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June 28, 2002

By Hand Delivery

Federal Trade Commission  
Office of the Secretary  
Room 159  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580  
Attn: FTC File No. R411001

Re: Telemarketing Rulemaking–Comment; FTC File No. R411001

Ladies and Gentleman:

This comment is submitted in connection with the FTC’s proposed revision of the Telemarketing Sales Rule, 16 C.F.R. Part 310, *see* Notice of Proposed Rulemaking (“NPRM”), 67 Fed. Reg. 4492 (Jan. 30, 2002). At the June 6, 2002 Forum on the proposed amendments, Associate Director of the Bureau of Consumer Protection Eileen Harrington invited submission by June 28 of information and perspectives that were not merely repetitive of what had already been submitted and said.<sup>1</sup> I believe that this comment, which is submitted at the request of a client of Covington & Burling, satisfies that test.<sup>2</sup>

This comment supports the Commission’s proposed treatment of preacquired account information as a reasonable, workable response to a serious issue. Although industry can point to some legitimate benefits from preacquired account information, it is hard to see how the underlying problem can be definitively resolved by something short of the Commission’s approach. As is explained below, there is no reason why the proposed rule would have to have dire consequences for legitimate telemarketers.

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<sup>1</sup> Although Ms. Harrington’s invitation to submit comments by June 28 does not appear to have been reflected in a formal extension of the comment period, presumably it nonetheless permits you to consider this comment.

<sup>2</sup> Although this comment represents the undersigned’s views, a member of the telemarketing industry is compensating Covington & Burling, to whom he serves of counsel, for his time.

## 1. The Need for the Proposed Provision

The Commission's basic insight is correct: any time credit or debit (hereinafter simply "credit") card numbers are being communicated, there is potential for mischief. This is true of in person purchases, where it makes no sense to print whole credit card numbers on receipts (a fact that has been recognized by the increasing number of state statutes that ban printing of more than the last four or five digits, *see, e.g.*, Ariz. Rev. Stat. § 44-1367; Cal. Civ. Code §1747.9; Colo Rev. Stat. § 6-1-711; La. Rev. Stat. Ann. § 3518.3; Wash. Rev. Code § 19.200.010.). It is also true in telemarketing. Each time credit card numbers are communicated or transmitted, there is another opportunity for wrong-doers to obtain and misuse a number.

In the context of the classic telemarketing call, a potential for misunderstanding will exist whenever "a telemarketer already possesses information necessary to bill charges to a consumer at the time a telemarketing call is initiated." NPRM, 67 Fed. Reg. at 4512. To be sure, strong requirements of disclosure, notification, and obtaining of explicit consent, and of recording all such conversations, could do some good. The problem is that an approach based on required disclosures and telemarketer-perceived consent is not self-enforcing. So long as a telemarketer starts out with all of the information needed to process a transaction, there will be incentives to cut corners and do whatever is needed to effect a sale. In a world where consumers routinely use "O.K." and "Uh Huh" to stall for time, and when consumers may speak on the telephone while attempting to multi-task, any permanent solution must be self-enforcing.

The Commission is also correct that the best way to be certain that a consumer really wants to make a purchase is to see if the consumer is willing to reach into a purse or pocket, open a wallet, take out a credit card, and read from it. When that happens, there is nothing ambiguous about what's taking place; there can be no misunderstanding. (And, reassuring one witness's worry, it cannot be the babysitter who is agreeing to a proposed purchase! *See In re Telemarketing Sales Rule Forum*, No. P994414, Tr. at 104 (July 27, 2000).) Even during a chaotic dinner hour, a consumer cannot open a wallet, pull out a credit card, and read from it without knowing that he or she is making some kind of purchase. Yet if a telemarketer starts a conversation already in possession of complete credit card information, the telemarketer can bill a consumer whose hand has never gone near a wallet. This is a valid Commission concern.

## 2. The Proposed Provision is Workable

Industry has argued that the proposed rule will drive up costs, prevent the execution of countless transactions into which consumers wish to enter, and irritate consumers who are forced repeatedly to read and recite 16 digits. These are not frivolous concerns. Anything that increases the time of calls becomes expensive when those calls occur thousands of times a day,

and longer calls translate directly into higher labor costs. Computer transmission of credit card numbers is far more accurate than voice transmission. With the frequency with which credit cards are used, card numbers can become hard to read and consumers may not relish having to struggle through deciphering and communicating 16 digits.

What some members of the industry have failed to appreciate, however, is that the proposed rule does not impose a requirement that every consumer read 16 digits and that telemarketers rely solely on recording those recitations as the source of entire account numbers. To the contrary, the proposed rule would not prevent a reputable telemarketer from possessing, for instance, 12 digits of a credit card number, and then, after disclosing that it had those digits, asking a consumer to pull out his or her wallet, select the indicated credit card, and supply the missing four digits.<sup>3</sup> This short-hand method for consumers to signal assent to a deal leaves

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<sup>3</sup> Proposed Rule § 310.4(a)(5) would generally prohibit the third party receipt or disclosure of “billing information,” so the technical issue would be whether receipt or disclosure of 12 of 16 digits, under the circumstances described above, would be the receipt or disclosure of “billing information.” “Billing information” is defined as data “that provides access” to an account. Possession of only 12 of 16 digits provides access to nothing, of course, so 12 digits, where the remaining four are unknown, would not be “billing information.”

This interpretation is supported not just by the words but also by the two contexts in which they are used. Section 310.3(a)(3) requires that before a checking account (for instance) is charged based on oral authorization, the customer must receive “specific billing information, including the name of the account and the account number, that will be used.” § 310.3(a)(3)(E). This clearly contemplates that “billing information” refers to whole credit card numbers. The NPRM explains that the revision “would add to [the] list of disclosures ‘billing information,’ *i.e.*, the identification of the consumer’s . . . specific account and account number to be charged.” 67 Fed. Reg. at 4498. As used in this provision, “billing information” cannot mean mere parts of account numbers, and, of course, defined terms normally have a consistent meaning throughout a rule.

As noted, Section 310.4(a)(5) generally prohibits the third party receipt or disclosure of “billing information” (that same term). As elucidated in the body of this comment, the whole point of this section is to prevent telemarketers from having such complete information in advance that a consumer is powerless to block entry of an order. “Typically, the preacquired billing information is a credit card number (and related information) . . .,” 67 Fed. Reg. at 4512, which must refer to a whole card number since an order could not be placed with only 12 digits. The Commission explained that “billing information” is “any data that provides access to a consumer’s or donor’s account,” and that it intends the term “to include information such as a credit or debit card number and expiration date, bank account number, utility account number, mortgage loan account number, customer’s . . . date of birth or mother’s maiden name, and any other information used as proof of authorization to effect a charge against a person’s account.” 67 Fed. Reg. at 4499. Perhaps if a telemarketer possessed 12 digit account information, the missing four digits could be “billing information,” but the Commission’s definition could not contemplate that those initial 12 digits are “billing information.” Thus the words of the proposed rule and the Commission’s commentary, as well as the proposed rule’s purposes, all permit appropriate preacquisition and use, with notice, of 12 digits of a credit card number.

complete control of the transaction in the hands of the consumer while preventing the industry burden from being any greater than necessary.<sup>4</sup>

This approach makes sense for several reasons. First, it protects many of the legitimate interests espoused by a major industry. If a telemarketer lacks and a consumer has to read only four digits, the process is significantly quicker and more accurate than if 16 digits are required. Consumer irritation is minimized because consumers need read only a confirming four digits. Many of us are getting used to supplying the last four digits as a method of indicating a credit card account and confirming a sale (for instance, of airline tickets purchased on-line), so consumers intending to purchase are unlikely to protest when asked to supply four digits. (With in-bound up-selling, for example, consumers can quickly confirm that they genuinely intend to make a second purchase simply by reiterating those four digits.)

Second, this approach accomplishes all of the Commission's purposes. Chances of abuse and deception are largely eliminated because consumers understand what it means to pull out a wallet and read the last four digits of a credit card. Requiring provision of a credit card's last four digits is rapidly becoming a widely recognized signal of assent to a deal. Indeed, a Legal Services Advocacy Project ("LSAP") comment recommended that the Commission reduce the frequency of unauthorized charges by requiring that consumers recite those last four digits. *See* Legal Services Advocacy Project comment on FTC Telemarketing Review, File No. P994414, at 2 (Apr. 20, 2000); *cf.* 67 Fed. Reg. at 4513 (quoting from that comment). Just this week, the Judiciary Committee of the California State Senate passed a bill making a telemarketing sale unlawful unless, *inter alia*, the telemarketer obtains from the consumer "at least the last four digits of the account number" being charged and any applicable expiration date. AB 2775, Regular Legislative Sess. (Cal. 2002).<sup>5</sup> As is widely recognized, consumers know that there is only one reason to pull out a wallet and read from a credit card.

Most important for the Commission's purpose, however, is that the telemarketer would not start telephone calls with the information necessary to bill charges to the consumer. The LSAP comment apparently contemplated that consumers would have to recite four digits, but

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<sup>4</sup> Although this comment refers only to the example of preacquiring 12 digits and letting the consumer signal his or her intent to purchase by communicating four, the proposed rule would also permit, for instance, the preacquisition of 11 digits and the consumer communication of five. The essential point is that there not be any deception. Prudent telemarketers possessing 12 of 16 digits would specifically disclose this fact before requesting the missing four, simply to comply with the general prohibition of deception, but the Commission is of course free to make this prudent practice mandatory.

<sup>5</sup> Before this bill becomes law, of course, it still needs to be passed by the full Senate. It also would have to be reconciled with an earlier version that was passed by the California State Assembly.

that control would remain with the telemarketer, who would not need those digits and could decide whether or not it had heard four digits with sufficient clarity. The proposed rule deliberately removes that control from the telemarketer. It goes beyond the LSAP recommendation and the California bill to create a self-enforcing system where the consumer is automatically in charge.

Third, this approach minimizes the communicating of whole credit card numbers. As noted above, it is never helpful for credit card numbers to be communicated unnecessarily. The proposed rule prevents whole credit card numbers from being obtained by or supplied to third parties. At the same time, since consumers could have to recite only four digits to effect a transaction, the persons taking those orders would never have access to whole account numbers, which could be misused. Finally, since consumers would have to recite only four digits to make a purchase, consumers would not become accustomed routinely to sharing whole credit card numbers and other personal account information with strangers. It would not have been good government policy unnecessarily to encourage the regular communicating of whole account numbers.<sup>6</sup>

### 3. Conclusion

The Commission's proposed rule's treatment of preacquired account information makes sense. It addresses a serious concern with a practical remedy. Because the proposed rule would permit a telemarketer to acquire 12 digits of a 16-digit credit card number and then, after disclosure, empower a consumer to signal a purchase by supplying the missing four digits, the rule achieves the Commission's purposes without unnecessary costs to a major industry. Legitimate telemarketing can continue while fraudulent selling is driven out.<sup>7</sup> To the extent that less communicating of whole credit card numbers results, the Commission has taken a step toward enhanced consumer privacy. The Commission has struck a sound balance.

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<sup>6</sup> It seems self-evident that consumers face greater risks when sharing whole credit card numbers than when sharing only the last four digits. Understanding that the proposed rule can permit the proper preacquisition and use of 12 digits helps reconcile the proposed rule's prohibition of the preacquisition of "billing information" with the many advisories cautioning consumers against reading (implicitly whole) account numbers to unknown people who place telephone calls to them. (Examples of such advisories are included in Attachment A.) Since the proposed rule contemplates that consumers can make purchases from telemarketers while communicating only four digits, the rule does not undermine those consumer advisories.

<sup>7</sup> Although I have not independently studied the "unfairness" analysis that the Commission chose to include as part of its proposed rule-making, obviously any such analysis is made more persuasive by the proposed rule's reconciling of industry needs and consumer concerns.

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Thank you for your consideration.

Yours truly,

Stephen Calkins  
Of Counsel

## ATTACHMENT A: CONSUMER ADVISORIES CAUTIONING ABOUT COMMUNICATING CREDIT CARD NUMBERS

- Federal Trade Commission: “Don’t: . . . Give out your account number over the phone unless you’re making the call to a company you know is reputable.” *Avoiding Credit and PCharge Card Fraud*, at <http://www.ftc.gov/bcp/online/pubs/credit/cards.htm> (last visited June 27, 2002).
- Federal Trade Commission: “Do not give out personal information on the phone, through the mail or over the Internet unless you have initiated the contact or know who you’re dealing with. Identity thieves may pose as representatives of banks, Internet service providers and even government agencies to get you to reveal your SSN, mother's maiden name, financial account numbers and other identifying information. Legitimate organizations with whom you do business have the information they need and will not ask you for it.” *ID Theft: When Bad Things Happen To Your Good Name*, at <http://www.ftc.gov/bcp/online/pubs/credit/idtheft.htm> (last visited June 27, 2002).
- Federal Trade Commission: “Keep information about your bank accounts and credit cards to yourself - unless you know who you're dealing with.” *Ditch the Pitch: Hanging Up on Telephone Hucksters*, at <http://www.ftc.gov/bcp/online/pubs/tmarkg/ditch.htm> (last visited June 27, 2002); *Straight Talk About Telemarketing*, at <http://www.ftc.gov/bcp/online/pubs/tmarkg/straight.htm> (last visited June 27, 2002).
- Major Credit Reporting Agencies: “Do not give personal information or account numbers to anyone until you have confirmed the identity of the person requesting this information and verified that you need to provide them with the information.” (Equifax) and “Don’t give your card number over the phone unless you initiate the call.” (Experian). Equifax Website, *Protect Yourself From Identity Theft*, at <https://www.econsumer.equifax.com/webapp/ConsumerProducts/PageFrameServlet?payloadName=pgCreditWise.jsp - 10Ways> (last visited June 27, 2002); Experian Website, *Fraud Prevention Tips*, at <http://www.experian.com/consumer/help/fraud/prevention.html> (last visited June 27, 2002).
- Better Business Bureau: “Never provide your credit card or checking account numbers to a caller from an unfamiliar company without first checking the company out with your Better Business Bureau, State Consumer Protection Agency or State Attorney General.” *Tips for Consumers*, at <http://www.bbb.org/alerts/tipstel.asp> (last visited June 27, 2002).
- Private banks issuing credit cards: “Never give out your personal information over the phone . . . .” (Citibank). *Citibank NetNews: Protect Yourself from Identity Fraud*, at <http://www.citibank.com/us/cards/news/sep2000/fraud.htm> (last visited June 27, 2002).
- California Department of Consumer Affairs, Office of Privacy Protection: “Don’t give out your personal information on the phone – unless you made the call or know the caller.” *Identity Theft Protection Tips*, at <http://www.privacyprotection.ca.gov/identitytheftprintver.htm> (last visited June 27, 2002).
- Office of New York State Attorney General: “Be careful to whom you provide your personal information: it’s advisable never to give out your bank account number, credit

card number, social security number or other personal information unless you know the company.” *Consumer Tips: Telemarketing Fraud*, at <http://www.oag.state.ny.us/consumer/tips/tele fraud.html> (last visited June 27, 2002).