

March 29, 2002

Office of the Secretary
Federal Trade Commission
Room 159
600 Pennsylvania Avenue, NW
Washington, DC 20580

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

Ladies and Gentlemen:

This comment letter is submitted by the National Business Coalition on E-Commerce and Privacy (the “Coalition”) in response to the proposed amendment by the Federal Trade Commission (“FTC”) to the Telemarketing Sales Rule (“the Rule”). This proposed rule would, among other things, create a national “do-not-call” list of consumers who wish to “opt-out” of the continued receipt of telemarketing phone calls.

The Coalition, which is comprised of nationally recognized companies from diverse economic sectors, advocates on behalf of mainstream American business in pursuit of a balanced and fair national policy pertaining to electronic commerce and privacy. The Coalition is committed to working with policymakers at the state, federal, and international levels to develop sensible and workable privacy policies and regulations.

The members of the Coalition are all nationally known and respected companies that place great value on the opinions and product preferences of consumers generally and our customers in particular. It is often counterproductive to engage in the telephone solicitation of consumers who do not wish to receive such calls. We recognize that unwanted calls can sometimes annoy consumers, and thus could adversely affect the public’s perception of what we do and who we are. Therefore, we believe that as long as the FTC’s proposed “do-not-call” registry balances the needs of consumers and the businesses that must comply with the Rule, the proposal would not be inconsistent with the interests of our members.

The FTC has asked for general comments on the proposed rule and has also posed specific questions, and we are happy to address each in turn.

- ***General Comments***

Preemption: The Coalition believes strongly that any final rule must preempt duplicative “do-not-call” lists at the state level. Unless the proposed rule preempts the growing number of inconsistent state laws and proposals now in effect and establishes a uniform national rule regulating the domestic use of telephonic marketing, it would be of very limited value to the business

community. The potential benefits from a federal rule that establishes a uniform, consistent standard would be administrative clarity, predictability, and a reduction in the growing cost and expenditure of resources now required to comply with a multiplicity of differing state “do-not-call” lists. An FTC rule that fails to preempt state law, however, would constitute little more than yet another confusing layer of regulation in what is already an expanding maze of inconsistency. To simply add the FTC’s national “do-not-call” registry to all existing (and future) state lists would only serve to substantially mitigate the value that businesses and consumers alike might otherwise reap from a federal rule.

Outgoing telephone calls: The Coalition is concerned about the proposed amendment to the definition of “outgoing telephone call” to include inbound calls initiated by a consumer which are subsequently transferred to another telemarketer or which involve a solicitation on behalf of more than one seller. While the intent is to ensure that the Rule’s mandated disclosures are made with respect to any subsequent offer, the consequences could be problematic. For example, a consumer could initiate a telephone call to register a new appliance with the manufacturer. In the process of this call, the manufacturer might wish to inform the consumer of appropriate companion products, or a contractor for on-site repairs, etc. However, if the consumer is on the proposed “do-not-call” registry, then the manufacturer would be precluded from doing so. We would propose that such a call initiated by the consumer either should fall under a “pre-existing relationship” exemption or should constitute express verifiable authorization for the purposes of that call.

Account numbers: The proposed rule seeks to regulate the use of a consumer’s account number in at least two ways. First, it appears to create an “abusive telemarketing” act of practice for instances in which a seller or telemarketer receives a consumer’s billing information, including account number, without that consumer’s consent. Second, a customer’s express verifiable authorization is conditioned upon his or her receipt of, among other things, “specific billing information”, including his or her account number. These requirements pose some practical problems with respect to encrypted account numbers. In order to protect consumers, businesses often do not convey actual account numbers to telemarketers, but instead provide only encrypted numbers. When a consumer authorizes charges to his or her account, the encrypted numbers are matched to that consumer, but the encrypted numbers and the matching consumer identity are returned to the originator for actual billing. The seller or telemarketer never has possession of the consumer’s actual account number, and therefore does not even have the ability to issue charges against that account. This important distinction was recognized by regulations implementing the 1999 Gramm-Leach-Bliley Act. The Act prohibited the disclosure of account numbers, but failed to make a distinction between actual account numbers and encrypted account numbers. The regulators immediately recognized the practical difficulties that would ensue and responded by crafting an exception for encrypted account numbers (12 C.F.R. §573.12). Accordingly, we recommend that the FTC re-examine this requirement and create an appropriate exception from coverage for the use of encrypted account numbers.

- *Specific Questions*
- *The proposed rule would permit consumers or donors who place their name and telephone number on the "do not call" registry to provide express verifiable authorization to specific sellers or organizations to make calls to them. How will this requirement affect those entities with which a consumer or donor has a pre-existing relationship?*

Express verifiable authorization would be difficult to administer and would unnecessarily complicate the pre-existing relationship. Therefore, the Coalition would hope that the final rule would instead simply contain an exception for businesses that have pre-existing relationships with their customers.¹ It is, after all, the unexpected and unsolicited arrival of telemarketing calls that consumers object to – not those calls that are the normal and expected result of an ongoing business-to-customer relationship. We believe that it is therefore reasonable to assume that a customer who maintains such an ongoing relationship (e.g., one which has been in effect for the past five years or less) fully expects to learn from us of updated products or services that may be available to them as a result of this relationship. We also believe that because the Rule applies only to calls relating to the sales of goods or services, it should not affect calls from businesses to consumers to follow up on customer inquiries or regarding such matters as account status or other details affecting the management or administration of an existing relationship. Moreover, requiring express verifiable authorization would create serious administrative difficulties – for example, whether a telephone call seeking such express verifiable consent would itself constitute a call to sell goods or services that is subject to the jurisdiction of the Rule.

- *Who should be permitted to request that a telephone number be placed on the "do not call" registry? Should requests from the line subscriber's spouse or adult child be permitted? Should third parties (outside the FTC) be permitted to collect and forward requests to be put on the "do not call" registry?*

The Coalition believes that only the person to whom the telephone number is assigned should be authorized to add the number to the “do-not-call” registry. Enabling parties other than the registered party to request the placement of telephone numbers on the proposed registry would only create administrative confusion and the potential for mischief. As an added security measure, the request to have a telephone number added to the registry should also originate from that telephone number as a further assurance of authenticity and reliability. Moreover, if a telephone number is subsequently reassigned to a different consumer, it should be removed from the registry unless and until the new owner requests that it be listed. Finally, outside third parties should not be authorized to collect and forward requests to be listed. We believe that any other decision offers no

¹ In 1996, the National Association of Securities Dealers implemented rules similar to the telemarketing restrictions in the Rule, and included an express exemption for pre-existing relationships. See Rule 2211 in the NASD Manual, available at <<http://secure.nasdr.com/default.htm>>.

readily apparent benefits while greatly increasing the chance of error or abuse of the registry.

- *How long should a telephone number remain on the national “do not call” registry?*

The Coalition believes that there should be some specified time limit for a given telephone number to remain on the list and that a retention period of about one year is appropriate. We believe an annual expiration of a registry listing offers an opportunity for the consumer to reexamine his/her needs and circumstances (such as relocation, change in marital status, etc.) and to either reaffirm or reconsider his/her choice to be listed on the “do-not-call” registry. An annual registration and renewal process would not be administratively cumbersome, would not constitute an unreasonable burden on the consumer, and would be appropriate given that the products and services offered by businesses change rapidly, and the attitude of the consumer may change as well.

- *Should the “do not call” registry be an “all or nothing” option or should it instead allow consumers to specify the days or time of day that they are willing to accept telemarketing calls?*

The Coalition believes that the only reasonable approach to the “do-not-call” registry is the “all-or-nothing” approach. The alternative creates the potential for an overwhelming administrative load for both the FTC and businesses complying with the rule.

We very much appreciate the opportunity to comment on the FTC’s proposed Rule, both with respect to the underlying importance of preemption and with respect to several other specific issues raised by the Rule. We hope that our comments are helpful and if you have any questions or need any additional information, please do not hesitate to contact me at (202) 756-3385.

Sincerely,

John Schall
Executive Director