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March 26,2002

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

RE: Telemarketing Rulemaking – Comment: FTC File No. R411001.

Dear Sir,

I write in response to the Federal Trade Commission's request for comments on its proposed national "Do Not Call" Registry Amendment to the Telemarketing Sales Rule.

I heartily support this proposal and ask that the Commission adopt it. Telemarketing continues to be an intrusive disruption that cries out for relief. It is a never-ending invasion of privacy and a constant harassment. The proposed rule offers those who choose to be free of that burden some hope of that relief.

I urge the Commission to consider the following comments in your review of the proposed rule and the Notice of Proposed Rulemaking (the "Proposal"). Broadly speaking, my comments focus on three general areas: concern that the rule will be ignored unless consumers are able to identify callers and violators (hence the need for Caller ID information and telemarketers to identify themselves when calling); areas in which the actual wording of the rule itself appears to fall short of what the Commission in its commentary says the rule does and therefore needs some drafting attention; and some practical considerations about getting on the national list.

Without a doubt, adopting of the proposed rule in present form would be a boon to consumers. The following comments are intended to help enhance that result by suggesting improvements to the rule for the benefit of the consumers who need them.

1. Definition of Telemarketing. Please maintain the present definition of "telemarketing" that includes the reference to "one or more" telephones. With growing frequency it seems that telemarketing firms are subcontracting calling activities to private individuals who act as independent agents calling from their own homes. (On more than one

occasion I have received Caller ID information with an individual's name and telephone number only to learn that the call is a telemarketing solicitation. I suspect that there is a connection between such occurrences and the "earn cash at home in your spare time" signs that appear in shops and on train station platforms.) It would defeat the purposes of the rule if each such caller were exempt from the rule by virtue of having and using only one telephone in his or her home.

The Commission should also take this opportunity to prevent a telemarketer from escaping from the restrictions of the rule merely because it subcontracts the actual telephoning to others. Section 310.2(z) defines "telemarketer" as a person who, in connection with telemarketing, "initiates or receives telephone calls." A company that sells telemarketing services to sellers, but does not maintain any calling facilities itself, instead subcontracting the actual telephoning to individuals, can assert that it does not "initiate or receive telephone calls" and therefore is neither a telemarketer or a seller. Therefore the definition should be amended to include any person who so acts "directly or indirectly, alone or through others."

The prohibition against "assisting and facilitating" in §310.3(b) is not adequate to address this need. The prohibition applies only to one **who** knows or consciously avoids knowing that another person is violating the rules. As a practical matter, it is so hard to prove that a person "consciously avoided knowing" something that the latter is virtually worthless as an enforcement standard. The rule should apply to those who engage in telemarketing "directly or indirectly, alone or through others" whether or not they know that others they have hired to do the actually dialing and speaking are violating the rule.

2. Caller ID Equipment I support entirely the Commission's proposal to specify in § 310.4(a)(5) that it is an abusive telemarketing act or practice for a seller, charitable organization or telemarketer to deliberately block, circumvent or interfere with the information displayed on Caller ID equipment.

However, more may be required to protect consumers adequately.

First, the proposed rule appears to prohibit only direct actions taken to frustrate Caller ID transmissions. If equipment used by a telemarketer can transmit Caller ID information but requires some step to activate that capability, is the failure to activate it also prohibited? It should be. The rule should therefore prohibit any failure to activate that capability if it is available to a telemarketer on the system it currently uses.

Second, as the Commission notes on page 63 of its notice of the Proposal: "Many telemarketers use a large "trunk side" connection …which is cost effective for making many calls but cannot transmit Caller ID information. Calls from these lines will display a term like "unavailable" on a Caller ID device…" I frequently receive calls from abroad. All of them also display "unavailable". Therefore I cannot tell if an call is coming from someone who I must speak to, or from a telemarketer who I certainly don't want to speak to. If telemarketers have no inducement to use a system that permits transmission of Caller ID information (and the Commission itself acknowledges that trunk side connections are the most cost effective for telemarketers) what good has the rule accomplished if it fosters a race to use technology that excuses compliance? Like the approaches of states described in the notice, the FTC should compel the use of technology that permits the transmission of Caller ID information if that technology is available on commercially reasonable terms in the place where the telemarketer operates.

Third, even if a telemarketer's telephone call was accompanied by Caller ID information (or if the Commission required telemarketers to use technology that transmits Caller ID information when and where it is available), trunk line exchange information is of little use to the consumer, as the Commission notes on page 63 of its proposal. The Commission's proposal, in § 310.4(a)(6), to ***allow*** the substitution of the actual name of the seller and the telephone number "which is answered during regular business hours" should be strengthened to ***require*** that information to be transmitted if any transmission is possible. Under the present rule that information is necessary so the consumer knows where to call to request to be put on a no-call list. Under the new rule, that information is necessary to determine who is disregarding the national no-call list.

Fourth, if the Commission determines not to address the issues described above by strengthening § 310.4(a)(6), it should then reconsider its position with respect to § 310.4(d) discussed in the next following numbered section of this letter.

3. Require Telemarketers to identify themselves *first.* Section 310.4(d) sets out certain oral disclosures that telemarketers must promptly make in any outbound telephone call made to induce the purchase of goods or services. The Commission, perhaps wisely, refrains from defining "promptly." That word is too subjective to belabor. But requiring the identity of the seller ($310.4(d)(1)) to be disclosed *first* before any other information is disclosed is an objective mandate, easy to observe and essential for the protection of the consumer. It also incidentally happens

to be proper telephone etiquette and would discourage the practice of telemarketers from hanging up as soon as the consumer asks who is calling. More importantly, if Caller ID information is not available (and for the benefit of the consumer who doesn't have or cannot afford Caller ID), it is the only way that the consumer can track a telemarketer that callously violates the no-call rule. In fact, the Commission should amend §310.4(d)(I) to include not only the identity of the seller, but the telephone number of the seller to enable the consumer to be able to contact the seller to report infractions of the telemarketing rule.

The Commission's commentary expresses concern about what it requires a telemarketer to say on the ground that the Commission does not want to overburden the consumer with information. However, a workable alternative is to provide that it is a misleading and deceptive practice for a telemarketer to refuse or decline to provide the name, address and telephone number of the telemarketer and the seller when a consumer asks for it.

4. Please close a maior loophole by remedying the drafting deficiency in §310.4(b)(iii)(B)(2). Footnote 236 of the Proposal states that: "The Commission expects that written authorization will be necessary in most instances because once on the national "do-not-call" list, a consumer could not be contacted by an outbound call to request oral authorization of future calls." That may be what the Commission hopes, but that is not what §310.4(b)(iii)(B)(2) says.

Literally and properly read, that Section does not condition the effectiveness of an express oral authorization on its being given in an inbound call. The section requires only that the telemarketer "record" the authorization, "receive" such authorization and be able "to verify that the authorization is being made from the telephone number to which the consumer ... is authorizing access." All of those things can happen during a telemarketer's outbound call. To make matters worse, the Commission proposes to restrict the application of §310.4(d) disclosures to calls made "to induce the purchase of goods."

As a result, a telemarketer may well conclude that it can disregard the national "do-not-call" list and that it is not required to give the §310.4(d) disclosures because, in each case, it says that it is calling to obtain an oral authorization for future calls rather than "to induce the purchase of goods". And the telemarketer may further conclude that the call becomes "telemarketing" **(as** defined by §310.2(aa)) only after the recipient gives oral authorization so the telemarketer can then and there proceed with its

sales pitch and give the §310.4(d). We therefore wind up right where we are now, effectively denied the benefit of the national do-not-call list.

It would appear that the best way to remedy this deficiency is to amend §310.4(b)((iii)(B)(2) so that oral authorization is effective only if made in an "inbound call", and then add "inbound call" to the definitions in 9310.2. Note that it would be insufficient merely to add that oral authorization cannot be given in an "outbound call" (as the Commission's language in footnote 236 suggests) because the term "outbound call" in §310.2(t) also contains the troublesome limitation "to induce the purchase of goods or services". "That's not me", says the telemarketer that purportedly calls only to obtain authorization to call.

5. Do not exempt calls made on the basis of a prior business relationship. I support fully, and urge the Commission to continue, its denial of an exemption based on prior business relationships. Only I, and not a telemarketer, should be able to determine whether I want the business world to intrude on a quiet evening at home. The national do-not-call list will enable me to make that choice. There are a great many organizations with whom I have done business, including a great many catalogue companies from which I have from time to time purchased goods. Allowing a single purchase or a few purchases (which, I suppose, constitutes a "prior business relationship") to be the basis of an exemption from the rule would substantially erode its usefulness.

6. Enforcing compliance. On page 80 of the Proposal the Commission states that: "Proposed §310.4(b)(2)(vi) requires the seller or telemarketer to monitor and enforce compliance with the procedures established in §310.4(b)(2)(i)." Once again, there is a troubling divergence between the Commission's commentary and the actual language of the proposed rule – in at least two important respects.

First, §310.4(b)(2)(i) nowhere mentions "monitoring" and "enforcing" procedures. It mentions only "establishing" and "implementing" them. "Establish" can mean merely adoption; "implement" could be taken to mean nothing more than publishing adopted procedures. If the Commission means "monitoring" and "enforcing" – which I hope it does – then it should say so and use those words rather than the lamer and more ambiguous word "implement".

Second, a more precise statement of the proposed rule is that a seller or telemarketer is required to take the steps outlined in §310.4(b)(2) *only if it wants to take advantage of the safe harborprovided by that section.* Federal regulations contain many "safe harbors" and there are many

reasons – prudent or otherwise – why a person may not wish to take advantage of them. Judging from the conduct and language I have encountered when dealing with telemarketers, I suspect that some individuals employed by telemarketers may be "rogues" who, with or without the tacit approval of their employers, have little regard for law or the norms of decent behavior. Under these circumstances, is it too much to require telemarketers to adopt procedures to comply with the law and monitor and enforce compliance with them? Hardly. Therefore, the standards set forth in §310.4(b)(2(i) through (vi) should be obligatory whether or not a telemarketer wants to comply with the safe harbor. The safe harbor can still be available to those who can demonstrate that they have complied with these standards.

7. Updating call lists. The following statement appears on page 117 of the Proposal: "Telemarketers would be required, at least monthly, to obtain the Commission's registry in order to update their own call lists, ensuring that consumers who have requested inclusion on the Commission's registry will be deleted from telemarketers' call lists." Again, there seems to be confusion between what the rule requires and what it permits. If the Commission wants to "ensure" that telemarketers update their lists every 30 days, the rule should require them to do that by moving this provision out of the safe harbor section. Updating call lists should not merely be optional behavior that is only a condition to being able to assert a safe harbor defense under §310.4(b)(2). Safe harbors are fine to prevent injustice, but they invite even prudent businessmen to do a cost-benefit analysis before deciding to comply. The Commission may hope that every seller and telemarketer will seek to avail itself of the rule's safe harbor, but it unrealistic to believe that will happen. If the national do-not-call list is to be truly effective, telemarketers must be required to update their calling lists from it whether or not they want to. Those who do can still have the benefit of the safe harbor, but updating should be mandatory, not optional.

8. Practical considerations in setting on the list. The Proposal states, on page 77, that "...to ensure that only the consumers who actually wish to be on the "do-not-call" registry are placed there, it is anticipated that enrollment on the national registry will be required to be made by the individual consumer from the consumer's home telephone number." This statement raises two practical concerns.

First, both my wife and I work. Will the do-not-call list be unavailable to those who are at work and cannot call from their home telephone during the FTC's office working hours?

Second, if I call from my home, but will the Commission be able to answer? Page 72 of the Proposal quotes a representative of the Kentucky Attorney General's office as saying that the public response to that state's no-call list "... literally – and I mean literally – fried our telephone systems. It knocked our telephone line out. . . [Tennessee's] telephone lines have been broken down because of the overwhelming response, and their list is not even ready. . . to be implemented . . .[Georgia] had exactly the same response, that there was truly a tidal wave of people who were seeking to be on the list." In each case, only a state was involved. The Commission now proposes to do the same thing for the entire nation. When I call, will I be able to get through? And if I can, how many times on how many days must I call before that happens?

A sensible solution would be to permit written applications for inclusion on the list. The Commission can require a written application to be in the form of a sworn affidavit attested by a notary and subject to the penalties of perjury, if it likes. Just please don't require me or others to take a day *off* from work to sit at home dialing a busy signal all day long in a fruitless effort to gain admission to the list.

9. Things to which exemptions should not apply. Why should a telemarketer be free to call me at home after I put my name on a national do-not-call list merely because that telemarketer is selling franchises (§310.6(b)) or plans not to complete a sale after a face-to-face meeting (§310.6(c))? I certainly do not want that to happen and suggest that there is no basis for supposing that other consumers do either. Please add §310.4(b)(iii) to the list of items at the end of Sections 310.6(b) and (c) to which those exemptions do *nof* apply.

10. Relationship to State Laws. States should be free to adopt stricter statutes and more stringent regulations than those being proposed by the Commission, and telemarketers should not be excused from observing them. The worst outcome of the Commission's current proposal would be the adoption of rule that implicitly or otherwise preempts state law, but is a watered down version of a state rule or is a rule that the Commission does not have the budgetary resources to implement.

The following comments respond to the following specific questions raised by the Commission in Part IX of its Notice of Rulemaking.

General Questions For Comment - (a): What is the effect (including any benefits and costs), if any, on consumers?

Answer: The effect can be of an enormous benefit to consumers – and be one of the most genuinely popular actions taken by government.

General Questions For Comment - (d): What changes, if any, should be made to the proposed Rule to minimize any cost to industry or consumers?

Answer: No changes should be made for that reason. Individual consumers should be able to be free from harassment within the security and comfort of their own homes when they chose to be. No cost to an industry that depends on such intrusion should be a countervailing factor in any decision.

Questions on Proposed Specific Changes - C(6): What changes, if any, to the scienter requirement in the assisting and facilitating provision, § 310.3(b), would be appropriate to better ensure effective law enforcement?

Answer: See the suggested change to the definition of "telemarketing" in item 1 of this letter.

Questions on Proposed Specific Changes - D(3)(a): The proposed Rule prohibits but allows altering the Caller ID information to provide the actual name of the seller or charitable organization and the seller's or charitable organization's customer or donor service number. What costs would this provision [prohibiting the blocking or altering the transmission of caller identification ("Caller ID") information] impose? Are these costs outweighed by the benefits the provision would confer on consumers and donors?

Answer: The proposed rule prohibits an obstructive and destructive activity. It does not require anyone to spend money on anything. (At that, it probably does not go far enough – see item 2 above). No cost to those seeking to intrude and inveigle their way into the peace and security of homes that seek to keep them out can be a relevant justification for watering down the provisions of the proposed rule. Whatever those costs may be, they are clearly outweighed by the benefits the provision will confer on consumers.

Questions on Proposed Specific Changes - D(3)(g): Would it be desirable for the Commission to propose a date in the future by which all telemarketers would be required to transmit Caller ID information? If so, what would be a reasonable date by which compliance could be required?

Answer: Absolutely, and the sooner the better.

Questions on Proposed Specific Changes - D(4): The proposed Rule would prohibit a seller, or a telemarketer acting on behalf of a seller or

charitable organization, from denying or interfering with the consumer's right to be placed on a "do-not-call" list or registry. Is this proposed provision adequate to address the problem of telemarketers hanging up on consumers or otherwise erecting obstacles when the consumer attempts to assert his or her "do-not-call" rights? What alternatives exist that might provide greater protections?

Answer: No, the proposed provision is not adequate for this purpose. There are several actions that the Commission can take to improve it. First, I believe that it is imperative that consumers be able to determine who is calling and a number that the consumer can call to request being put on a no-call list, to report infractions and to determine who to report to the FTC in the case of infractions. Unless consumers are bale to do that, telemarketers are not likely to be unduly concerned with compliance. See items 2 and 3 above. In addition, if an officer or shareholder of a telemarketer is required to certify to the FTC that the telemarketer is in compliance with the rule, the temptation to circumvent the rule or ignore it would be substantially diminished. I cannot count the number of times that telemarketers have hung up on me as soon as I begin to ask for the name and address of the caller. As long as the telemarketer or person initiating the call believes that they can operate with anonymity, abuses will result. Open disclosure and the possibility of being discovered and held to be personally accountable are the ideal prophylactics. Even better would be a requirement that all telemarketers register, be given a registration number, and be required to communicate that registration number to a consumer at the beginning of a call, and occasions of abuse would decrease dramatically.

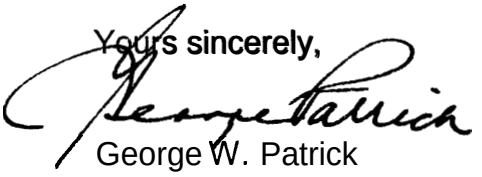
Questions on Proposed Specific Changes - D(6): What should be the interplay between the national "do-not-call" registry and centralized state "do-not-call" requirements? Would state requirements still be needed to reach intrastate telemarketing? Would the state requirements be pre-empted in whole or in part? If so, to what degree? Should state requirements be pre-empted only to the extent that the national "do-not-call" registry would provide more protection to consumers?

Answer: See item 10 in the letter above. State requirements are still needed. They should not be preempted in whole or in part except to the extent, if any, that they offer less protection to consumers that the FTC's proposed rule.

Questions on Proposed Specific Changes - D(9)(e): Does the proposed Rule provide sufficient guidance to business on what information is sufficient to evidence a consumer's express verifiable authorization to opt in to receiving calls from a specific seller, or a telemarketer acting on behalf of that seller or on behalf of a specific charitable organization? Is there additional

information that should be required in order to evidence the consumer's express verifiable authorization? Answer: See item **4** in the foregoing letter.

Yours sincerely,



George W. Patrick