To Internal Up-Selling Practices

The Commission's proposed definition of an "outbound telephone call" includes "any telephone call to induce the purchase of goods or services . . . when such telephone call . . . is transferred to a telemarketer other than the original telemarketer."[14] Under the proposed Rule, the term "telemarketer" means any "person" who initiates or receives a call.[15] Read literally, this provision could limit the ability of a single seller's telemarketing representative to transfer customer calls, whether inbound or outbound, to other telemarketing representatives acting on behalf of the same seller. Intuit does not believe that the Commission intended this result. In fact, in the latter part of its proposed definition, the Commission specifically states that a telephone call involving a single telemarketer will only be considered an "outbound telephone call" if the telemarketer is "soliciting on behalf of *more than one seller* . . . ."[16] (emphasis added). This language appropriately limits the reach of the definition and recognizes the important distinction between internal and external up-selling.[17] Absent misrepresentations or false initial disclosures, the risk of consumer confusion and deception is almost non-existent in the context of internal up-selling.

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[14] Proposed Rule § 310.2(t)(2).

[15] *Id.* at § 310.2(z).

[16] *Id.* at § 310.2(t)(3).

[17] In these comments, Intuit uses the terms "internal up-selling" and "external up-selling" as they are understood by the Commission: "[w]hen the product or service is offered by the same seller, the practice is called internal up-selling; when a second seller is involved, the practice is termed external up-selling." *NPRM*, 67 Fed. Reg. at 4495 n.45.

Accordingly, the Commission should revise the proposed definition of "outbound telephone call" to clarify that internal up-selling practices are not within its scope.

IV. Eliminating the Business-To-Business Exemption for Web Services and Internet Services is Unwarranted and Particularly in the Absence of an Established Business Relationship Exemption Would Lead to Unreasonable and Unintended Results.

In recognition of the fact that "in business-to-business transactions, telemarketers are selling to 'uniquely sophisticated' purchasers who are skilled in evaluating and negotiating competing offers,"[18] the proposed Rule generally carries over from the current TSR the exemption for business-to-business transactions.[19] However, the proposed Rule singles out providers of "Web services" and "Internet services" and proposes that they no longer be eligible for the business-to-business exemption.[20]

Burdening all providers of business-to-business Internet and Web services with the compliance obligations of the Rule threatens to unnecessarily regulate one of the most significant engines of growth in the U.S. economy. The definitions of Internet and Web services[21] in the proposed Rule broadly sweep in much, and quite possibly all, of the economic activity that can be attributed to the burgeoning "Internet Economy." The Commission acknowledges the intended wide swath of the Web services definition in the NPRM, by declaring its intention of encompassing "any and all services related to the World Wide Web."[22] With such a broad reach, the proposed Web and Internet services exception not only sweeps into its path substantial

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[18] *NPRM* at 4531 (*quoting* comments of Electronic Retailing Association, at 5).

[19] Proposed Rule § 310.6(g).

[20] The current version of the Rule already includes an exception to the business-to-business exemption for calls involving retail sales of non-durable office or cleaning supplies.

[21] The proposed Rule defines "Internet services" as "the provision, by an Internet Service Provider, or another, of access to the Internet," and "Web services" is defined as "designing, building, creating, publishing, maintaining, providing or hosting a website on the Internet." Proposed Rule §§ 310.2(o) and (bb).

amounts of legitimate commercial speech, but it leaves untouched telemarketing to businesses by fraud artists in nearly all other segments of the economy.

The elimination of the business-to-business exemption for sellers of Internet and Web services places providers of these services at an unfair competitive disadvantage. Web and Internet services providers are not segregated from the rest of the economy and often compete with more traditional "brick-and-mortar" providers of similar services. In addition, because of limitations on the FTC's jurisdiction, the TSR is inapplicable to entire industry sectors, such as banking, insurance and common carrier services that may be in direct competition with providers of Web and Internet services providers. Imposing limitations on the ability of Web and Internet service providers to communicate with potential business customers when many of their direct competitors are not subject to any such restrictions, unfairly discriminates against them and places them at a competitive disadvantage.

Moreover, the regulatory burdens under the proposed Rule far outweigh the actual interests that would be advanced given the limited evidence of abusive practices to date. In the NPRM, the Commission states that "the sale of Internet and Web services to small businesses has emerged as one of the leading sources of complaints about fraud by small businesses."[23] Yet, in support of this proposition, the FTC cites only four cases involving Web services and no cases involving Internet services.[24] Given the size and rapid growth of the Internet economy, the fact that the Commission cites only four cases involving Web services fraud and none in the area

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[22] *NPRM*, 67 Fed. Reg. at 4500.

[23] *Id.* at 4531 (citing comments of National Association of Attorneys General at 16-17; Rule Tr. 250-53, 266, 269-70).

[24] *Id.* at 4531 n.398.

of Internet services leads to the conclusion that fraud in these areas actually is quite isolated and confined to specific type of abuses. Another conclusion that can be drawn from the NPRM is that the Commission's existing anti-fraud tools are fully capable of addressing the limited amounts of fraud that are perpetrated by purported providers of Internet and Web services. In each of the four cases cited in the NPRM, the FTC acted under the broad enforcement powers conferred upon the Commission by Section 5 of the FTC Act.[25]

Finally, particularly when coupled with the absence of an established business relationship exemption, the elimination of the exemption in this area would lead to impractical and unintended results. For example, *each* call relating to the negotiation of a contractual agreement for the sale of Web or Internet services between sophisticated commercial parties would need to begin with a recitation of the TSR's disclosure requirements and would have to be conducted within the calling hour restrictions of the Rule. Alternatively, under the proposed modified direct mail exemption[26], companies could instead make the disclosures in all business to business e-mail communications the purpose of which is, in part, to solicit further sales. However, this cannot be what the Commission intended. It would be equally impractical and unnecessary to require business representatives engaging in e-mail correspondence with prospective business customers to recite the disclosures necessary under the TSR in each case, yet this could be exactly what they are forced to do as a result of the Commission's proposed elimination of the business-to-business exemption for sales of Internet and Web services.

For all of the reasons set forth above, Intuit opposes the FTC's elimination of the business-to-business exemption for sales of Internet and Web services. If the FTC continues to

[25] 15 U.S.C. § 45 (2001).

[26] Proposed Rule § 310.4(b)(1)(iii)(B).

believe that it is necessary to limit the business exemption, it should target only the Web site "cramming" practices that have been the subject of complaints.

V. The Proposed National Do-Not-Call Registry Should Preempt State Do-Not-Call Laws and Should Be Carefully Designed So As Not to Not Impose Impractical and Burdensome Requirements.

Under the current TSR, Intuit already is required to maintain a list of individuals who have requested that they not receive further telemarketing calls.[27] The Direct Marketing Association (the "DMA"), of which Intuit is a member, also requires its members to refrain from calling non-customers who have registered with the DMA's Telephone Preference Service (the "TPS"), a free service pursuant to which individuals can have their names added to a centralized do-not-call list. In addition, non-DMA members use the TPS service for free in order to avoid telemarketing to customers who have indicated that they do not want to be called. There are currently 4.5 million consumers registered with the TPS. In addition, at least twenty states have enacted telemarketing laws that require companies to refrain from calling individuals who have placed their names on state-managed do-not-call lists, and similar legislation has been introduced in several other states.[28]

A. The Proposed National Do-Not-Call Registry Should Preempt Other State Required Do-Not-Call Lists.

Intuit supports a national do-not-call registry that would accomplish its intended purpose. The establishment of a national do-not-call registry could help to relieve the burdens imposed on business by the numerous and sometimes conflicting state do-not-call laws. Absent preemption of state law, however, the proposed national do-not-call registry will simply add another layer of

[27] 16 C.F.R. § 310.4(b)(1)(ii)(2001).

[28] *NPRM*, 67 Fed. Reg. at 4517 n.239.

complexity and force companies to incur the additional cost of matching their lists against the national do-not-call list (costs that will ultimately be passed on to consumers).

As noted above, at least twenty states have enacted do-not-call legislation. Compliance with these varied state telemarketing laws results in substantial costs as businesses must monitor frequent legislative changes and implement new practices. And the process of managing and accessing state do-not-call lists adds significant additional costs to the execution of marketing campaigns. Intuit calculates that the cost of performing a merge-purge operation on telemarketing lists is as high as thirty-five to fifty cents ($.35-.50) per one thousand (1000) names. If the proliferation of state do-not-call laws continues, it eventually may become necessary for companies to "scrub" their lists more than fifty times in connection with a single national telemarketing campaign. Therefore, Intuit encourages the Commission to preempt state do-not-call laws or, at a minimum, allow businesses to opt to use a single national do-not-call list as opposed to the multiple, individual state lists.

B. The Proposed National Do-Not-Call Registry Should Be Designed With Practical Considerations In Mind in Order to Avoid Difficult and Costly Implementation.

The implementation of a national do-not call list that is both effective and efficient for consumers, while at the same time not overly burdensome for government or business, involves a number of challenges. Under the proposed Rule, consumers would be permitted to add their "name and/or telephone number" to the national do-not-call registry.[29] However, in public statements describing the operation of the registry, the Commission has suggested that consumers will be able to add their telephone numbers to the list simply by calling from the

[29] Proposed Rule § 310.4(b)(1)(iii)(B).

phone number that is to be added and then confirming that number by entering it on the keypad.[30] Intuit believes the Commission should consider:

(1) whether it is necessary to have consumers provide both their name *and* number, in which case businesses may be able to compare their lists to either or both fields;

(2) whether the national list will be maintained in the same format as state do-not-call lists, and whether the FTC should set standards for national and state lists to minimize incremental costs;

(3) whether the frequency with which telephone numbers change as people move means that the national list will quickly become obsolete if only telephone numbers are used; and

(4) how frequently consumers should be required to renew their registrations.

In addition, the national do-not-call proposal provides that it is a violation of the Rule to contact a "person" who has placed his or her name on the national do-not-call list.[31] A "person" is in turn defined under the TSR to mean any "individual, group, unincorporated association, limited or general partnership, corporation, or other business entity."[32] Allowing a "business entity" to be placed on the national do-not-call list would be inconsistent with the provisions of the Rule exempting calls to businesses and would lead to impractical results and the potential for foul play. For example, a single employee should not be authorized to place an entire corporation on the national do-not-call list. Moreover, the list easily could be manipulated by businesses in attempts to prevent their competitors from calling their customers.

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[30] *See* Caroline E. Mayer, *FTC Anti-Telemarketer List Would Face Heavy Demand*, Washington Post, March 19, 2002, *at* http://www.washingtonpost.com/wp-dyn/articles/A47200-2002Mar18.html ("To collect names, the agency is not planning to rely, as most states have, on operators or the Internet. Consumers who want to sign up would have to call in from the phone number they want listed on the do-not-call registry. The number would be automatically 'captured' in the database, and the consumer would have to verify it by entering the number again. 'That's all we need,' [J. Howard Beales III, director of the FTC's Bureau of Consumer Protection] said.").

[31] Proposed Rule § 310.4(b)(1)(iii)(B).

VII. The Proposed Changes to the "Express Verifiable Authorization" Requirements for Payments Should Be Reconsidered Because They Would Be Burdensome for Both Intuit and its Customers.

Intuit's Financial Services Group ("FSG") sells products and services to both individuals and small businesses, including many non-profit organizations. Intuit makes use of "demand drafts" – also known as "facsimile drafts" – to process payments and also accepts payment via ACH and debit cards, as well as credit cards. At the time an order is taken, it is unknown whether payment will be by ACH or facsimile draft. For example, if the customer's financial institution does not participate in the ACH system, then the routing number shown on the customer's checks will not be valid for making an ACH payment and a facsimile draft must be used instead. Since this determination is made by processing vendors after the fact, for ACH/facsimile draft customers Intuit obtains both payment information and authorization during the telephone call sufficient to process a transaction using either the ACH system or a facsimile draft. A written confirmation of the transaction is then sent to the customer.

Under the current Rule, a telemarketer that uses a demand draft to debit a consumer's deposit account must obtain "express verifiable authorization." The proposed amendments to the Rule would make the express verifiable authorization requirement more onerous by:

- Eliminating the option to obtain authorization by sending written confirmation of oral instructions.
- Instead requiring oral authorizations to be tape-recorded and preserved, thereby adding to the existing requirements for obtaining and maintaining the recorded authorization.
- Expanding the types of transactions subject to the requirement to include any form of payment that does not have error resolution and liability protections "comparable" to the Fair Credit Billing Act ("FCBA") and Truth in Lending Act ("TILA").

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[32] *Id.* at § 310.2(u).

A large percentage of Intuit customers who order by telephone, including both consumers and businesses, use ACH or facsimile draft payments. If Intuit is in effect forced to stop using those payment methods, it would immediately lose the savings from utilizing what is, for the company and its customers, a very efficient method of payment. Moreover, many users of Intuit's ACH and facsimile draft payment methods are lower-income consumers, small startup businesses, and non-profit organizations, which often do not have access to credit cards. If Intuit were forced to require the use of a credit card for telephone transactions, then consumers and organizations within the purview of the proposed Rule would have to fill out an order form and mail in a check, which could delay the shipment of their order by a week or more.

A. Existing Authorization Methods Should Be Retained and Expanded to Include Electronic Confirmations in Order to Avoid Imposing Impractical Burdens on Obtaining Express Verifiable Authorization.

Requiring companies to utilize and maintain a system of oral recordings for authorization of ACH and/or facsimile drafts would make these payment methods uneconomical. Because Intuit does not know in advance which of the two payment methods will be used to process the transaction, it does not matter whether the new requirements apply to both ACH debits and facsimile drafts, or just to the latter. As a result, Intuit would have to obtain and store recordings for all potential ACH/facsimile draft transactions. The proposed Rule would, therefore, make processing such payments much more difficult, and could force Intuit's Financial Services Group to stop offering payment by any method other than those considered to have protections that are "comparable" to the FCBA/TILA protections for credit cards.

Contrary to statements in the NPRM, taped verification is not a practical method for obtaining authorization. Taping calls imposes substantial costs due to the equipment costs and the costs associated with storing hundreds of thousands of hours of taped phone conversations

for two years. Thus, the direct costs and administrative overhead of taping calls make it impractical.

Written confirmation sent immediately after the customer has placed an order is a method that has served Intuit and its customers well, and it should be retained by the Commission. Intuit recognizes that telemarketers intent on fraud can abuse the current written confirmation method, but the same is true for any other method, including advanced written authorization or recorded oral consent.

Eliminating the written confirmation method for ACH/facsimile draft transactions, and imposing even more requirements on taped verification of such transactions, would leave Intuit with only one practical method of obtaining express verifiable authorization—advance "written" authorization for the transaction. Obtaining authorization by a written signature sent via regular mail would impose lengthy delays on delivery. Intuit's only alternative would be to use electronic authorization; however, it would be cumbersome and impractical to interrupt a telemarketing call with a request that the consumer provide electronic authorization. A facsimile confirmation also would be possible, but many customers do not have ready access to fax machines. Intuit also would incur significant costs due to the much higher volume of incoming faxes.

Additionally, clarification of the Commission's proposal is needed to ensure that Intuit can receive written authorization electronically in a convenient and efficient manner. Although the proposed Rule acknowledges that a signature can be in electronic form, a footnote indicates that it must be a "*verifiable* electronic or digital form of signature."[33] This language could be read to impose a verifiability requirement on the use of any electronic signature in order to

comply with the proposed Rule. Public/private key infrastructure ("PKI") encryption for digital signatures is the technology generally understood to constitute a "verifiable" electronic signature.

PKI is a very secure technology, but it is also very expensive and, as such, is not suitable for the small transactions typical of the Financial Services Group's telemarketing business. Moreover, in order to use the technology, both the seller and the customer must have previously obtained, and learned to use, complex software. Thus, PKI in its present form is generally unsuitable for use in connection with sales to consumers or small businesses, and, of course, unusable for new customers who have not obtained the technology. Other secure technologies such as biometrics are also not feasible for Intuit. On the other hand, other types of electronic signatures are more appropriate for typical telemarketing transactions covered by the Rule.

The Electronic Signatures in Global and National Commerce Act ("ESIGN Act") makes it clear that less robust forms of electronic signatures are equally acceptable as a form of written authorization.[34] The ESIGN Act gives telemarketers the flexibility to comply with specific requirements of the Rule in many ways. As an example, the current "written confirmation" requirements for facsimile drafts could be satisfied by a printed document containing the required information sent by mail, an image sent by facsimile, an e-mail containing the required information, an e-mail with an attached Acrobat "PDF" file containing an image of a printed document, and numerous other modes of delivery. All of these modes of disclosure can be equally valid, allowing a telemarketer to use electronic disclosures as a substitute for printed

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…continued

[33] Proposed Rule § 310.3(a)(3)(i); *NPRM*, 67 Fed. Reg. at 4542 n.3 (emphasis added).

[34] *See* Pub. L. No. 106-229, 106th Cong., 2d Sess., 114 Stat. 464 (2000), *codified at* 15 U.S.C. §§ 7001 *et seq.*

ones.[35] The FTC should, therefore, expressly allow telemarketers to satisfy the existing written confirmation method through the use of such electronic records.

Therefore, Intuit strongly urges the Commission to retain the existing alternatives, including written confirmation, for providing express verifiable authorization. Also, to avoid any ambiguity, the Commission should expressly incorporate the ESIGN Act's definitions of an acceptable "electronic record" and "electronic signature" into the regulation and allow telemarketers to satisfy the existing written confirmation method through the use of electronic records

B. ACH and Debit Card Payments Should Not be Subject to the Express Verifiable Authorization Requirement Because Adequate Consumer Protections Already Exist.

The proposed Rule would greatly expand the reach of the express verifiable authorization requirement to cover not only demand drafts, but also any other form of payment that is not protected by liability limits and error resolution procedures "comparable" to the FCBA and TILA. As noted above, the proposed Rule seems to suggest that electronic payments – including ACH payments and debit cards – are not protected by "comparable" requirements.

There is no reason to impose additional requirements on these types of payment, which are subject to two consumer protection schemes – the Electronic Fund Transfer Act ("EFTA") (for consumer and sole proprietorship transactions) and the National Automated Clearing House Association ("NACHA") Rules (for all transactions).

[35] At this time, the rules of the North American Clearing House Association ("NACHA") do not permit the use of e-mail to deliver confirmation of an ACH debit authorization. However, NACHA has indicated a willingness to review this rule as access and use of technology changes, and the ESIGN Act would permit the use of e-mail if consented to by the customer.

The suggestion that debit cards are not subject to "comparable" requirements presents serious immediate problems for Intuit and other telemarketers. If telemarketers must obtain express verifiable authorization to accept a debit card, they must also do so for most credit cards, because the Visa and MasterCard rules require that their branded credit and debit cards be accepted by merchants on an equal basis. If the final rule retains this distinction, the Commission would effectively be promoting reliance on a single mode of payment – the credit card – that is not any more secure from fraud and abuse than any other payment method. This approach would not be helpful to the consumers and small businesses that the Rule is intended to protect.

In fact, as noted, both ACH payments and debit cards are subject to the EFTA as implemented in Federal Reserve Board ("FRB") Regulation E, which provides both liability and error resolution protection that is very similar, although not identical, to the FCBA/TILA protection for credit cards.[36] Thus, at a minimum, the Commission should specifically state that ACH payments and debit cards provide "comparable" protections to the FCBA/TILA provisions on credit cards and are not subject to the express verifiable authorization requirement.[37]

However, even if the Commission revises the proposed Rule as suggested, there still would be uncertainty over whether even credit cards are acceptable without express verifiable authorization in telemarketing transactions aimed at businesses that would be covered by the

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[36] *See* Regulation E, 12 C.F.R. § 205.11.

[37] Ironically, even facsimile drafts are actually covered by legal protections that might conceivably be considered "comparable" under the FTC's proposal. Under the check processing laws in effect in all 50 states, a bank may not charge a customer for an item unless it is properly payable. An item is not "properly payable" unless it is authorized by the customer. Because a facsimile draft does not bear the customer's signature authorizing payment, it is not "properly payable" unless the facsimile draft has actually been authorized. Therefore, if a bank customer timely advises the bank of an unauthorized facsimile draft after receiving a periodic account statement, the bank is obliged to refund the amount of the draft. *See* Uniform Commercial Code, §§ 4-401 and 4-406. This is the same error correction process available to the customer with respect to ACH debit transactions and debit cards.

proposed Rule. The error resolution provisions for open-end credit in the FCBA, as implemented in FRB Regulation Z, apply only to transactions for personal, family, or household purposes.[38] The liability limits on credit cards do not fully apply to organizations that have more than 10 credit cards.[39] Thus, there would be a significant question whether Intuit and other merchants could even accept credit cards without going through the express verifiable authorization procedure. Intuit doubts that this was the Commission's intent in proposing this amendment.

Accordingly, Intuit strongly encourages the Commission to continue to limit the express verifiable authorization requirement to demand drafts, which is the one area in which it believes it can document abuses. If the Commission decides to expand verification requirements, it should make it clear that ACH and debit card payments are not subject to them.

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[38] *See* 12 C.F.R. §§ 226.1(c), 226.2(a)(11) and (12), and 226.13.

[39] *See* 12 C.F.R. § 226.12(b)(5).