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Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW
Room 159
Washington, DC 20580

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

To the Commission:

This comment letter is submitted on behalf of MasterCard International Incorporated ("MasterCard")[1] in response to the Notice of Proposed Rulemaking ("Proposal") published by the Federal Trade Commission ("FTC") to amend the FTC's Telemarketing Sales Rule ("Rule"). MasterCard thanks the FTC for the opportunity to comment on the Proposal.

In General

Telemarketing fraud continues to be a serious problem and warrants the attention of the FTC. As discussed in greater detail below, however, we are concerned that in the effort to address inappropriate telemarketing practices, the FTC has included a number of provisions in the Proposal which would adversely impact legitimate telemarketing activities and, in some cases, may facilitate fraud. For instance, the FTC's proposed restrictions on submitting billing information for payment (§ 310.3(a)(3)), and on receiving a consumer's billing information from anyone but the consumer (§ 310.4(a)(5)), would appear to *require* consumers to provide their account numbers to telemarketers in order to consummate a sale over the telephone. The FTC has long recommended that consumers not provide their account numbers to telemarketers, and we believe that it is important that the Proposal not do anything to undermine that sound recommendation. In addition,

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[1] MasterCard is a global membership organization comprised of financial institutions that are licensed to use the MasterCard service marks in connection with a variety of payments systems.

both of those sections create the potential for significant confusion regarding the interplay between the Proposal and the FTC's directly related interpretation under Section 502(d) of the Gramm-Leach-Bliley Act ("GLBA") (15 U.S.C. § 1602(d)).

Moreover, the proposal to create a central do-not-call registry for consumers creates a significant number of difficult issues for the FTC and legitimate businesses and requires careful study before any final rule is adopted. For example, there are concerns about how to protect the information in a necessarily publicly available do-not-call registry from those who would use the information in connection with defrauding or doing even greater harm to consumers. Also, of major concern to legitimate telemarketing businesses is the fact that the Proposal's do-not-call provisions do not contain an exemption for contacting existing customers. In addition, because the FTC's do-not-call registry as proposed does not preempt other federal or state do-not-call requirements, it would only add complexity to the already balkanized do-not-call requirements that exist today.

As a result of these and other significant issues raised by the Proposal, we urge the FTC to continue its careful deliberations regarding revisions to the Rule. In this regard, in light of the complexity of the many issues raised by the Proposal, we request that the FTC refrain from issuing final revisions to the Rule until it has published a revised proposal for public comment. The following sets forth MasterCard's more specific comments on the Proposal.

<u>Restrictions on Submitting Billing Information for Payment (§ 310.3(a)(3))</u>

Section 310.3(a)(3) of the Rule provides that when a customer seeks to pay a telemarketer by "demand draft or similar negotiable paper," the telemarketer must obtain the customer's "express verifiable authorization" before submitting the draft or negotiable paper for payment. The Proposal seeks to expand the express verifiable authorization requirement to cover any form of payment 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 [("FCBA")] and the Truth in Lending Act [("TILA")], as amended."

a. <u>Scope of Express Verifiable Authorization Requirement</u>

We commend the FTC for acknowledging that payments that are subject to the relevant provisions of the FCBA and the TILA should be exempt from the express verifiable authorization requirement. These types of payments, such as those made by payment cards that access an open-end line of credit, provide strong consumer protections that obviate the need for specific authorization requirements such as those included in the Proposal. Specifically, the Federal Reserve Board's Regulation Z, which implements the FCBA and TILA, requires that a creditor who provides open-end credit accounts to consumers must furnish those consumers a "periodic statement" reflecting the activity on the accounts during the applicable billing cycle. 12 C.F.R. § 226.7. Regulation Z also provides that a consumer may dispute any "billing error," including any unauthorized transaction, reflected on the consumer's periodic statement. 12 C.F.R. § 226.13.

A creditor that receives a consumer's notice of a billing error must, among other things, resolve the consumer's dispute within two billing cycles (but in no event more than 90 days). The creditor must follow certain procedures in resolving the dispute, including either correcting the error or conducting a "reasonable investigation" before determining that no error occurred. The creditor also must adhere to certain rules pending resolution of the dispute, including prohibitions against attempting to collect any disputed amount, and reporting the consumer delinquent for failing to pay any such amount. *Id.* Moreover, Regulation Z implements the provisions of TILA which limit a cardholder's liability to no more than $50 for unauthorized use of a payment card that accesses an open-end credit account. 12 C.F.R. § 226.12. In view of these strong consumer protections, the FTC's decision to exempt such payment card transactions from the express verifiable authorization requirements is the correct one and should be preserved in any final rule adopted by the FTC on this issue.

In addition, we believe that it is critically important that any final rule adopted by the FTC also explicitly recognize other types of payment transactions which are subject to consumer protections comparable to those of Regulation Z. In particular, payments covered by the federal Electronic Fund Transfer Act (15 U.S.C. §§ 1693 *et seq.*) ("EFTA") involve protections quite similar to those set forth in Regulation Z and should be exempt. The EFTA governs electronic fund transfers to or from a consumer's asset account. For example, the EFTA applies when a payment card is used to make a telemarketing purchase if that payment card accesses a consumer's asset account.

The Federal Reserve Board's Regulation E, which implements the EFTA, sets forth billing error provisions that afford consumers protections similar to those provided under Regulation Z. For example, under Regulation E, a financial institution that provides accounts to consumers to or from which electronic fund transfers can be made must send to the consumers a periodic statement setting forth the activity on the account for each billing cycle. 12 C.F.R. § 205.9(b). Regulation E provides that a consumer may dispute any "billing error," including any unauthorized electronic fund transfer, reflected on the consumer's periodic statement. 12 C.F.R. § 205.11. A financial institution that receives a consumer's notice of a billing error must, among other things, promptly investigate and determine whether an error has occurred within a specified time frame –

generally within 10 business days of receiving the notice. Once a financial institution has determined that an error occurred, the financial institution must correct it within 1 business day. Although financial institutions may take additional time in certain circumstances to investigate an error (generally up to 45 days), the financial institution must provisionally recredit the consumer for the amount of the error (including interest) within a 10-business-day time frame. *Id.*

In addition, like Regulation Z, Regulation E generally limits a consumer's liability for unauthorized electronic transfers to no more than $50. 12 C.F.R. § 205.6. The only potentially relevant difference between the unauthorized use provisions of Regulation Z and Regulation E is that in limited circumstances, a consumer may be held liable for more than $50 under Regulation E if the consumer receives a periodic statement showing an unauthorized electronic fund transfer but fails to notify the financial institution within 60 days after transmittal of the periodic statement. *Id.* We do not believe that this distinction between the two regulations is sufficient to warrant different treatment under the Proposal for payments covered by Regulation Z and payments covered by Regulation E. Accordingly, we respectfully request that the FTC make it clear in its final rule that payments which are covered under the EFTA will not be subject to the express verifiable authorization requirement set forth in section 310.3(a)(3).

Additionally, we urge the FTC to carefully examine voluntary industry measures which result in even stronger protection for electronic fund transfers than are afforded under federal law. For example, MasterCard has adopted a "zero liability policy" which provides greater protections to MasterCard cardholders than those provided under federal law. The policy provides that a consumer will not be liable for an unauthorized transaction involving a U.S.-issued MasterCard consumer payment card, assuming the consumer's account is in good standing and that the consumer exercised reasonable care in safeguarding the card. This means that when a consumer uses a MasterCard payment card that accesses the consumer's asset, credit, or other account, the consumer receives unauthorized use protections which are *more protective* than those provided under the FCBA and TILA. For example, the MasterCard unauthorized use protections combined with the error resolution provisions of Regulation E ensure that the protections received by MasterCard cardholders with respect to electronic fund transfers are stronger than those of the FCBA and TILA. In order to appropriately recognize MasterCard's and other similar voluntary industry efforts, any final rule adopted by the FTC in this area should make it clear that such efforts are relevant in determining whether a particular payment method should be exempt from the express verifiable authorization requirement of section 310.3(a)(3).

b. Content of Oral Authorizations

The Proposal sets forth the specific requirements for obtaining express verifiable authorization for those payments which are not exempt. In this regard, the Proposal states that express verifiable authorization means either:

(i) express written authorization signed by the customer; or

(ii) express oral authorization, which is recorded and made available upon request to the customer and evidences clearly the customer's authorization of payment, the number, date, and amount of debit(s), charge(s), or payment(s), the customer's name, the customer's billing information (including account number), a customer inquiry telephone number, and the date of authorization.

Under the Proposal, the FTC would delete the existing portion of the Rule which permits a telemarketer to obtain express verifiable authorization by sending written confirmation of the transaction to the customer before the transaction is submitted for payment.

We commend the FTC for continuing to acknowledge that it is possible to obtain a consumer's authorization for a transaction orally during a telephone call. The ability to obtain oral authorization is critically important to legitimate telemarketers and should be preserved in any final rule adopted by the FTC on this issue. The contents of the oral authorization set forth in the Proposal, however, create a number of potentially serious issues which must be addressed.

The most problematic element of the oral authorization requirement is that the oral authorization must include the consumer's "account number." The Supplementary Information to the Proposal states that this requirement is intended to mean that the consumer's account number "must be recited by either the consumer or the telemarketer" as part of the authorization.

Because of FTC and banking agency regulatory requirements in other contexts, however, the telemarketer will not have the consumer's account number in most instances. For example, under the FTC's rule implementing the privacy provisions of the GLBA a financial institution may not disclose a consumer's account number to any nonaffiliated third party for certain types of marketing purposes, including telemarketing. 16 C.F.R. § 313.12. This restriction is intended to regulate, among other things, the arrangements that financial institutions are permitted to enter into with third-party telemarketers in which those telemarketers agree to market certain products and services to customers of the financial institution. Under the GLBA, a financial institution may not furnish to the telemarketer the account numbers of any of its customers for use in the telemarketing program. Instead, the financial institution must maintain control of the account number and will initiate charges to the account only upon assurances from the telemarketer that the consumer has authorized the charge. In these programs, consumers are protected by the fact that the financial institution, not the telemarketer, ultimately controls the consumer's account number.

Consumers also are protected by the fact that these arrangements ensure that the consumers are not required to divulge their account numbers during telemarketing calls. This protection is consistent with the FTC's longstanding advice to consumers that consumers not divulge their account numbers to telemarketers.

The Proposal, on the other hand, undermines this important consumer protection and would essentially have the apparently unintended consequence of requiring consumers to disclose their account numbers in order to complete a telemarketing purchase. In order to correct this problem, we urge the FTC to make it clear that a consumer's oral authorization need not include the consumer's account number. If the FTC, nevertheless, determines to retain the account number element for some types of telemarketing transactions, the account number requirement should at least be eliminated for telemarketing arrangements between a telemarketer and a financial institution that is subject to the privacy provisions of the GLBA.

In addition, we request that the Supplementary Information to section 310.3(a)(3) delete the reference to "MasterCard" as an example of the type of account requiring express verifiable authorization.[2] As discussed, MasterCard payment card transactions are precisely the type of transactions that should be exempt from the express verifiable authorization requirement under the Proposal, and using MasterCard as an example in this context may create confusion on this point.

We also recommend that the requirement that an oral authorization include "the date of the debit(s), charge(s), or payment(s)" should be deleted since those dates in many instances will be unavailable to the telemarketer. In this

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[2] In this regard, the Supplementary Information states "[i]n addition to expanding the scope of section 310.3(a)(3) to require express verifiable authorization for additional payment methods, the proposed Rule also requires that the customer must receive additional information in order for authorization to be deemed verifiable: the name of the account to be charged (*e.g.*, "Master[C]ard," or "your XYZ mortgage statement") and the account number, which must be recited by either the consumer or the telemarketer."

regard, the timing of particular debits, charges, or payments may be subject to a number of variables beyond the control of the telemarketer, such as the procedures used by the customer's financial institution to process such payments. Those procedures may result in delays between the time the telemarketer submits the transaction for payment and the time that any "debit(s), charge(s), or payment(s)" is posted to the customer's account. If the FTC chooses to include a requirement regarding the timing of debits, charges, or payments, we suggest that the FTC eliminate the requirement that the "date of" those items be disclosed and instead require that "the frequency of" such items be disclosed. For example, it should be adequate if the telemarketer indicates to the customer that charges will be posted to the customer's account "monthly" rather than being required to specify a particular date on which such charge will be posted to the customer's account.

Exchanging Billing Information for Telemarketing (§ 310.4(a)(5))

Section 310.4(a)(5) of the Proposal would prohibit any seller or telemarketer from "[r]eceiving from any person other than the consumer . . . for use in telemarketing any consumer's . . . billing information, or disclosing any consumer's . . . billing information to any person for use in telemarketing . . . ." The term "billing information" is defined as "any data that provides access to a consumer's . . . account, such as a credit card, checking, savings, share or similar account, utility bill, mortgage loan account or debit card."

Section 310.4(a)(5), like section 310.3(a)(3), appears to be directly inconsistent with the FTC's longstanding and well considered advice to consumers that they not release their account numbers to telemarketers. In this regard, by prohibiting a telemarketer from receiving a consumer's account number from any person other than the consumer, the Proposal virtually mandates that consumers *must* release their account numbers to telemarketers in order to complete a telemarketing purchase. In essence, the Proposal would have the apparently unintended consequence of promoting the very behavior that makes consumers vulnerable to fraudulent telemarketers.

In addition, the Proposal appears to be inappropriately broad in that it attempts to regulate certain activities specifically regulated by Congress in the GLBA, and does so in a manner inconsistent with congressional intent and the FTC's own interpretation of the GLBA. As noted above, the GLBA prohibits a financial institution from furnishing certain account numbers to third parties for, among other things, telemarketing. It is important to note that when Congress chose to legislate in this area, it specifically chose to prohibit financial institutions from furnishing account numbers to telemarketers rather than prohibiting telemarketers from receiving those account numbers. To the extent that the Proposal attempts to prohibit a telemarketer from receiving account numbers from a financial institution, the Proposal would appear to be inconsistent with the choice made by Congress when it explicitly legislated in this area.[3] In order to address this issue, the FTC should, at a minimum, make it clear that section 310.4(a)(5) does not apply to the transfer of billing information between a financial institution covered by the GLBA and a telemarketer. Any final rule on this issue should acknowledge that such communications of information are governed exclusively by the GLBA and not the Rule.

We also are concerned that the Proposal may create confusion regarding the FTC's interpretation of the GLBA, particularly as it relates to the use of encrypted account numbers. In interpreting the meaning of "account number" in the context of the GLBA, the FTC stated that "[s]everal commenters noted that encrypted account numbers and other internal identifiers of an account are frequently used to ensure that a consumer's instructions are properly executed and that the inability to continue to use these internal identifiers would increase the likelihood of errors in processing a consumer's instructions. These commenters also point out that if internal identifiers may not be used, a consumer would need to provide an account number . . . which would expose the consumer to a greater risk than would the use of an internal tracking system that preserves the confidentiality of an account number that may be used to access the account." 66 Fed. Reg. 33646, 33669 (2000).

The FTC went on to state that it "believes an encrypted account number without the key is something different from the number itself . . . ." *Id.* The FTC observed that "[i]n essence, [an encrypted account number] operates as an identifier attached to an account for internal tracking purposes only" and that in addressing this issue Congress focused "on numbers that provide *access* to an account." *Id.* (emphasis in original). The FTC went on to state that "[w]ithout the key to decrypt an account number, an encrypted number does not permit someone to access an account." *Id.*

The FTC concluded by stating that:

> "[i]n light of the statutory focus on access numbers, and given the demonstrated need to be able to identify which account a financial institution should debit or credit in connection with a transaction, the [FTC] has included a clarification in [its GLBA rule] stating that an account

[3] We note that the Proposal would also be inconsistent with the FTC's interpretation of the GLBA insofar as the FTC's rule implementing the privacy provisions of the GLBA permits financial institutions to disclose account numbers to third parties in certain circumstances. *See, e.g.,* 16 C.F.R. § 313.12(b).

> number, or similar form of access number or access code, does not include a number or code in an encrypted number form, as long as the financial institution does not provide the recipient with the means to decrypt the number. Consumers will be adequately protected by disclosures of encrypted account numbers that do not enable the recipient to access the consumer's account." *Id.*

Although the definition of "billing information" set forth in the Proposal appears intended to be consistent with the FTC's interpretation of the GLBA, corresponding language in the Supplementary Information to the Proposal has the potential to create confusion on this point. As noted above, the Proposal itself essentially defines "billing information" as "data that provides *access* to a consumer's account." As such, it appears to conceptually track with the FTC's interpretation under the GLBA which provides that a number must provide "access" to a consumer's account in order to be an "account number." The Supplementary Information to the Proposal, however, states that the FTC intends the term "billing information" "to include information such as a credit or debit card number and expiration date, bank account number, . . . and any other information used as proof of authorization to effect a charge against a person's account." 67 Fed. Reg. 4492, 4499 (2002). As such, the Supplementary Information could unintentionally create confusion as to whether the use of encrypted account numbers as expressly permitted by the FTC under the GLBA would be restricted under the Proposal. In order to address this issue, it is critically important that the FTC make it clear in the final rule that billing information does not include encrypted account numbers.

Centralized Do-Not-Call List (§ 310.4(b)(iii)(B))

The Proposal also would establish a centralized do-not-call registry maintained by the FTC which would allow a consumer to elect to stop calls from any telemarketers by placing the consumer's name and/or telephone number in the registry. Under the Proposal, a telemarketer would be prohibited from calling any consumer who has chosen to be included on the FTC do-not-call registry unless the telemarketer has obtained the consumer's express verifiable authorization to place telemarketing calls to the consumer.

MasterCard recognizes that some percentage of consumers do not wish to receive telemarketing calls, and MasterCard strongly supports the right of those consumers to exercise that choice. Moreover, we believe that the concept of a centralized do-not-call registry should be supported if it can be properly crafted. We are concerned, however, that as currently drafted, the proposal to create a central do-not-call registry creates a significant number of difficult issues with potentially adverse consequences for the FTC, consumers, and legitimate businesses. For example, there are basic practical issues such as how the FTC will handle what many predict will be a substantial volume of do-not-call requests. States that have adopted their own do-not-call lists have experienced difficulties in this area as evidenced by recent press reports. The difficulties include handling the volume of calls and enforcing the requirements.

Moreover, it is unclear how the FTC would build sufficient staff to respond to the consumer inquiries that inevitably would arise as consumers attempt to familiarize themselves with the do-not-call registry. The FTC also would face challenges in compiling, storing, and presenting the do-not-call registry in a manner which is usable to the vast array of different businesses that will be called upon to comply with the Proposal. Other foundational issues, such as how the administration of the do-not-call registry would be paid for, appear to be beyond the realm of simple solutions.

The concept of a central do-not-call registry raises far more difficult issues as well. For example, how would the FTC protect the information in a do-not-call registry from those who would use it in connection with defrauding consumers or perpetrating even greater harms?

Also, it is inevitable that a central do-not-call registry would impose the most significant inequities on legitimate telemarketing businesses. The issue of greatest concern in this area is the fact that the Proposal's do-not-call provisions do not contain an exemption for contacting existing customers. As a practical matter, this means that unscrupulous telemarketers who cause a high volume of consumers to participate in the do-not-call registry would do great harm to legitimate businesses by preventing those businesses from telemarketing their existing customers who have added their names to the do-not-call list.

Moreover, although the Proposal attempts to establish a "central" do-not-call registry, the Proposal's approach would complicate, rather than centralize, the do-not-call process. The Proposal adds yet another layer to the already complex process for determining which individuals have opted out of telemarketing. In this regard, telemarketers currently are subject to at least two federal do-not-call requirements (*i.e.*, under the existing Rule and the Federal Communications Commission's ("FCC") rule implementing the Telephone Consumer Protection Act ("TCPA")) and must comply with numerous state laws, some of which establish state-by-state do-not-call lists. Many telemarketers also voluntarily participate in industry do-not-call lists. This means that telemarketers already are required to examine multiple databases, with different information and inconsistent formats, just to determine whether a marketing call may be placed to an individual.

In view of the many complex issues involved in developing a central do-not-call registry, there are significant questions about whether mandating such a registry at the federal level is workable. If the FTC, nevertheless, determines to pursue this matter, it is critically important that the FTC at least address the following four issues.

First, in order to avoid inappropriate consequences for legitimate businesses, any do-not-call registry must contain an exemption allowing businesses to contact their existing customers. This approach has been adopted by the FCC in its TCPA rule, and many states have adopted similar exemptions. Moreover, in order to preserve the synergies that the financial modernization provisions of the GLBA were designed to create, it also would be important to ensure that the existing customer exception enables the entire corporate family to contact a customer if one of its members has a customer relationship with the individual.

Second, any attempt to establish a central do-not-call registry is likely to be counterproductive unless it preempts state do-not-call provisions and releases businesses from the responsibility of maintaining company-by-company do-not-call lists under the FTC's and FCC's rules. In this regard, neither consumers nor legitimate businesses are well served by a scheme in which large numbers of databases must be consulted as part of every telemarketing program.

Third, the Proposal indicates that an individual may place "his or her name and/or telephone number" on the do-not-call registry. In order for businesses to use a do-not-call registry, the registry must include a name *and* a telephone number. For obvious reasons, a business cannot reconcile its list of potential telemarketing calls against a list of only names. A list of only telephone numbers would also not be appropriate, since more than one person may use a single telephone line. To address these issues, we strongly urge the FTC to amend its Proposal to require consumers to place their name *and* telephone number on any do-not-call registry.

Finally, the FTC has asked whether it should accept do-not-call requests compiled by third parties. We do not believe that the FTC should accept names and phone numbers from anyone other than the individual requesting to be added to the registry. The use of intermediary service providers acting on behalf of consumers would likely decrease the accuracy of the registry and create potential for fraud and abuse. Therefore, the FTC should accept name and telephone information only directly from the individual wishing to be added to the registry.

Blocking Caller ID (§ 310.4(a)(6))

The Proposal would deem the blocking, circumventing, or altering the transmission of the name and/or telephone number of the calling party for caller identification service purposes as an abusive telemarketing act or practice. Should the FTC decide to retain this portion of the Proposal as drafted, we urge an important clarification. In the Supplementary Information, the FTC appears to acknowledge that not all telemarketing calls are made using technology capable of transmitting Caller ID information. We urge the FTC to clarify that the Proposal does not *require* telemarketers to use technology capable of transmitting Caller ID information and that use of technology which does not allow for Caller ID information is acceptable.

Definition of Outbound Telephone Call (§ 310.2(t))

Currently, the Rule exempts telephone calls that are initiated by a consumer that are not the result of any solicitation by a seller or telemarketer. This exemption makes it clear that when a consumer chooses to make a so-called inbound call to a company without being solicited to do so, the call is not covered under the Rule even if the consumer decides to make a purchase during the call. This exemption is preserved in the Proposal, and we urge the FTC to include it in any final rule adopted on this issue.

We are concerned, however, that the FTC's revision to the definition of "outbound telephone call" may inadvertently create confusion regarding the scope of this important exemption. Specifically, the FTC proposes to expand the definition of outbound telephone call to include an inbound telephone call if the call "is transferred to a telemarketer other than the original telemarketer . . . ." We are concerned that this definition could inadvertently create ambiguity regarding the coverage of a variety of calls which should be excluded from the Rule. For example, if a consumer initiates a telephone call to a financial institution to make a customer service inquiry, that call should not be covered if, as part of the call, the consumer chooses to be transferred for purposes of making a purchase. Similarly, if a consumer initiates a telephone call to a seller for purposes of making a purchase, that call should not be covered if the consumer is transferred to a "telemarketer" to consummate the purchase so long as the consumer's original call was not the result of any solicitation by a seller or telemarketer.

Exemptions (§ 310.6)

The Proposal would exclude from its coverage telephone calls between a telemarketer and any business, except those involving the sale of Internet services or Web services, among other things. The Supplementary Information notes that these types of services are "leading sources of complaints of fraud." We applaud the FTC for attempting to reduce the incidence of fraud by including such calls within the scope of the Proposal. However, we caution the FTC on the application of the Proposal as drafted. For example, the Proposal could be construed to cover the telemarketing of banking products that may involve an Internet component, or even the provision of access to the Internet in connection with the banking product, to businesses. There are likely similar situations with other types of products (*e.g.* marketing or inventory tools). We do not believe these types of calls or products are part of the leading sources of complaints. Therefore, in order to prevent them from being inappropriately covered by the Proposal, we urge the FTC to clarify that calls involving Internet services or Web services will still qualify for the exemption if such services are a component of another product which is enhanced by such Internet or Web services.

Predictive Dialers

In the Supplementary Information to the Proposal the FTC has noted that it considers the use of predictive dialers in a manner which produces "many" abandoned calls is coercive or abusive. Furthermore, the FTC indicates that telemarketers who abandon a phone call, through use of a predictive dialer for example, violate the Rule by not providing required disclosures to the person receiving the call.

While the misuse of predictive dialers can result in consumer frustration, we do not believe the FTC should hold the industry to a standard which does not allow for the reasonable use of predictive dialers. Therefore, we urge the FTC to consider one or both of the following suggestions. First, the FTC should study current industry practices to determine an "acceptable" rate of abandoned calls. This rate should be flexible enough to allow businesses to use the technology in a meaningful way, but not to permit bad actors to abuse the use of predictive dialers. Furthermore, we do not believe the ability to use predictive dialers which may result in a limited number of abandoned calls should be available only to those who are able to transmit Caller ID information. Such an approach is clearly not technology-neutral and may stifle the development of other communications methods. Second, the FTC should examine the feasibility of allowing companies *the option* of playing a recorded message when the use of a predictive dialer results in what would otherwise be an abandoned call. However, such an approach should be strictly at the discretion of the caller.

Jurisdiction

The FTC indicates that while the Proposal would not apply to banks, it would apply to any third parties that conduct telemarketing activities on banks' behalf. We respectfully disagree with this position and urge the FTC to clarify that any final rule does not apply to entities performing activities on behalf of a bank. In particular, it would be important to clarify that the final rule does not apply to any bank subsidiary or affiliate performing services on behalf of a bank.

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Once again, MasterCard appreciates the opportunity to comment on this important matter. If you have any questions concerning our comments, or if we may otherwise be of assistance in connection with this issue, please do not hesitate to call me, at the number indicated above, or Michael F. McEneney at Sidley Austin Brown & Wood LLP, at (202) 736-8368, our counsel in connection with this matter.

Sincerely,

Joshua L. Peirez
Vice President &
Senior Legislative/Regulatory Counsel

cc: Michael F. McEneney, Esq.