April 13, 2002

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

IN THE MATTER OF TELEMARKETING RULEMAKING - COMMENT
FTC FILE NO. R41100

I thank the FTC for its proposal and write in strong support of the proposed national do not call list. A national DNC list was clearly the preferred choice of Congress when it passed the Telephone Consumer Protection Act (TCPA). The failure of the FCC to create such a list has lead to the problems we now have, and the increasing number of states that pass DNC lists to address them. I have filed several suits against telemarketers, and find they generally fail to comply with the FCC's existing regulations, particularly those regarding identification of the solicitor.

I have tried to write comments roughly in the order the topics were listed in the proposed rule changes, although I have miscellaneous comments as well.

FTC Do-Not-Call List Registry - Costs

The cost of the national list should be borne by the telemarketers, and by recoveries in FTC enforcement proceedings, not by Americans who simply want to be left alone in their home. It appears this is what the FTC proposes. The FTC proposed this rule because it realizes there are serious privacy problems with telemarketing, and the best way to address the problem is to get as many persons as possible on a DNC list. The best way to obtain this recognized goal is to not assess any charge for adding a phone number to the DNC list. At the very least, the FTC should make it free initially, and if it turns out that the FTC later needs to assess citizens a fee, it can do so then. People who have already experienced the benefits of being on the FTC list for free initially will clearly be more inclined to pay a small fee than if they never had this benefit because a small fee scared them away.

An area code change is effectively, a change in the telephone number. If the FTC can develop software to update area code changes automatically, fine. Otherwise, citizens will have to re-enter their number with the new area code, just as they would if they obtain an additional, new telephone number.

There should be some form of verification for both citizens and telemarketers to check to see if a phone number is on the FTC's DNC registry list. An automated system should be possible, or through the web.

Definitions - 16 C.F.R. Part 310.2

(c) "*Billing Information*" - This definition should explicitly include "social security number." The FTC should also consider including certain types of identifying information commonly used by, traded among, and reported by, the national credit reporting agencies.

(r) "*Outbound Telephone Call*" - The new definition of "Outbound telephone call" should address the intrusive and annoying practice of the same telemarketer or salesperson solicits more than one item on behalf of the same seller. This often happens with telephone companies, which will try to sell you every service they have, even if all you did was call to correct a billing issue. Such persons would meet the definition of 'telemarketer' at 310.2(z), yet under the proposed definition of "Outbound Telephone Call" only part of their solicitation(s) would be regulated. Thus the increasing problem of 'up-selling" that the FTC identified would not be fully addressed. The language at proposed 310.2(t)(3) should be changed to read: "involves a single telemarketer initiating the solicitation of a product or service on behalf of one or more sellers or charitable organizations."

The FTC should also make sure to clarify in its order that an 'outbound telephone call' includes calls initiated for sales purposes irrespective of whether a telemarketer speaks to a consumer or donor - i.e. it includes predictive dialer hang up calls, also known as dead-ringers.

Finally, the FTC should make it clear, either a new definition, or in its promulgating order, that connections to a consumer made by or through a trunk line, T1 line, PBX or other circuit, computer or other equipment are all considered 'telephone calls.'

Abusive telemarketing acts or practices - 16 C.F.R. Part 310.4

"Billing Information" - Part 310.4(a)(5).

This subsection should also address and explicitly include selling and/or transferring of 'billing information.' My understanding of the proposal is that it would only cover "receiving" of 'billing information.' Why restrict and regulate only one end of the process that results in the potentially abusive transfer of 'billing information'?

Caller ID - Part 310.4(a)(6).

I have posted at www.worshamlaw.com/telemarketing.htm an example of what the FTC rule would prevent - the deliberate use of Caller ID to mislead. My web site sample call shows "FREE MONEY" on the Caller ID display. Failure to provide true Caller ID information does indeed "assist or facilitate" deceptive telemarketing.

The FTC's rule is good as far as it goes: prohibiting blocking or otherwise subverting the transmission of the name and/or telephone number of the calling party for caller identification service

purposes. However the FTC must go the step further that it is seriously considering, by requiring telemarketers to affirmatively send or provide non-deceptive caller ID information.

The FTC proposal recognizes that two states, NH and TX, already require affirmative production of Caller ID information. The FTC also notes that H.R. 90, passed Dec. 4, 2001 by the U.S. House, "would require that the telemarketer display on the Caller ID equipment the name of the seller on whose behalf the call is being made and a valid, working telephone number the consumer may call to be placed on a 'do-not-call' list." This bill is in line with NH and TX, but for some reason the FTC incorrectly placed this House bill among the states that only prohibit Caller ID blocking, and do not require affirmative production of Caller ID information. I believe the U.S. Senate is considering the stronger and more pro-privacy approach to require affirmative production of Caller ID information.

The FTC noted that there is only some evidence that trunk or T-1 lines can not produce Caller ID information, and in footnote 222 notes that 'line side' connections <u>are</u> capable of transmitting Caller ID information, and that the FCC has found that PBX equipment <u>does have</u> the capability of transmitting Caller ID information. All of the above strongly support the affirmative production of Caller ID information for all telemarketers.

The Caller ID information transmitted need not be the number of the individual solicitor's phone, but there should at least be a requirement to produce a working phone number of the main switch or circuit of the call center, or customer service number. There is a distinction between "generic" Caller ID data and "specific" data. If a telemarketer has 60 lines carried by a T3 Trunk, and 100 sales agents in the building, the Caller ID does NOT need to be the exact name and extension of the particular agent making that call, just the generic name of the company, and a main switchboard number would be sufficient. The caller-specific Caller ID is more expensive, and takes somewhat more advanced equipment. However, sending generic Caller ID should be easy, and can even be added at the central office by the phone company. The bottom line is that when the industry claims "we can't do it... it will cost billions" they are talking about specific Caller ID, not generic Caller ID. The FTC should get further input from the FCC on whether the on-premises telephone switches operated by telemarketers using trunk lines have the ability to transmit Caller ID.

Weighing the benefits, large call centers have the greatest ability to make this simple technical adjustment, and simultaneously have the greatest impact on people's privacy because of the far larger number of outbound calls they make. Who determines, and how will that person determine, whether a telemarketer is simply claiming that they can not provide Caller ID information?

We prohibit certain manufacturing operations in certain areas (i.e. residential districts, wetlands, etc.). Why can't we require that if you want to voluntarily enter the field of telemarketing, you must locate where the phone company has digital SS7 service, and must use equipment necessary to send Caller ID, or else make arrangements with your phone provider to add it in at the phone company's central office.

If absolutely necessary, the FTC could allow entities that claim that for technical reasons that they

can not provide Caller ID information to be allowed exemptions on a case by case basis by petition to the FTC. Even for these entities that are exempted after petitioning the FTC, they should have a phased in time period within which they ultimately must affirmatively provide Caller ID information.

The failure to produce Caller ID information is deceptive in several ways that the FTC proposal noted. Most obviously it does not allow many people, who now rely on their Caller ID as a screening method, to tell who is calling. It also does not allow people who return to their house at the end of the day, or after a vacation, to tell which of the thousands of telemarketers have called when all their Caller ID says is "UNAVAILABLE" or "UNKNOWN CALLER." This is particularly annoying when multiple calls show up this same, unidentifiable way.

I have been called by telemarketers without Caller ID transmitted who told me they could not tell me the number they were calling from. Only after pressure would they give me a number to call. Even then, it may be the number of the company advertised during the call (i.e. the company on whose behalf the call was made), rather than the actual telemarketing call center making the call.

Caller ID information is just that - information. Information is power. In the non-profit charity call context, many people are very interested to know that the call is coming from a for-profit telemarketer, rather than from the charity itself.

The Caller ID information transmitted should be that of the entity actually placing the call, whether that is the actual seller, or the telemarketer. Allowing or requiring the telemarketer to insert the Caller ID information of the seller, rather than of the telemarketer making the call, would cause confusion among consumers. This practice would itself be somewhat deceptive, since the Caller ID would display an entity other than the one making the call. It would also lead to consumer frustration, because even if that Caller ID information was then used to call the seller, the seller would have no first-hand knowledge of the call or of the particular telemarketer who may have made an abusive or otherwise improper call. The consumer would then have to directly call the telemarketer anyway to get satisfaction, and thus have to make two calls. If the FTC gave telemarketers the option of inserting either the sellers or the telemarketers Caller ID information, the telemarketer may choose to put the seller's information in simply to avoid the complaints that it, the telemarketer, would - and properly should - get.

Calling Time Restrictions - 310.4(c).

The FTC should restrict the hours that telemarketers are allowed to call to 8:00 AM to 6:00PM. There would be no conflict in federal law in doing so. It would simply mean that the FTC's restriction during the hours of 6:00 to 9:00 PM is more restrictive than the FCC's 8:00 AM to 9:00 PM limit. This is no more of a 'conflict' than to say that the FTC's proposed national list, which will restrict a company from ever calling a person, is a conflict with the FCC's existing rule which requires a do-not-call request to be honored for 10 years. The FTC is obviously aware that people dislike dinner time calls more than other calls, but is avoiding a simple solution to this problem. The proposal for people to choose what hours or days to be called would be unworkable. A simple across the board national time restriction to protect

people's dinner and key family time is the right approach.

Business to Business Exemption - 310.6(g).

I do not know of anything that should preclude the proposed national DNC list from applying to businesses that wish to avoid telemarketing calls. As long as a business calls into the automated system the FTC envisions from the business number that the business wishes to be added to the national DNC list, that request should be honored.

The FTC readily acknowledges in its preamble discussion "the increasing emergence of fraudulent telemarketing scams that target business" and that it "receives a high number of complaints about such business-to-business telemarketing frauds, and has brought numerous law enforcement actions against them" but blithely responds by saying it "believes a business-to-business exemption continues to be appropriate" without any adequate justification. Fraud is fraud, whether it occurs to a person sitting in an office or in their home. As an attorney who often works out of his home, I see no logic to the FTC's continued refusal to protect small business from fraud. The Business-To-Business exemption should be removed in its entirety.

MISCELLANEOUS ISSUES:

Opt-In Approach - I strongly agree with, and refer the FTC to the excellent discussion and documentation by EPIC and other privacy groups explaining why an opt-in approach is much preferred over the opt-out approach the proposed rule takes. There is a constitutional right to privacy, albeit also a constitutional right to free speech. However, the reality is that people pay for Caller ID and devices such as the Tele-Zapper for the purpose of stopping or avoiding telemarketing. Current telemarketing is therefore arguably not free speech, in much the same way that junk faxes are not free speech, because the recipient pays for the junk fax.

Predictive Dialers - I wholeheartedly support the FTC's proposal to clarify that the use of predictive dialers resulting in "dead air" violates the existing Rule. There are many telemarketing operations that operate profitably without the need to resort to the outrageous and illegal practice of using a machine or computer to make solicitation calls that purposefully hang up on people that the machine calls. It would be very difficult to police or regulate any abandonment rate over zero. The telemarketer could and would come up with any old explanation for the abandonment of a particular call. Everyone can understand a zero abandonment rate. At an absolute bare minimum, the FTC should only allow an abandonment rate above zero for those telemarketers than can and do transmit Caller ID information. This could be a sort of technology-forcing solution to the claimed lack of Caller ID by some telemarketers.

The FTC's suggestion for a tape-recorded message to be played when a telemarketer using a predictive dialer is not available to talk to the called person is rude and insulting. These messages would be subject to the TCPA and the FCC restrictions on pre-recorded voice solicitations. In fact, it would in many situations be a violation of 47 U.S.C. 227 § (b)(1)(B). While theoretically addressing the problem of hang up call anonymity, this would not address the problem recognized by the FTC of elderly people for whom

just getting to the phone is an effort, or for people who work at night and sleep during the day, or for any other person who is interrupted from what they were doing. The "shortage of telemarketers" as the FTC calls it, should be seen for what it is - a cost-cutting method of a for-profit entity that intrudes on the privacy of millions of Americans every day.

Pre-recorded Phone Solicitations - The rule does not clearly indicate that it applies to pre-recorded calls as well as 'live' telephone solicitations. This should be explicitly stated as part of the rule.

Fax Advertisements - The rule should clarify that it applies to fax advertisements, which meet the definition of 'telemarketing,' at least for the Caller ID blocking requirements. Junk faxers hide behind the anonymity they have and maintain by not providing Caller ID. Some of the FTC's requirements, such as record keeping, apply to "sellers," and this would and should include persons who sell items via fax advertisements.

Applicability - The FTC should have a means of ensuring that it is clear what companies fall under the new rule's requirements. In approving the proposal, one of the FTC Commissioner's noted that "the Commission lacks jurisdiction, in whole or in part, over the calls of entities such as banks, telephone companies, airlines, insurance companies, credit unions, charities, political campaigns, and political fund raisers." Many companies will invariably tell a person that they comply with the FTC rule, even though they do not have to because they are exempt. However, even some companies that do in fact fall under the FTC's rule will make this claim.

I suggest that the FTC note in a publicly accessible location the list of all companies that have signed up for or are honoring the national DNC list. The FTC could indicate that the rule applies to a company with an 'x' or similar mark next to each company's name. Those without an indicating mark would be the ones that are in fact honoring the national list even though not required to. The FTC could note that these latter companies must still comply with the DNC rule requirements of the FCC, and can not mislead the public of this fact. People would thus gain the benefit of the FTC's proposal to prohibit a telemarketing from interfering in any way with a consumer's right to be placed on a "Do Not Call" list, which is a term and regulated area of the FCC as well as of the FTC. If after review the FTC finds the national list has been successful, the FTC should work with the FCC, which does not face the jurisdictional limitations of the FTC, to create a national list that covers all entities that make telemarketing calls

Taping of Calls - Some states, such as Maryland, are "two-party" consent states, and require the consent of both parties to be taped. Some of the FTC's proposed rule requiring proof of authorization may conflict with the law of certain "two-party" states.

Third Party Requests - The FTC's national DNC list should honor third party requests from groups like Private Citizen, which I am a member of, as well as the AARP, or Direct Marketing Association. Private Citizen requires a written authorization from its members to act on their behalf in making do-not-call requests to telemarketers. This appears adequate and reliable. It is hard to seriously imagine that someone is actually going to complain about <u>not</u> getting telemarketing calls because somehow or other their number

was mistakenly added to the FTC's national list.

Prison Labor - Ban the practice of allowing prisoner to engage in telemarketing. The example in Utah cited by the FTC shows that even with serious precautions and protections abuses will still occur. Telemarketing has more than enough inherent problems already, and does not need to have the use of prison labor added to the problems.

Please include my comments in the official rulemaking. This original and five copies are enclosed. I am also e-mailing these comments to tsr@ftc.gov. I would also like to participate in the hearing on this rule scheduled for June.

Thank you for your consideration of these comments on the FTC's proposed TSR revisions.

Sincerely,

Michael C. Worsham, Esq.

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