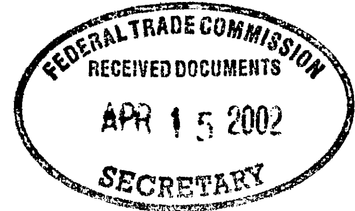

Before the
FEDERAL TRADE COMMISSION
Washington, D.C. 20580

COMMENTS OF THE NATIONAL RETAIL FEDERATION

TELEMARKETING RULEMAKING—COMMENT
FTC File No. R411001
(Proposed Amendments to the Telemarketing Sales Rule)

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April 15,2002

Telemarketing;Sales Rule
Comments of the National Retail Federation

On behalf of the retail industry, the National Retail Federation ("NRF") submits the following comments regarding the proposed changes to the Federal Trade Commission's ("FTC's" or "Commission's") Telemarketing Sales Rule. Telemarketing, both inbound and outbound, is among the tools many retailers use to communicate with their customers. We do not believe that our members were the focus of the difficulties the Telemarketing and Consumer Fraud and Abuse Prevention Act was enacted to address. They do however bear the burdens of compliance. Nevertheless, NRF has worked with its members (and with the Commission) to ensure that retailers observe existing telemarketing requirements, whether embodied in the Telemarketing Sales Rule or elsewhere. Any change to those rules potentially has great effects on our members' operations.

By way of background, the National Retail Federation is the world's largest retail trade association with membership that comprises all retail formats and channels of distribution including department, specialty, discount, catalog, Internet and independent stores. NRF members represent an industry that encompasses more than 1.4 million U.S. retail establishments, employs more than 20 million people -- about 1 in 5 American workers -- and registered 2001 sales of $3.5 trillion. NRF's international members operate stores in more than 50 nations. In its role as the retail industry's umbrella group, NRF also represents 32 national and 50 state associations in the U.S. Both NRF's larger and smaller members will be very much affected by the proposed changes to the rule.

Telemarketing is an important issue. Retailers who use it as a tool should be sensitive to the concerns of the individuals they attempt to contact. The Commission should provide strong, bright lines, beyond which no marketer can legally traverse, along with a combination of industry guidance and carefully targeted enforcement for activity beyond those lines. What it should not do is subsume the latter two in the former. For that reason these comments are divided into two sections. In the first we discuss the

Commission's authority to issue the proposed rule. In brief, as the rule is currently constituted, we do not believe that authority exists. The second section consists of factors that must be incorporated into a rule should the Commission decide to proceed. They are not options, they are interrelated operational necessities. All of them are essential to a reasonable rule.

I. Issuance of the Proposed Rule

Authority

There is a serious question as to whether the Commission has the authority to establish a national do not call list. The Telemarketing and Consumer Fraud and Abuse Prevention Act provides authority to develop a rule governing deceptive or abusive activities. The existing Telemarketing Sales Rule addresses many practices consistent with that mandate. Thus, in order to prevent deception, prior to a telemarketing sale being consummated, a company can be required to not mislead a customer by failing to reveal the total cost of the order as well as the substance of an unusual or an unexpected refund or return policy. The Commission can adopt such a rule because any action taken that hides the true cost of a purchase is highly likely to cause significant injury to the customer purchasing that merchandise.

Similarly a company can be prohibited from engaging in an abusive practice such as using threats in order to accomplish a telemarketing sale. Each individual who is threatened suffers the personal harm associated with the fear arising from threats. Although the law did not create a right to regulate on the basis of unfairness, it is clear that the rule could be expanded to the extent additional deceptive or abusive activities were identified by the Commission.

However, for a number of reasons, mandatory adherence to a Commission-established do not call list of telephone numbers meets neither of these requirements and exceeds the Commission's authority under the law. This can be summarized simply. At

base, there has been no demonstration that the decision by a retailer to make telephone sales calls to two established customers, whom it may never have called before, is either a deceptive or an abusive practice under any fair reading of the law. Yet that is the gravamen of the proposed rule.

As proposed, no retailer, regardless of size, could make two sales calls from Chicago to customers in Michigan (or from Cincinnati to nearby Covington, Kentucky), without first contacting a federal agency in Washington, D.C. to determine whether he or she would be permitted to do so. This would be an extraordinary expansion of federal involvement into business activity, and it would be premised on nothing for which Congress has granted the Commission authority to regulate. We have found no basis in the law, and the Commission's notice of proposed rulemaking cites no basis consistent with the law.

cost

Unlike some other industries, retailers, whether large or small, operate under extremely tight margins. For that reason, analysis of the costs and benefits of the proposed rule and its constituent parts will require extraordinary sensitivity on behalf of the Commission if it is not to unduly hamper those operations. Based on the available data, it appears that the cost of the proposed regulation is likely to be unacceptably burdensome, especially for smaller retail operations.

The Commission has not placed the ultimate cost of its proposed do not call list procedures on the public record. Therefore, it is not possible to perform a true cost/benefit analysis. We understand, however, that one state (Indiana) charges companies $300 per year for access to its quarterly issued list (i.e. $75.00/list). The Commission proposes to update its list monthly. It is unclear whether the cost to obtain the list would increase proportionately. Would the hypothetical retailer above (even a specialty merchant who might have only a few hundred out of state customers) be

required to spend nearly a thousand dollars per year (12 x $75) in order to determine whether any of those customers happened to be on the Commission's list?

There is additionally the cost to a small retailer of having to purge its customer list on a monthly basis. Alternatively, the rule proposes that the shop could attempt to reach its customers for the purpose of obtaining an express verifiable authorization. However this could potentially double the number of calls the merchant would need to make to its customers in order to obtain their authorization. In addition, this effort would not necessarily relieve the retailer of the cost of purchasing the Commission lists. Even in the unlikely event the retailer were ultimately successful in obtaining authorizations from every one of its existing customers, unless it also could do so for every new customer, the incremental cost to the retailer in order to contact that new customer would be the nearly thousand dollar cost of obtaining the Commission list. (The alternative would be foregoing the potential income from sales to that customer). That is an unacceptably costly burden.

With respect to the cost of purging lists, there are additional logistic problems, especially for calls to existing customers. Such calls are typically generated from the company's customer records, not from a segregated "list" which can be compared to a do not call list. To implement the Commission's list, a retailer would have to find a way to incorporate the list – and every update to the list - into the retailer's system. There are likely as many different systems as there are retailers. Moreover, unlike larger companies, small retailers are far less likely to have computerized customer lists. (Indeed, even many large companies still maintain favored customer lists in a paper format.) Those smaller retailers that are computerized typically lack the in-house expertise to make the conversion to a phone number accessible list. Instead, those companies will need to rely on outside vendors to reformulate their data. The fewer the number of customers, the higher the per name cost of conversion would be. Thus, unless a business owner were willing to retype all of the information herself, a company with only five or ten thousand names in its database might face an initial cost of nearly a dollar per name in order to have its list converted to a phone number-searchable file.

Once that was accomplished, the company would face the cost of purging the list of names each time an updated list was produced. Again, the cost of purging is dependent on the volume of numbers to be manipulated. While a very large list might be handled for a penny a name, a shorter list – such as the example above – could cost from ten to fifty cents a name. Depending on how often the Commission required lists to be updated, this cost would be repeated. If, as the draft rule proposes, this were to be done monthly, a small business would face a new expense of several thousand dollars per year (on top of the several thousand dollar initial set-up) before it could begin to contact its customers.

For many such businesses, the cost to the retailer is measured not only in money, but more importantly, in time. For smaller businesses in particular, the extra hours they may be forced to spend in order to prepare to contact their customers is subtracted from the time they could spend serving those customers. The practical effect of the Commission's proposed rule for such businesses is that they simply could not afford to contact customers they had served in the past. For that group, the proposed rule is a ***de facto*** prohibition.

II. Essential Requirements of a Reasonable Rule

Preemption

Challenges

If, despite questions as to its authority and the potentially heavy business costs associated with it, the Commission proceeds with **a** national do not call program, it should do so in a method that attempts to lessen some of the burdens such programs impose. One means by which the Commission could help mitigate the costs of

administering a do not call system is by developing a reasonable system coupled with some form of preemption.

At present, a significant minority of the states have adopted do not call requirements governing some telemarketing sales. In general, individually, most of the state laws are significantly less burdensome than the Commission proposed rule. For multi-state retailers however, they are collectively more burdensome than would be a single national rule that adopted their features.

Difficulties occur with multiple state rules because they present the do not call information in widely differing formats, requiring companies to reconcile those formats within their systems. For example, the states vary tremendously in the frequency with which they publish do not call lists and/or the time within which they expect company lists to be updated. The exceptions to the do not call provisions also vary by state. A retailer that operates in several states, perhaps with some of its customers located in still other states and which places calls from still other states, could find itself with a bewildering set of requirements. Were the Commission to go forward, it could provide a benefit to retailers facing this conundrum by substituting for these state programs a single national standard (provided that standard recognized – as has virtually every state law - established business relationships, another essential element discussed below). If an effective national do not call list is to be developed, it must be a reasonable and preemptive program.

Technically, some state laws govern only in-state (intrastate) calls while a Commission rule would govern only out-of-state (interstate) calls. NRF's larger members, which are subject to the conflicting requirements mentioned above, generally ignore this distinction and instead interpret the state lists more broadly than necessary. That is, to the extent central databases exist, if a customer places his or her number on a particular state's intrastate do not call list, the retailer flags it on the database as a do not call number for interstate purposes as well.

Under such circumstances, a fifty state retailer is already subject to, and is required to purchase and use, all twenty existing state lists. **As** other state legislatures consider adopting similar laws to demonstrate support for the politically popular trend of placing curbs on intrastate calls, retailers will be required to purchase those lists as well. If the Commission adopts a rule without achieving preemption, then the Commission will merely have added more burdens on businesses. The Commission's list simply becomes *one more list,* the twenty-first list (or the fifty-first list), that national retailers would be forced to administer. Furthermore, because of its national scope (it is unknown whether the Commission will offer state-by-state or other regional versions of its list – we recommend the former), the FTC list is likely to be more expensive to acquire and use than the state lists. **A** new national list will also add its own complexities in terms of timing and coverage all of which, depending on the composition of the final rule, will further increase the cost of compliance.

Worse, it might unintentionally be confusing to consumers who, not knowing that they had only opted out of *interstate calls* via the FTC list, might mistakenly assume that in-state callers were knowingly violating the law. This could actually frustrate the Commission's purpose by undermining the apparent effectiveness of do not call programs.

On the other hand, were the Cornmission to achieve preemption in conjunction with its proposed rule, consumers could receive the benefits the Commission seeks and businesses would be spared the conflicting patchwork of state regulations that has developed and which a non-preemptive rule would exacerbate.

Options

There are several options for achieving preemption. The Commission might assert its primacy over this area, although that is a less than certain claim. Alternatively, the Commission might attempt to obtain Congressional support for its effort, in the form of a federal law granting preemptive status to its rule. Or, the Commission might hope

that other states would pass laws declaring compliance with the Commission's rule to be tantamount to compliance with their own (or abandon their intrastate efforts). We do not believe that any of these options is likely and therefore cannot support a Commission effort that adds costs to the system without taking any out. There is another option, however, that builds on companies' existing practices and offers the possibility of achieving beneficial results for the Commission, as well as for retailers and their customers.

The Commission might encourage states to voluntarily add their lists to the FTC list for free, thus providing their citizens with wider protection, in return for a state attorneys general agreement that companies who properly used the FTC list to screen both interstate and intrastate calls (subject to the terms of the FTC rule) would have an affirmative defense or would otherwise be discretionarily exempt from state enforcement action. Companies contacting customers in states with do not call laws who failed to comply with the Commission adopted rule potentially would be subject to action by both federal and state authorities.

This approach would require the Commission to work with its fellow enforcement agencies to develop an agreement that could help underlay its cost/benefit rationale for the adoption of the rule. However, since the state attorneys general would be negotiating to provide their citizens with less confusion and more protection, that would be achieved more simply than otherwise would be the case, while still respecting the states' right to act to protect their citizens interest, it potentially would be advantageous to all parties concerned. Such an agreement would also provide both economic and compliance incentives for greater numbers of companies to reconfigure their systems so as to mesh with the proposed rule's approach and abandon distinctions between intrastate and interstate calling programs.

Adoption of a Reasonable Rule: Preserving Established Business Relationships ("EBRs")

Critical to acceptance of the proposed rule, and the second essential requirement, is that it recognize the existence and importance of retailer/customer relationships. The overwhelming majority of state laws (indeed all but one – and that one provides other exceptions) exempt from their coverage those situations where the retailer/customer relationship has already been established. As discussed below, such an approach allows an individual to prohibit the vast majority of companies, who would otherwise be free to do so, from calling that individual. In addition, the Telephone Consumer Protection Act's company specific do not call regulations enable consumers to prevent calls from firms with which they do business but from whom they do not want to receive calls. This is a deterrent to legitimate firms who do not treat their customers with the sensitivity those customers expect. This combination, a national do not call list and company specific deletions, makes it more likely that the rule will preserve the free flow of information related to products and services with which consumers have an involvement, while restricting, when desired, that for which they do not.

The Commission reports that there have been complaints from some consumers who signed up for a state list but continue to receive calls. There are two broad categories from which it is likely these calls arise.

The first is that consumers may still receive calls from companies who are not governed by the state law. These could either be interstate calls or calls from entities that have been given a blanket exemption by the state legislature regardless of whether they have established a relationship with the consumer. For example, chanties, political organizations or real estate agents might be exempted from a state law's coverage.

The second category includes calls from companies who are ignorant of the law, companies for whom the costs or other burdens of compliance are so high that they cannot afford them (and remain in business), and companies for whom the benefits of cheating are so great that they are willing to risk the costs of noncompliance.

As to the second category, the failure to include an established business relationship in the rule does not diminish the likelihood that consumers will receive those calls regardless. The only remedy for those calls is education and enforcement. If those two elements are lacking, no rule will successfully stop those calls.

As to the first category, subject to enforcement, except where the Commission has no jurisdiction, the company specific do not call provisions will remove customers' names from the remaining companies' lists. Where the Commission does not have jurisdiction (e.g. self-dialed calls by charities seeking donations) the failure to include an established business relationship in the rule will not diminish those calls either. In short, the Commission needs to distinguish the benefits of an EBR provision from reports that are driven by a failure of knowledge, coverage or enforcement.

Cost of Not Adopting An Established Business Relationship Provision

Direct Consequences

The Commission has asked for a cost/benefit analysis of not providing for an established business relationship. How does one demonstrate the costs associated with a non-event? Against what is it to be balanced?

Since retailers have had no significant experience with a situation in which companies are precluded from calling their own customers, what is the proper base from which to calculate? Is it the total number of sales made as a result of telemarketing calls? To use one area of marketing, "Clientelling" is the retail practice of gradually nurturing a relationship with a customer (short of an explicit "personal shopper" involvement) to provide greater convenience and more personalized service. The sales associates are trained to be sensitive to particular customers' desires and then to provide a customized

level of service, often without being asked. For example, a customer may receive a call giving her advance notice that a frequently-purchased product is going on sale. When a favorite designer's new collection has arrived, a sales associate may call and offer to hold the customer's size until it is convenient for the customer to come into the store, or may offer to send the item to the customer. Several, typically somewhat more exclusive, stores have developed very loyal customer bases as a result of these efforts. The calls are based on an informal personal relationship between the consumer and the retailer (frequently, a particular department or a specific salesperson). It is extremely doubtful that customers receiving this type of personalized service even consider the calls to be "telemarketing," let alone intend the calls to cease simply because they choose to eliminate unsolicited calls by signing up for a do not call list. Yet sections 310.4(b)(1)(iii)(b) and 310.6(c) of the proposed rule presume this to be the case.

One well-known department store determined that clientelling alone, which relies heavily on telephone marketing, amounted to approximately six percent of their annual sales. (The same company engages in other forms of telemarketing as well.) Six percent is not the precise measure of the loss from the currently proposed rule because the company does not know what percent of its customers would place themselves on a national do not call list. Nor does it know what percent of those would subsequently provide affirmative permission to call despite placing their name on the list. It does know that customers would immediately fall into two categories. The first is those customers with whom the company had established a clientelling relationship prior to the rule's adoption. Those customers would have had an opportunity to witness the company's service; determine that the company did not abuse their trust; and evaluate, based on experience, the benefits the clientelling relationship provides. Those individuals could more easily make a determination, when approached after the rule goes into effect, whether they wished to override their do not call listing on behalf of that company.

However, there would be a second, larger category of new customers on the do not call list who would not have had that experience. They have not had the opportunity to judge how the company manages its customer base. Yet the company's history

demonstrates that those who become its customers, if they were marketed to in the same manner as their more experienced predecessors, would also have come to value the business to the same six percent level of total department store sales. However, as a result of the proposed rule's operation, unlike customers who have had a favorable experience with the company's telephone practices, the new customers would have no basis on which to determine they should seek the benefits their predecessors achieved.

Again, it's important to note that we are only talking about customers who establish a relationship with the store. Those who do not could not be telemarketed to. Since an individual can only establish a limited number of company relationships, approximately 99.9% of the 1.4 million U.S. retailers could not make a sales call to an individual on the list.

Accordingly, if the Commission preserved the established business relationship exemption provided in most state laws, the overwhelming majority of Commission regulated calls would be blocked, yet the up to six percent sales volume of calls to which satisfied customers currently respond would be preserved (less any who chose to place themselves on the company-specific do not call list).

A successful anchor department store in a mall (at which clientelling takes place) typically has somewhat more than one hundred million dollars in annual sales. Depending on the percentage of customers who put themselves on the FTC list, the lack of an established business relationship provision therefore initially could equal six percent of that percentage in loss of sales. That is, if 30% of customers subscribed to the list, the immediate loss would be more than $2,000,000 in sales, per store in the first year.

As suggested above, however, over time the store might be able to effectively recruit back those customers who gradually come to realize that they have been dropped from the lists of the company with whom they had been dealing. They at least have the advantage of having had the experience with the company to evaluate whether it manages

its calls in such a manner that they wish to hear from the company again. Not so for those DNC listed consumers who had not yet had such dealings with the company.

If, as it appears, comfortable experience with the company's calling program is a significant portion of what makes clientelling successful, then the rule's bias against that experience *(with companies customers have chosen to do business with, as opposed to the 99+% with whom they have not and whose sales calls would be blocked by the rule regardless of whether it contained an EBR provision)* significantly increases the rule's cost. No business survives by only serving its long standing customers. Depending on the underlying assumptions, the capitalized costs of the loss of those new customers is several times the two million dollars per store. For example, in order to merely keep even with previous year's sales, a store needs to attract at least 10% new customers per year to replace those existing customers who are removed from its market. This amounts, as a rough approximation, to an additional $200,000 x the number of years of business, factorial, loss in these more difficult to replace sales. (Over a ten year replacement period that would be ($200,000 x 10 years) + ($200,000 x 9 years) + ($200,000 x 8 years) + ($200,00 x 7 years), etc. for a total additional loss of $11,000,000 in incremental customer sales per store. Note - any gain of new customers who agree to receive calls would be partially offset in this example by the fact that no allowance has been made for the loss of year to year growth in sales that successful stores would have achieved had customers been reachable.) Bear in mind as well that after the costs of merchandise, salaries, benefits, rent, utilities, advertising, shrinkage and returns the average retail store has a net profit margin of approximately two percent of sales.

Failing to include an EBR exception also will impose systems development costs which are likely to be significant. As described above, calls to existing customers are often generated directly from the retailer's customer records, which may or may not be centralized. In such cases there is no "calling list" which can be compared to the FTC "do not call list." Retailers will be required to develop new programs and procedures to coordinate their records with the FTC list (including periodic updates). Avoiding the

imposition of these significant systems cost is yet another reason why the states wisely chose to recognize established business relationships.

Unintended Consequences

In the absence of an EBR provision, legitimate companies will undertake efforts to acquire the express verifiable authorization. Both businesses and the Commission will need to carefully consider unintended consequences of requiring express verifiable authorization to continue (or to establish) previously permissible business relationships. For those who attempt to obtain authorizations on the sales floor, there will be significant costs in time and logistics in attempting to "sell" the idea of an authorization and to convert written authorizations into a reliable database. The cost of developing and implementing a system to receive information from multiple locations and maintain the information in retrievable format may itself be prohibitive. In addition, the express authorization requirement is an affirmative burden on the customer. Efforts to obtain authorizations will detract from time that could be spent serving customers. Worse, it will be a waste of customers' time.

When a customer approaches a sales associate, the associate will not know whether the customer has previously provided an authorization. If the authorizations are to become critically important, as the Commission proposed rule makes clear, then every sales associate will seek to make an inquiry of the customer at each transaction. Thus customers may well be solicited for authorizations in each department of each store they visit, every time they visit, whether or not they have previously given authorization and whether or not they have even placed their number on the FTC's do not call list. Many people already complain of some stores' practice of requesting a telephone number even when they make a cash purchase. The Commission's proposal will have the effect of encouraging even more stores to adopt that practice.'

[1] In addition, because the proposed rule would link the authorization to a specific phone number, rather than to the name of the customer, the consumer must re-submit the authorization every time she changes

Some companies will attempt to obtain authorization within the store. Some will rely on direct mail, advertising or the Internet. **A** number of companies will rely on the telephone.

Rather than making a telemarketing call, which would be prohibited under the rule, some companies will make (possibly multi-purpose) calls to obtain express verifiable authorization for the future. While one would expect legitimate businesses to use this method with discretion, there are less scrupulous companies who will not. By using an express verifiable authorization, rather than an EBR, as a proxy for those customers who might accept a call, the Commission will be placing an economic premium on the authorization as opposed to on the existence of a relationship. All marketers could compete to secure authorizations. This raises a question as to under which scenario consumers will receive more calls:

Option 1. Those placing themselves on the list block all telemarketing calls except those from companies with which they have an established business relationship. (The latter calls could be reduced through company specific requests.)

Option 2. Those placing themselves on the list block all telemarketing calls except those from companies holding authorizations **AND** calls from companies seeking to obtain one. (The authorized calls could be reduced through company specific requests; the latter calls could not.)

In addition, as a result of their increased relative value, authorizations are likely to be sought by some marketers in a greater variety of guises.

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her phone number or wants to take calls at a different location. The burden of this aspect of the requirement on both the business and the consumer is particularly unwarranted, because the authorization is based on that individual's relationship with the business – not on her phone number.

Timing

If a do not call list is adopted, there are two major timing issues. How often lists should be updated and how long a number should remain on the list.

Updating

Regardless of the update period chosen, the Commission must recognize that it will take time to absorb new do not call numbers into a company's system. None of retailers with whom we have spoken, even the most sophisticated, would be able to confidently implement a scrubbed list in less than a month, unless it were an extremely limited calling program. Most retailers indicated they currently need three months to fully accomplish scrubs of their lists. Furthermore, most current systems cannot update lists while a calling campaign is in progress. Any FTC rule should recognize these factors.

In addition, as was discussed above, there are costs associated with creating a phone accessible list and updating it on a regular basis. The smaller the company, the more significant these costs and burdens become. Accordingly, the Commission should take care to balance the cost of updating against the desire for instantaneous change.

There are arguments for updating lists yearly. It allows companies the opportunity to refresh their lists during the least busy season of the year (for many retailers this tends to be February) when they are less likely to be distracted by other activities. For consumers, a yearly update is in some ways comparable to having one's name removed from the white pages. In that context, it is expected that it will take an average of six months before a request for an unlisted number becomes fully effective.

If the Commission seeks to tip the balance in the direction of faster deletion, at the cost of greater burden, then a biannual or quarterly update schedule has some advantages.

The cost of more frequent updating does not outweigh the relatively modest expedition of the do not call request it would provide. That is, the incremental costs of requiring monthly (as opposed to quarterly) updating is likely to be three times as high, simply to save 60 days. This higher cost to each retailer is continual (i.e. the retailer must purchase and scrub its lists every month, forever) while the compensating cost to a consumer who chooses to place his or her name on the list is a one-time additional two to five month wait.

Duration

The second major timing issue is the length of time an individual's number should remain on the do not call list. Here one must strike a balance between the burden of requiring an individual to reregister their number with the Commission and the cost to commerce of talung out of circulation numbers which have been reassigned to individuals who did not placed themselves on the do not call list.

Fortunately, under the rule proposal, the burden on the individual is fairly modest. Assuming no payment requirements, she would dial a toll free access number from her home and then enter her home number once or twice. The number would automatically be entered into the Commission's database.

The burden on the marketer of "dead" numbers remaining on the Commission's list is considerably greater. If ten percent of the numbers on the list have been reassigned to individuals who did not place themselves on the do not call list, then the Commission's list has effectively raised the cost of marketing by slightly over 11% - a significant increase. Accordingly, the greater the likelihood that the Commission's list contains dead numbers, the shorter the time period the numbers on the list should remain in effect, provided there is not a compensating great burden to consumers who wish to maintain their do not call status.

It is generally recognized that fifty percent of households change their address within any seven year period.[2] This is not a perfect proxy for changes in telephone numbers. Some people move a sufficiently short distance that they are able to maintain the same telephone number. On the other hand, many telephone numbers change even when the individuals do not move. Some individuals change their number when they decide to make it unlisted. Some numbers change because of reassignment of area codes. Regardless of which occurrence is more likely, if for purposes of estimation, we use the conservative seven year standard, then approximately 7% of telephone numbers change every year. Unless one knows that the persons associated with the numbers on a list have not moved or changed their numbers, within two years every seventh listing on the Commission do not call list would be incorrect. Such an outdated list would impose a substantial increase in costs on businesses.

Therefore, the numbers on the Commission lists should be released (or simply reentered by individuals wishing to have their numbers on the list) within two years, unless the Commission is able to develop a mechanism for ensuring greater accuracy of its lists. One possibility is to capture not only the telephone number but the individual's address as well. If the Commission determines that the address associated with a number on its list changes, that might be grounds for inquiry and/or removing that number from the list, either because a new person has moved into the old address or the old number has been reassigned to a new address. Such a system would make it more likely that the numbers on the Commission's list were the numbers of persons who had chosen to place themselves there.

Depending on the accuracy with which the Commission maintained such a system, it might well be possible to keep unchanged numbers on the list for several (e.g. five) years before there would be a need for individuals to renew their listing. **At** that point other anomalies not captured merely by number and address (such as death or divorce) would begin to affect the accuracy of the listing.

[2] Other estimates suggest **up** to 1/5 of phone numbers change in any given year.

Caller ID

The proposed rule would require that calls placed to a consumer's home display a Caller ID number that can be used by the consumer to contact the caller regarding the solicitation and request that his or her name be placed on the company specific do not call list. This is a much more difficult requirement than it appears.

In some cases Caller ID numbers do not appear because the local exchanges do not convey them. There is nothing that a retailer located in one of those exchange areas can do to change that systemic problem.

Even where numbers can be conveyed, situational and equipment idiosyncrasies can further complicate this proposed requirement. For example, in order to avoid purchasing multiple sets of expensive equipment, the same equipment is often used for multiple marketing programs, as well as for unrelated purposes such as customer service calls, fraud investigation and debt collection.

Because multiple programs are launched from the same equipment, it may not be possible to provide a contact number that can identify the purposes of a particular call. Providing a number that does not connect the consumer to someone with knowledge about the specific call to that consumer may actually be more aggravating to the consumer than providing no number at all.

Billing Information

The Commission has proposed a prohibition on telemarketers receiving from any person other than the consumer, for use in telemarketing, that consumer's billing

information; or disclosing any consumer's billing information for use in telemarketing. In large part, the Commission's proposal appears to arise from a concern that some consumers may tell the marketer that it is acceptable to bill their account, when in fact the consumer does not believe that the marketer could do so because the consumer did not provide the account number. It is unclear from the proposal how widespread this occurrence is. However, we respectfully suggest that there are equally compelling contrary considerations.

For many years the Commission has played a leading role in the effort to reduce incidences of credit card fraud and identity theft. NRF and many of its members have pursued these issues as well. Unfortunately, the proposed rule changes appear to run somewhat counter to those efforts because it mandates that the individual placing the telemarketing call be given the consumer's actual account number. By providing the actual credit card number over the telephone, the risk that the number subsequently might be misused by the individual who receives it for fraudulent purchases is somewhat increased. To that extent, it is more protective of the consumer if the telemarketer has the ability to initiate charges ONLY for the product or service being marketed.

The Gramm-Leach-Bliley act, and the rules thereunder, essentially requires companies who share credit card billing information with third parties for marketing purposes to do so in an encrypted format. The encryption helps ensure that third party marketers who receive the data cannot use it for non-intended purposes. Although the customer might be asked: "May we bill this purchase to your **M-----------** Card", identifying an account held by the consumer, the marketer would only have access to the encrypted number. There are other ways to confirm that the consumer truly authorized the purchase, such as asking for some other piece of identifying information to verify the telemarketer spoke with the consumer before charging his or her account.

There are additional considerations with respect to proprietary or private label credit cards issued by many retailers. Section 310.4(a)(5) seems to prohibit a seller or telemarketer receiving from any person other than the consumer for use in telemarketing

any consumer's billing information or disclosing any consumer's billing information for use in telemarketing. Yet the Gram-Leach-Bliley act (section 502 (e)(1)(B) and the rules thereunder) allows for the sharing of account information for marketing purposes to a participant in a private label credit card program or an affinity or similar program. Not only would a recognition of this exception help create consistency between the two sets of rules, it smooths customer relations issues as well.

Stores issue private label cards to help foster a personal connection with their shoppers. Unlike most third party cards, they create a direct link between the customer and the store. If Mrs. Barnes receives a call from "Johnsons" department store regarding merchandise, she is likely to find it awkward and somewhat disconcerting if the department store then asks her to find, and give back to them, the number they assigned to her. At a minimum, it has the appearance of poor preparation and poor customer service on the part of the sales associate.

By requiring the consumer to affirmatively provide specific billing information over the telephone, the Commission potentially undercuts one of the privacy and security benefits achieved by the Gram-Leach-Bliley act. Before adopting this change the Commission should determine whether the risk of increased fraud and theft from once again making specific billing information more widely available to third parties, is outweighed by the occurrence of consumers who agree to have their accounts billed but believe, in fact, that the marketer will not do so. Given that identity theft and fraud have a highly documented elevated rate of incidence, the NRF recommends that given a choice, reducing that risk is the direction the rule should take. Therefore, proposed section 310.4(a)(5) should not be adopted.

Conclusion

We do not question that telephone calls to consumers from some entities with which the consumers have never dealt (and in select cases, from those with which they have) can be annoying. Indeed, calls from certain relatives may have the same effect.

But that is not justification for the Federal Trade Commission to adopt a rule of nationwide effect, virtually prohibiting those calls. This is especially the case when the basis for the rule's adoption neither exists in the subject specific statutory authority nor within the Commission's more general powers.[3]

The forgoing observation is distinct, however, from whether the Commission, had it the legislative power to do so, should enact such a law. Ideally, were it acting as a legislative body, the Commission would attempt to create a solution that reduced the "annoyance" while maximizing the benefits of its actions as to all interested parties. Seeking one goal to the near exclusion of the others, such as completely eliminating the annoyance, likely would result in an over-correction, and far less than optimal benefits.

Unfortunately, that is the direction the proposed rule appears to take. By potentially eliminating all calls from entities (within its jurisdiction) that are unknown by a consumer; and furthermore by prohibiting virtually all calls from entities with whom the consumer has a business relationship, unless the entity has specific verified authority to speak to the consumer, the rule makes avoidance of potential annoyance the *sine qua non* of commercial telephonic communication. **All** other benefits are secondary to this formulation.

In these comments, the NRF has attempted to demonstrate some of the competing benefits and values that the proposed rule ignores. We have also attempted to demonstrate steps the Commission could take, should it chose to proceed, that would provide greater benefits for both businesses and consumers, while still advancing its goal.

The underlying rulemaking proposal is far more complicated in its implications and in its scope than its drafters may imagine. It is not possible, given the large numbers of individuals and businesses who would be affected, to amass answers to all of the concerns in the limited period of time that has been allowed for public comment.

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[3] Under these circumstances, adoption of such a rule will cause retailers to undertake considerable efforts to change their manner of operation, in order to achieve compliance, even though there is a significant likelihood that they will later discover those expenditures (or business failures) were unwarranted.

Nevertheless, as always, NRF is willing to work with the Commission and its staff to address these and the other difficult issues this proposal presents.

With that in mind, we wish to reiterate the request, contained in our March 12 letter, to participate in the public forum further evaluating the proposed rule.

Respectfully submitted,

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