(Delivered Via Electronic Mail)

April 12, 2002

Federal Trade Commission
Office of the Secretary
Washington, D.C. 20580

Re: Telemarketing Rulemaking–Comment
FTC File No. R411001

Ladies and Gentlemen:

Wells Fargo & Company ("Wells Fargo") welcomes the opportunity to comment on the notice of proposed rulemaking by the Federal Trade Commission (the "Commission" or "FTC") to amend the Telemarketing Sales Rule, 16 CFR Part 310 (the "Rule"). Wells Fargo is a diversified financial holding company with over 30 subsidiary banks and over 100 additional subsidiaries that provide financial products and services to consumers. While our banking subsidiaries are not directly covered by the Rule, the proposed extension to telemarketing contractors would affect our banks, and some non-banking subsidiaries would be directly affected.

While we believe that the substance of many of the proposed amendments to the Rule have merit, we also believe there are some serious flaws, some of which are inherent in the process chosen by the Commission to try to achieve its purposes. Our main objections are twofold:

1. <u>Any Federal "Do Not Call" List Should Preempt State Law.</u>

Approximately 20 states have already enacted legislation establishing "do not call" lists which purport to apply to interstate calls to residents of those states, as well as purely intrastate calls. (Arguably, as to interstate calls, such laws are preempted by the Communications Act of 1934 and/or the Telephone Consumer Protection Act). Many businesses attempt to comply with such laws, even as to interstate calls. However, the multiplicity of state lists and the variations in the details of these state laws constitute a significant expense and compliance risk for businesses operating in many states.

There would be tremendous value to both businesses and consumers in a single, nationwide "do not call" list and a single set of associated rules, at least with respect to interstate calls. However, we have concerns as to whether the Commission has the authority to promulgate a preemptive regulation through the rulemaking process. As a result, consumers who do not want to receive telemarketing calls will still have to put themselves on multiple lists, and different rules will apply to each list to the confusion and frustration of both businesses and consumers.

2. Coverage Should Not Depend on the Use of Contractors Rather than Employees.

Congress exempted banks and certain other types of businesses from the Telemarketing and Consumer Fraud and Abuse Prevention Act for the simple reason that these businesses are already subject to statutory and regulatory schemes–and regular regulatory scrutiny–so that it is unlikely they would engage in the practices which that Act seeks to prevent. It is inappropriate for the Commission to attempt to assert jurisdiction over such businesses indirectly by extending the proposed rule to contractors performing services on behalf of such exempt organizations. As the bank regulatory agencies have repeatedly stressed, regulated institutions are responsible for ensuring that their contractors act responsibly and within the law. It makes no difference to the consumer whether he or she is called by an employee of a bank or someone employed by a contractor to the bank. In addition, consumers who have put themselves on the "do not call" list will be confused and frustrated because they will continue to get some telemarketing calls selling exactly the same kinds of products as the calls which led them to place themselves on the list in the first place.

For both of the reasons noted above, we believe that establishing a national "do not call" list would more appropriately be undertaken by the Federal Communications Commission under the authority which already exists in the Telephone Consumer Protection Act or by means of new legislation, rather than via Commission rulemaking. Our other concerns with the proposed amendments are noted below.

3. The Rule Should Recognize Alternate Consumer Protection Mechanisms.

Proposed Section 310.3(a)(3) requires "express verifiable authorization" before initiating billing or collection procedures unless the method of payment provides for (a) a limitation on the consumer's liability for unauthorized charges and (b) "dispute resolution procedures pursuant to, or comparable to those available under, the Fair Credit Billing Act and the Truth in Lending Act." It is clear that if both the Fair Credit Billing Act and the Truth in Lending Act are applicable to the chosen payment method, "express verifiable authorization" is not required. However, it is not clear what protections would be considered "comparable to" those provided by those statutes. For example, would similar protections afforded by card association interchange rules be considered "comparable" even though not embedded in statutes? Payment methods may be chosen by consumers for a number of different reasons and this aspect of the Rule should not operate to discourage the development or use of alternatives just because they are not expressly covered by the named statutes.

4. The Rule Should Not Require Consumers to Give Account Numbers to Persons who call them.

Section 310.3(a)(3)(ii)(E) requires that "express oral authorization" include the consumer's account number. Section 310.4(a)(5) prohibits a telemarketer from receiving billing information from anyone other than the consumer. Taken together, these sections require consumers to disclose their account numbers to telemarketers who call them.

While we recognize the potential for abuse in "preacquired" telemarketing, the potential for fraudulent use of account numbers by persons posing as legitimate telemarketers is even greater. For years, consumers have been warned not to disclose personal information to anyone who calls them that the consumer does not know personally. Requiring consumers to disclose account numbers in order to complete telemarketing transactions would undo those warnings is a classic "out of the frying pan and into the fire" scenario. Title V of the Gramm-Leach-Bliley Act and its implementing regulations already adequately control the provision of account numbers for use in telemarketing. Further restrictions in the Rule are not only unnecessary, but also counterproductive. Moreover, the proposed restrictions on account numbers would upset the balance struck by Congress in the Gramm-Leach-Bliley Act.

5. Only Active Blocking of Caller ID Should be Prohibited

Proposed Section 310.4(a)(6) prohibits blocking of the name and number of the calling party for caller identification service purposes. This section should be modified to make it clear that only actions specifically designed to block caller identification services are intended to be prohibited; use of equipment that does not provide the caller's name or number is not per se prohibited.

6. Company Specific "Do Not Call" Requests Should Be Required to Follow Certain Procedures.

Proposed Section 310.4(b)(1)(iii)(A) prohibits initiating "any outbound telephone call" to a person who "has stated that he or she does not wish to receive an outbound telephone call" from or on behalf of a particular organization. This section should be amended to make it clear that organizations may establish certain procedures for making such "do not call" requests; otherwise, a complex organization might have to honor such requests even if the request is made in an obviously inappropriate fashion. For example, would every checkout clerk in a retail establishment have to be equipped to receive and process such requests?

7. Express Authorizations Should be Effective if Verifiable.

Proposed Section 310. 4(b)(1)(iii)(B)(2) permits reliance on oral authorization to call someone on the Commission's "do not call" list only if the authorization is made from the same number to which the authorization applies. Likewise, subsection (B)(1) requires a written authorization to call include the consumer's signature. There is no provision for an electronic authorization to call. These requirements are unnecessary and, in many cases, unworkable. Many of the same consumers who place themselves on "do not call" lists are likely to block caller identification on their own phones. Consumers for whom the primary communication channel is electronic are often requested to permit use of an alternate channel–including telephone–if their e-mail is not working, but such authorizations may not meet the "signature" requirement. In any event, whether the authorization is written, electronic or oral, the telemarketer bears the risk of it being genuine and should be able to rely on various indicia of authenticity.

8. Outbound Calls to Established Customers Should be Permitted

We recognize that there is no reason to exempt calls to established customers from the Rule's anti-fraud provisions. However, there are good reasons to exempt calls to customers with whom the caller has an established relationship from the "do not call" list provisions of Section 310.4(b)(iii)(A) and (B). Both the Telephone Consumer Protection Act and almost all state "do not call" list laws recognize such an exception. This is not because businesses ought to ignore their customers' desires regarding telemarketing; the point is that there are many situations in which there is no clear line between "customer service" and "sales." A few examples:

A. A securities broker calls a client to recommend selling a security in the client's current portfolio. Indeed, under some circumstances, the broker may have a legal obligation to make such a call. But, because the broker will probably get a commission from the sale, even that could be construed as a "sales" call. And, in many cases, the client will ask, "What should I do with the proceeds?" Any recommendations the broker makes would clearly be within a broad definition of "sales" or "solicitation."

B. An auto lease is expiring. The lessor calls to determine whether the lessee intends to make a payoff or return the vehicle. If the customer doesn't want to return the vehicle, the call is likely to flow into a discussion of loan or lease extension/renewal options.

C. During a period when interest rates are falling, a mortgage lender may be willing to allow existing borrowers to refinance at lower rates at a very low (or no) fee.

D. In a collection or workout situation, the lender may be willing to offer an extension, renewal or new loan to someone who is delinquent. Does making such an offer turn the collection call into a sales call?

Without an exception to the "do not call" list provisions of the Rule, legitimate customer service calls will be inhibited, or the customer may not be informed of all available options. Unlike calls to non-customers, in dealing with existing customers, a business has substantial motivation to treat them respectfully since they can take their business elsewhere.

9. <u>Both Name AND Telephone Number Should be Required to Register</u>.

The current proposal would allow an individual to register for the "do not call" list by name OR telephone number. Name alone is clearly unworkable; how many "John Jones" and "Mary Smith's" are there? At a minimum, both name and telephone number should be required for an individual to register on the "do not call" list.

10. <u>Listings Should Expire Automatically</u>.

"Do not call" listings should expire automatically after a reasonable period–say, three years–if not renewed by the individual. American families move, on average, about every five years, and most moves involve a change of phone numbers. In addition, frequent area code changes have become a fact of life. Experience with state "do not call" lists shows that, unless they are purged regularly, many numbers remain on those lists long after they are assigned to another consumer. The burden on consumers of renewing their listings periodically is minimal.

11. <u>"Do Not Call" Lists Should be Updated No More than Quarterly</u>.

Any proposal to establish a "do not call" list should also establish the frequency with which the list will be updated and the "grace period" between the publication of a new list and when new additions to the list must be observed. Most state "do not call" lists are published quarterly, with a 30-day grace period between the effective publication date and the effective date. This timetable seems to work reasonably well for all concerned. More frequent updates or a shorter grace period will impose additional burdens on businesses that employ telemarketing and the agency maintaining the list, with little corresponding benefit to consumers.

12. <u>The "Do Not Call" List Provisions Should Not Apply to Any Inbound Calls</u>.

Proposed Section 310.2(t) appears to have the effect of turning some calls initiated by the consumer into "outbound" calls for all purposes of the Rule. While it may be appropriate to apply the anti-fraud provisions to such calls, the "do not call" list requirements of Section 310.4(b)(iii)(a) and (B) should not apply to such calls. The primary argument for "do not call" lists is that telemarketing calls interrupt other activities, especially dinner. This intrusion factor simply does not apply to calls initiated by the consumer. It is unlikely that a consumer will initiate calls to an organization he or she has specifically asked not be called by. And calls initiated by a consumer who is on the Commission's "do not call" list do not bear any risk of intrusion at an inconvenient time, even if there is a transfer to another employee or agent of the organization receiving the call.

Conclusion

We believe a truly national "do not call" list, applicable to all interstate telemarketing calls, would benefit businesses and consumers alike provided it did not interfere with our ability to service the needs of our existing customers. However, it does not appear that the current rulemaking procedure by the Commission would achieve that goal.

Please feel free to contact the undersigned at (415) 396-0940 or by email at "mccorkpl@wellsfargo.com" if you have any questions regarding the foregoing comments.

Very truly yours,

/s/ PETER L. MCCORKELL

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