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Nessa Feddis
Senior Federal Counsel
Phone: 202-663-5433
Nfeddis@aba.com

9 December 2002

Ms. Marlene H. Dortch
Office of the Secretary
The Federal Communications Commission
445 12th Street, SW
Room TW-A325
Washington, D.C. 20554

Re: CG Docket No. 02-278
CC Docket No. 92-90
FCC 02-250

The American Bankers Association ("ABA') is pleased to submit our comments to the Federal Communications Commission's ("FCC") Notice of Proposed Rulemaking regarding the Telephone Consumer Protection Act of 1991 published in the 8 October 2002 *Federal Register.* The FCC is seeking comment on whether to revise or clarify its rules governing unwanted telephone solicitation and the use of automatic telephone dialing systems, prerecorded or artificial voice messages, and telephone facsimile machines. It is also seeking comment on the effectiveness of company-specific do-not-call ("DNC") lists and whether it should establish a national do-not-call list.

The ABA brings together all elements of the banking community to represent the interests of this rapidly changing industry. Its membership – which includes community, regional, and money center banks and holding companies, as well as savings associations, trust companies, and savings banks – makes ABA the largest banking trade association in the country.

Generally.

If a national DNC list is adopted, it is critical that it preempt state DNC lists. In addition, the FCC rather than the FTC should promulgate any such regulation, making clear that the federal regulation preempts state DNC list laws. Congress specifically conveyed to the FCC the discretion to develop a national DNC list. Congress also appropriately envisioned preemption of related state laws. Further, a single uniform law makes sense for regulating businesses that essentially operate on a nationwide basis. If the FCC uses the FTC's proposed DNC list scheme, we strongly recommend that it publish a revised regulation for comment before proceeding to address the many issues and challenges presented with that original proposal.

ABA believes that the current company-specific DNC lists works well and conveys to consumers the most control in managing telemarketing calls. However, the system could be improved by prohibiting interference with caller identification and allowing consumers to request addition to company DNC lists through a toll-free number or website. These measures will also address issues related to abandoned calls. In addition, abandoned calls could be reduced by adoption of guidelines setting acceptable abandonment at 5 percent per day. We believe that these measures will eliminate any need to restrict or prohibit use of predictive dialers or answering machine detection systems, which are very efficient marketing tools.

Network Technologies.

The FCC is seeking comment on whether network technologies have been developed that may allow consumers to avoid receiving unwanted telephone solicitations. Specifically, the FCC asks whether telemarketers should be required to transmit the name and telephone number of the calling party, when possible, or prohibit them from blocking or altering the transmission of such information. We believe that prohibiting interference is a workable, balanced solution that gives consumers the most control over managing telemarketing calls: consumers can choose whether they wish to talk to the particular telemarketer or not. For example, a consumer interested in obtaining a new credit card or in changing telephone services, may wish to hear about offers related to those products at a particular time, but may not want to hear about other products. However, if they have chosen to be included in a state or national DNC list, they will not receive those offers that interest them. Caller identification, which has become much more ubiquitous and available, allows the consumer to effectively screen, an option not available through a government-sponsored DNC list.

Any final rule should clarify that the telemarketer has no liability if the caller identification does not work. On occasions, systems cannot relay the information for various reasons. Telemarketers have no control over this failure and should not be liable. It is sufficient to prohibit active interference.

Predictive Dialers.

The FCC is asking for information on whether predictive dialers, as a form of automatic telephone dialing system, are subject to the ban on calls to emergency lines etc. We have no objection to prohibiting predictive dialers to call to emergency lines etc. This is an appropriate ban.

The FCC also seeks comment on whether it should adopt rules to further restrict the use of predictive dialers to dial consumers' telephone numbers, noting its recognition of the benefits of predictive dialing to the telemarketing industry. Specifically, it invites comment on whether requiring a maximum setting on the number of abandoned calls or requiring telemarketers who use predictive dialers to also transmit caller identification information are feasible options for telemarketers.

Predictive dialers are automatic dialing software programs that automatically dial consumers' telephone numbers in a predetermined manner such that the consumer will answer the phone at the same time that a telemarketer is free to take the call. In some instances, however, there is no telemarketer free to take the call when the consumer picks up. The consumer hears nothing or just a click as the dialer hangs up. Consumers have complained that they rush to pick up the phone, only to be met with dead air and no ability to determine the source of the call.

We recommend an approach built on the Direct Marketing Association ("DMA") guidelines. In addition, depending on costs and feasibility, some kind of caller identification, by number or name, may be an alternative. The DMA guidelines set acceptable maximum abandonment at 5 percent per day. The DMA guidelines also limit the number of times a marketer may abandon a consumer's telephone number in one month. We believe this is an appropriate and flexible standard. At this time, it is not feasible to eliminate all abandoned calls and a zero tolerance would, in effect, eliminate an efficient tool.

The suggestion to require that telemarketers transmit caller identification information could at least alleviate consumer concern that the hang-ups are due to harassment, for example. However, there may be technical impediments and any rule should make clear that telemarketers are only responsible for transmitting the identification information, not for ensuring its receipt, which is beyond their control. Any rule should also be flexible so that either a number or name is acceptable and that the name and number may relate to either the telemarketer or the seller.

In any case, the FCC should support federal preemption of any similar state laws to eliminate multiple and varying rules that will cause confusion and add unnecessary costs without any discernable benefit.

Answering Machine Detection.

The FCC speculates that another reason for "dead air" may be the use of answering machine detection ("AMD") technology that monitors calls once they are answered. AMD may either send a prerecorded message to an answering machine or transfer the call to a telemarketer once it detects that a customer has answered the call. In the event the

person has answered the telephone and the call is transferred to a sales representative, there may be "dead air" while the call is being transferred.

The FCC seeks comment on whether AMD technology is responsible for much of the dead air. AMD may contribute to some, but by no means most or all of the "dead air" phone calls. In any case, it does not contribute enough to justify restrictions or a prohibition given its usefulness and efficiency.

AMD is a very effective and efficient tool to contact consumers. A large percentage of messages are relayed to answering machines. Consumers can choose to simply delete the message if they are not interested or respond to it they are. In this fashion, both the consumer and the telemarketer save time.

Regulations require that persons making a telephone solicitation must provide the name of the individual caller, the name of the person or entity on whose behalf the call is being made, and a telephone number of address which the person may be contacted. The term "telephone solicitation" is defined to mean the initiation of a call or *message* for the purposes of encouraging the purchase or rental of property goods or services.

The FCC asks whether it is necessary to modify the rules to state expressly that the identification requirements apply to otherwise lawful artificial or prerecorded messages as well as to live solicitation calls. We believe that the rule should require identification. This allows consumers to be deleted from telemarketers' lists.

The FCC seeks comment on the identification requirements to predictive dialing and other circumstances involving abandoned calls. The Federal Trade Commission ("FTC") assumes that abandoned calls violate the Telemarketing Sales Rule because the telemarketer fails to identify itself. The FCC asks whether it should adopt a similar stance.

As noted in our letter to the FTC, we strongly disagree that abandoned calls violate the Telemarketing Sales Rule and recommend that the FCC not adopt this position. Nevertheless, we agree that the issue should be addressed as discussed earlier in the section related to predictive dialers. We recommend an approach that sets maximum abandonment rates, based on the DMA guidelines and, depending on costs and feasibility, some kind of caller identification by number or name.

Established Business Relationship.

The regulations provide an "established business relationship" exemption from the restrictions on artificial or prerecorded message calls to residences. The FCC concluded that a solicitation to someone with

whom a prior business relationship exists does not adversely affect subscriber privacy interests. "Established business relationship" means:

> [P]rior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.

The FCC specifically seeks comment on whether it should clarify the type of consumer inquiry that would create an established business relationship for purposes of the exemption. For example, it asks whether it should clarify that a consumer's request for information related to business hour or directions to a business location is not an inquiry that would establish the requisite business relationship.

Such a clarification appears unnecessary. The definition refers to a "communication . . . on the basis of an inquiry . . .regarding products or services offered. . ." An inquiry related to location does not appear to be an inquiry about a product or service.

Wireless Telephone Numbers.

The rules specifically prohibit telephone calls using an autodialer or an artificial or prerecorded voice message to any telephone number assigned to a paging service, cellular telephone service, or any service for which the called party is charged for the call except in emergencies or with prior consent. Rules also provide that live telephone solicitations to residential telephone subscribers must comply with time of day restrictions and must institute procedures for maintaining do-not-call lists. The FCC has not opined on whether wireless subscribers are "residential telephone subscribers."

The FCC is seeking comment on the extent to which telemarketing to wireless consumers exists today. We are not aware of any telemarketing made to cellular phones today. However, as telephone numbers become portable between cellular and wireline telephones, it will be a greater challenge to make a distinction and avoid cellular phones. Telephone companies would have to provide the information if calls are prohibited to cellular phones.

State Law Preemption.

The FCC seeks comment on whether state requirements should be preempted. We strongly urge the FCC to clarify that any federal regulation preempts state laws, particularly with regard to DNC list laws.

As the FCC notes, the Consumer Telephone Protection Act provides that only *intrastate* laws are preempted. Clearly, Congress anticipated a uniform law to be applied to entities and systems that it recognized are national in their activities and reach.

Moreover, a single, uniform law makes sense under the circumstances. First, telemarketing calls most often involve interstate commerce and entities that do business on a nationwide basis. Second, the federal law provides strong protections to consumers. The cost of compliance with the various and numerous state laws, including monitoring state laws, developing programs to ensure the various state laws are followed, auditing compliance with multiple state laws, etc., outweighs any minimum benefits bestowed by state laws. The government-sponsored DNA lists are particularly illustrative. The variations in the state laws simply do not justify the existence of multiple lists – and fees. It is a waste of valuable resources.

For these reasons, we strongly urge the FCC to clarify that the federal regulation preempts state laws.

National Do-Not-Call List and State Do-Not-Call Lists.

The FCC is revisiting the possibility of creating a national DNC list. Previously, it had considered creating a national DNC list, but declined. Instead, it opted to require company-specific DNC lists. Based on changes in the marketplace, technological developments, and the FTC's initiative to create a national DNC list, it is reviewing the issue.

If the FCC adopts a national DNC list, it should make clear that the federal regulation preempts state DNC list laws. Otherwise, it should not adopt such a national DNA list. We also believe that the FCC rather than the FTC should adopt the national DNC list regulation. Finally, if the FTC DNC list proposal is the model, it should be revised and reissued for public comment.

The FCC should make clear that a national DNC list preempts any state DNC list requirements. A federal list otherwise adds little. As we noted in our comments to the FTC, obviously, a single national list is more efficient and less costly for the government, users, and consumers: consumers need sign up only once, not each time they move; a single reconciliation rather than dozens costs less; and a single format costs less. Multiple lists are unnecessarily expensive for users. Fees for users of state DNA lists are currently expensive. Users must not only buy from each state, but often must buy multiple subscriptions from each state. Fees are also collected for violations.

Creation of a single national DNC list and regulation will help significantly in minimizing costs and improving the system generally. Indeed, there is little benefit for businesses to create a federal DNC list absent federal preemption of state laws.

We also believe that if there is to be a national DNC list, the FCC rather than the FTC should adopt the regulation establishing such a DNC list. The Consumer Telephone Protection Act specifically addresses telemarketing and specifically notes that regulations may require "the establishment and operation of a single national database to compile a list of residential subscribers who object to receiving telephone solicitations." (47 USC Section 227(c)(3)) Clearly, Congress envisioned that if there were to be a national DNC list, it would be established under the Consumer Telephone Protection Act, pursuant to the FCC's discretion.

In addition, if the FCC is looking to the FTC proposal as a model, it should put out a revised proposal for additional public comment. The FTC proposal posed significant challenges and raised numerous questions. Too many questions and details need resolution to rely on the initial proposal. (See attached ABA comment letter to the FTC.)

Company-specific do-not-call approach.

FCC is seeking comment on the overall effectiveness of the company-specific-do-not-call approach in providing consumers with a reasonable means to curb unwanted telephone solicitations. ABA believes that generally, the company-specific DNC approach works well and allows consumers the greatest control over telemarketing calls. As the FCC notes, there are advantages to this approach:

- It is already maintained by many telemarketers;
- It allows subscribers to selectively halt calls;
- It allows business to gain useful information about consumer preferences;
- It protects consumer confidentiality.

We are not aware of any problems with telemarketers not responding appropriately to requests, but any problems should be remedied with enforcement, not new requirements.

The FCC notes that predictive dialers may result in hang-ups or dead air calls so that the consumer loses the opportunity to be removed from the list. If dead air is limited based on the previously discussed DMA approach, incidents where the consumer does not have the opportunity to be deleted from the list will also be minimized.

The FCC asks whether companies should be required to provide a toll-free number and/or a website that consumers can access to register

their name on the do-not-call list. So long as the telemarketer has the option to choose either the toll-free number or website, we do not object.

The FCC also ask whether companies should be required to respond affirmatively to requests or otherwise provide some means of confirmation so that consumers may verify that their requests have been processed. We believe that this is unnecessary and expensive. Compliance should be assumed absent evidence to the contrary.

The FCC asks whether inclusion on the list for ten years is a reasonable length of time for consumers and telemarketers. We believe that it is an unreasonable and impractical length of time given the frequency with which people move and change telephone numbers. Lists become obsolete long before ten years, usually by five years. To be balanced and reasonable, five years should be the maximum time.

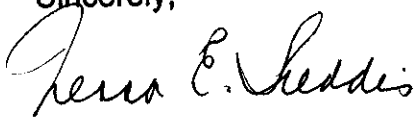
If the FCC believes that steps are necessary to better inform consumers of their right to request placement on the company's do-not-call list, the FCC, not the industry should fund those initiatives.

The FCC asks whether the rules could be modified to minimize unnecessary burdens on telemarketers. Federal preemption of state DNC list laws would serve to reduce significantly unnecessary burdens on telemarketers by eliminating duplicate efforts and lists and by reducing fees.

Conclusion.

The ABA appreciates the opportunity to comment on this important issue. We believe that the current company-specific DNC list generally works well, though it could be improved. The FCC should only adopt a national DNC list if it makes clear that the FCC regulation preempts related state laws. We are happy to provide additional information.

Sincerely,



Nessa Eileen Feddis

AMERICAN BANKERS ASSOCIATION ®

1120 Connecticut Avenue, NW
Washington, DC 20036

1-800-BANKERS
www.aba.com

World-Class Solutions, Leadership & Advocacy Since 1875

Nessa Feddis
Senior Federal Counsel
Phone: 202-663-5433
Fax: 202-828-5052
nfeddis@aba.com

10 April 2002

Office of the Secretary
Room 159
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, D.C. 2058

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

The American Bankers Association ("ABA") is pleased to submit our comments on the proposed changes to amend the Federal Trade Commission's ("FTC") Telemarketing Sales Rule, ("Rule") 16 CFT Part 310 released 22 January 2002. The Rule prohibits specific deceptive and abusive telemarketing acts or practices, requires disclosures of certain material information, requires express verifiable authorization for certain payment mechanisms, sets recordkeeping requirements, and specifies those transactions that are exempt from the Rule.

Among the proposed changes are amendments to:

- Create a federal "do not call" registry maintained by the FTC;
- Require "express verifiable authorization" for all transactions lacking dispute resolution protection against unauthorized charges similar to those available under the Fair Credit Billing Act and the Truth in Lending Act;
- Require, in the sale of credit card protection, the disclosure of the legal limits on a cardholder's liability for unauthorized charges;
- Prohibit the practice of receiving any consumer's billing information from any third party for use in telemarketing; and
- Prohibit other practices, including blocking caller identification services.

The ABA brings together all elements of the banking community to represent the interests of this rapidly changing industry. Its membership – which includes community, regional, and money center banks and holding

companies, as well as savings associations, trust companies, and savings banks – makes ABA the largest banking trade association in the country.

General

While banks themselves are exempt from the rule pursuant to the Federal Trade Commission Act, banks often rely on third parties to perform telemarketing for them. Thus, the Rule will have a significant effect on bank marketing practices. Our primary concerns relate to the proposed "do not call" registry and the new requirements applied to calls initiated by the consumer and then transferred to another telemarketer.

With regard to the do not call list, we strongly support federal preemption of state laws. A federal do not call list adds little otherwise. At the very least, the FTC should coordinate uniformity among state laws to minimize cost and maximize effectiveness. We also strongly recommend that the FTC follow the example of virtually all states and except established customers from the do not call list. Including them is impractical and will have unintended consequences that will confuse and frustrate consumers.

We believe that there are many details yet to be determined with regard to the list. Many of the features being considered, such as allowing consumers to designate times they can be called, while positive because they may refine the list, are not so critical as to justify much expense. We strongly urge the FTC to revise the proposal and issue a second proposal for comment before finalizing the Rule. The FTC should also provide information about how the do not call registry will be funded after the two year "trial" period.

The proposed Rule also expands its coverage to include calls transferred to telemarketers even when the consumer initiates the call. This approach is impractical and will have unintended and adverse effects. We recommend that the FTC delete this overly broad expansion and address any specific problems more directly and narrowly.

With regard to obtaining "express verifiable authorization" for billing purposes, the proposed Rule ignores or confuses the protections of the Electronic Fund Transfer Act. The final Rule should except from the extensive "express verifiable authorization" requirement transactions covered by this act.

Finally, we suggest that the FTC omit the prohibition against sharing billing information (preacquired billing information). The issue has already been reviewed and decided by various federal agencies, including the FTC. The proposed Rule renders the Title V Gramm-Leach-Bliley Act ("GLBA") regulations, including those issued by the FTC, irrelevant by overlooking its legitimate and considered exceptions.

Our specific comments and recommendations follow.

Scope

The FTC notes in the supplementary information that the Rule does not apply to entities exempted by the Federal Trade Commission Act, including banks. The final rule should clarify that the Rule also does not apply to non-bank operating subsidiaries of banks as defined by the banking agencies. These entities, in effect, incorporated departments of the bank, have always been and continue to be under the jurisdiction of federal banking agencies. Expanding jurisdiction to include operating subsidiaries would be contrary to Congressional intent.

310.2 Definitions:
((t) outbound telephone call
(z) telemarketer.

The proposal includes in the definition of "outbound telephone call" "any telephone call to induce the purchase of goods or services . . . when such telephone call is initiated by a telemarketer [or] *is transferred* to a telemarketer other than the original telemarketer. . . " "Telemarketer means any person who, in connection with telemarketing, initiates or *receives* telephone calls to or from a customer or donor." (Italics added.)

Thus, the proposed Rule appears to cover telephone calls when a consumer is transferred from one telemarketer to another, including situations when the *consumer initiates* the call, even though calls initiated by consumers are generally exempt under Section 310.6(d). The supplementary information on page 23 appears to support this interpretation:

> Under the proposed definition, when a call, whether originally initiated by a consumer/donor or by a telemarketer, is transferred to a separate telemarketer or seller for purposes of inducing a purchase. . . the transferred call shall be considered an "outbound telephone call" under the Rule.

We do not believe that such calls, when initiated by the consumer, should be treated as outbound telephone calls.

The definition of outbound telephone call comes into play in several areas, including: the prohibition against contact with those on the do not call list; calling time restrictions; and the requirement to provide certain oral disclosures. With perhaps the exception of some disclosures, we do not believe that applying these provisions to calls transferred to a telemarketer when the customer initiated the call is practical or beneficial to consumers.

The issue typically would arise when a consumer is transferred from an institution to a subsidiary or affiliate of that institution. For various legal, historical, and business reasons, banks often are structured in a manner where subsidiaries and affiliates, are, in effect, departments of the company. For example, prior to laws permitting interstate branching, banks used affiliates and subsidiaries to expand their markets. Those structures survive. Tax rules and other laws as well as business consideration may also justify creation of subsidiaries or affiliates. The affiliates and subsidiaries are, in effect, departments of the bank.

In this environment, the proposal will create unexpected, costly, and inconvenient outcomes. For example, assume a consumer, responding to a general media advertisement, phones a financial institution, seeking a home equity loan. After some discussion, the consumer determines that a refinancing is more appropriate and beneficial and asks to be transferred to a representative handling refinancings. This could mean transferring to the financial institution's affiliate or subsidiary.

In such a case, the representative receiving the transferred calls arguably is a telemarketers under the proposed Rule. Either the recipient of the original call or the representative to whom the call is transferred must then check to determine whether the consumer is on the federal do not call list and cease contact if the consumer is. The business incurs costs to incorporate the list into its system, which was not built to anticipate this feature – and in the future, possibly pay for the subscription.

Consulting the list also delays the inquiry, at the consumer's inconvenience. Consumers on the list undoubtedly will be confused that the representative must terminate the call and not respond or provide the information they are seeking.

Under proposed Section 310(4)(c), representatives should also ask consumers, including those not on the list, about terminating the call if it is before 8:00 AM or before 9:00 PM in the consumer's location – even though the consumer does not believe the time inconvenient, as he or she initiated the call. The consumer may understandably be perplexed.

The change will also potentially require recipients of the call to comply with the record keeping requirement.

This scenario will occur when consumers determine they desire a different product than the one they originally called about. It will occur if the consumer purchases one product or service and seeks a complementary product or service. The same situation arises when the callers are not eligible for the product they called about, but might be eligible for a different product offered by a subsidiary.

We do not believe that this makes sense for the consumer or the business. A call initiated by the consumer is very different from a one initiated by the telemarketer. These consumers clearly are in control: they are obviously interested in the product and find the time of day convenient. Indeed, we do not believe that consumers choosing to add their names to the do not call list will expect these restraints on their inquiries and requests for products and services.

Therefore, the FTC should retain the original exemption for calls the consumer initiates. In any case, the FTC should clarify how this section comports with the provisions of Section 310.6 which exempts calls initiated by consumers. As written, the proposed Rule is ambiguous and confusing at best.

If there is some specific abuse the FTC is trying to address, e.g., that consumers are being transferred without their knowledge or that the second entity is not identified, it should do so more directly and narrowly. For example, it could require the recipient of the call to disclose that the caller is being transferred to a different entity and require that second entity to provide appropriate identification information.

310.3 (a)(3) Deceptive telemarketing acts or practices: Submitting billing information without express verifiable authorization.

Section 310.3(a)(3) of the proposed Rule deems it a deceptive act to submit billing information without the customer's

> [E]xpress verifiable authorization when the method of payment used to collect payment does not impose a limitation on the customer's . . . liability for unauthorized charges nor provide for dispute resolution procedures pursuant to, or comparable to those available under the Fair Credit Billing Act and the Truth in Lending Act. . .

The proposal allows written authorization as well as oral authorization which is recorded and shows the customer's authorization of payment for the goods and services. The oral authorization is acceptable if it provides to the consumer specific information listed in the Rule, including the customer's specific billing information.

We commend the FTC for allowing oral authorization. However, the final Rule should specifically recognize other payment mechanisms subject to legal or private business protections against unauthorized transactions including electronic funds transfers subject to the Electronic Fund Transfer Act. In addition, the final Rule should delete "nor provide for dispute resolution procedures."

According to the Supplementary Information, The FTC's primary two concerns appear to be "novel" payment mechanisms, such as utility and mortgage bills, and protections against *unauthorized transactions*. It explains on page 11, "Therefore, because newly available payment methods in many instances are relatively untested, and may not provide protections for consumer from *unauthorized charges*, consumers may need additional protections." (Emphasis added.) In addition, on page 39, it notes:

> By expanding the express verifiable authorization provision to cover billing methods besides demand drafts, the Rule would provide protections for consumers in a much larger class of transactions where an *unauthorized charge* is likely to present a particular hardship to the consumer because of the lack of TILA and FCBA protections. (Emphasis added.)

Moreover, the contents of the proposed Rule's "express verifiable authorization" relate strictly to whether the consumer is *authorizing* the transaction: number, amount, and date of debits, charges, or payments, customer's name, specific billing information, telephone number for inquiries, and date of authorization. This information has no relevance to disputes with merchants.

Debit card and other electronic fund transfers are not "novel" payment mechanisms. More importantly, consumers are as well protected against unauthorized electronic transactions under the Electronic Fund Transfer Act against as they are for unauthorized credit transactions under the Truth In Lending Act. Accordingly, they should be treated the same as credit card transactions with regard to the requirement to obtain express verifiable authorization.

Under Section 205.6 of Regulation E, (which implements the Electronic Fund Transfer Act), consumer liability for unauthorized transactions is, as a practical matter, nil. Section 205.6(b)(3) provides that the consumer is only liable for ***unauthorized transactions made 60 days after the mailing of a statement that contains an unauthorized transaction.*** In addition, for liability for these subsequent unauthorized transactions, the institution must show that the unauthorized transactions would not have occurred if the consumer had notified the institution in a timely fashion. This period is extended for extenuating circumstances such as illness or holiday.

Thus, consumers are not liable for unauthorized electronic fund transactions made through a telemarketer unless they fail to report an unauthorized transaction contained in a statement. Even then, they may only be liable for unauthorized transactions *made 60 days after* the statement is sent.

The provisions imposing potential other liability, (e.g., up to $50) apply only when the access device, e.g., the debit card, is lost or stolen. As telemarketing involves relaying card numbers and not the physical presence of the card, the lost and stolen card provisions are rarely, if ever, relevant in these cases.

Even if they were, as a practical matter, liability is limited to $50, as it is under the Truth in Lending Act. Under Section 205.6 (b)(2) of Regulation E, consumers' liability for unauthorized electronic funds transfers is limited to $50 if they notify the financial institution within two business days after ***learning*** of the loss or theft of the access device.

Liability may increase for failure to notify in a timely fashion. Potential liability only increases to $500 when the consumer fails to notify the financial institution within two business days of ***discovering*** the loss or theft of the card. However, liability is limited to transactions made ***after that time period.*** Consumers failing to report the loss within two business days increase their potential liability to $500, representing :

1. up to $50 for unauthorized transfers made in the two day period, and
2. the amount of unauthorized transfers that occurred ***after*** the 2 business days and before the notice -- if the banks' losses would not have occurred if the consumer had notified the bank.

In addition, it is worth noting that under Section 909 (b) of the Electronic Fund Transfer Act, the burden of proof that a transaction is authorized lies with the financial institution. Given the liability provisions and the burden of proof standard, financial institutions will take appropriate precautions and measures to ensure that the telemarketer has authorization. For these reasons, the express verifiable authorization provisions should not apply to transactions subject to the Electronic Fund Transfer Act.

The proposed Rule should also delete the condition that the protections provide "dispute resolution procedures" such as those in the Truth in Lending Act. These protections are irrelevant and unrelated to payment authorization and the information required to be verified in the proposed Rule: the Rule delineates transaction and billing information to show transactions are authorized; if the consumer did not authorize the transaction subject to the Electronic Fund Transfer Act, the consumer is not liable. This meets the stated justification for the exemption. The dispute resolution features are irrelevant.

We also recommend that the FTC make more clear that private contracts and business rules that offer comparable protections are also exempt. MasterCard and VISA, as the supplementary information notes, have adopted protections superior to those required by federal law. Other

organizations governing other types of transactions may do the same in the future, especially for new types of payment mechanisms.

Section 310.4(a)(5) Abusive Telemarketing Act or Practices: Preaquired billing information.

Section 310.4(a)(5) of the proposal prohibits telemarketers and sellers from receiving billing information from anyone other than the consumer for use in telemarketing. It also prohibits disclosure of any consumer's billing information to any person for use in telemarketing. Exceptions are made for purposes of payment processing. Billing information means "any data that provides access to a consumer's. . . account, such as a credit card, checking, savings, share or similar account, utility bill, mortgage loan account or debit card."

ABA recommends deletion of this provision. Eight federal agencies, including the FTC, have already addressed the issue in the GLBA implementing regulations. Section 2313.12 of the FTC's GLBA privacy regulation already addresses the issue. It prohibits sharing account numbers with telemarketers, but provides exceptions for encrypted information, sale of an entity's own product through an agent, and cobranding and affinity programs. The proposed Rule fails to include these exceptions, making it inconsistent with the GLBA regulations and rendering the regulations irrelevant.

The FTC offers no explanation or justification for excluding these exceptions. On page 61 of the supplementary information, it notes that the prohibition is included because the FTC believes that the sharing of billing information "causes or is likely to cause substantial injury to consumers which is not reasonable avoidable by consumer themselves and not outweighed by countervailing benefits to consumer or to competition."

However, permitting encrypted numbers so that consumers are not relaying billing information to strangers may be safer for consumers. Indeed, the FTC's website, in warning consumers about telemarketing fraud, advises consumers, "Never send money or give out your credit card or bank account number to unfamiliar companies." (See "Are You a Target of . . . Telephone Scams?" ftc.gov/bcp/coonline/publs/tamarkg/target.htm.) Telemarketers with arrangements to use encrypted account numbers are verified legitimate merchants and not criminals trying to obtain account information for fraudulent purposes.

Eliminating the need to relay account numbers also protects consumers from billing errors that result from erroneous transcription of account numbers. It ensures that the correct account is debited.

For these reasons, we suggest deletion of the provision. To the degree that there are gaps with the GLBA regulations, the FTC should adopt a parallel rule.

Section 310.4(a)(6) Abusive Telemarketing Acts or Practices: Blocking caller identification services.

Section 310(4)(a)(6) prohibits blocking, circumventing, or altering the transmission of the name and telephone number of the calling party for caller identification purposes. Generally, we agree with the proposal, but suggest clarification that a telemarketer has no liability if the caller identification does not work. On occasions, systems cannot relay the information for various reasons. Telemarketers have no control over this failure and should not be liable. It is sufficient to prohibit active interference.

Section 310.4(b)(1)(iii) Abusive Telemarketing Acts or Practices:
Do not call registry.

This section of the proposed Rule creates a federal do not call list and prohibits telemarketers from calling a person on that list unless the consumer has authorized that particular seller to make calls to the person. "Express verifiable authorization," written or oral, is required to call people on this do not call list. Our comments to this proposal focus mainly on the costs, federal preemption, and details, including the lack of exception for established customers. In any case, the FTC should draft and put out for comment a revised proposal after review of initial comments before adopting a final Rule.

Costs.

ABA is concerned about the cost of maintaining the proposed do not call list. The FTC has not explained how the list will be funded after the two year "trial" period it has proposed. We assume that after the two year review, the FTC may follow the example of states maintaining do not call lists and consider imposing user fees. Accordingly, the cost of creating and maintaining a federal list is an important issue for users.

State "do not call" lists and federal preemption.

The FTC in question 5a asks what changes could reduce expenses of reconciling lists with a national registry on a regular basis. ABA strongly believes that any federal do not call rule should preempt state rules. Obviously, this is more efficient and less costly for the government, users, and consumers: a single reconciliation rather than dozens costs less; a single format costs less. In any case, the FTC should make every effort to create a uniform standard for state registries and the federal registry. This

will help significantly in minimizing costs and improving the system generally. Indeed, there is little benefit for businesses to create a federal do not call list absent federal preemption or uniformity among the state lists.

In question 5j, the FTC asks about experience with fees for state do not call lists. From the user standpoint, the fees are expensive. Users often must buy multiple subscriptions. Fees are also collected for violation. We oppose federal fees and fees for multiple subscriptions.

Exception for established customers.

Unlike virtually all state do not call lists laws, the proposed Rule does not provide an exception for established customers. We strongly urge the FTC to except established customers from the do not call list.

Prohibiting businesses from calling their own customers is not necessary. Already, under the current Rule, businesses must discontinue calling customers if requested. Businesses ignore this request at their own peril: they irritate and lose their most valuable customers.

Moreover, prohibiting businesses from calling their own customers would be confusing to businesses, causing inadvertent violations or unnecessary limitations in responding to customers. It is not clear when calls to a customer to service an account and calls initiated from the customer could become subject to the do not call rule.

For example, if an agent for a bank calls a customer to clear up overdrafts and suggests that the customer consider overdraft protection to avoid them in the future, is the call subject to the do not call rule? Similarly, it appears that the Rule would apply if, in a declining interest rate environment, to beat the competition, a mortgage company calls customers about refinancing at a lower rate. Businesses would also be subject to the rule if their own customers call about an existing account and during the call, inquire about another product or service, and are then transferred to a subsidiary offering that product or service.

We believe that consumers will be surprised about this consequence to inclusion in the do not call list. Indeed, a Massachusetts banker recently received a letter of impending lawsuit for failure to advise existing customers that they were eligible for a "better" account than the one they chose to open.

All but one of the two dozen or so state do not call rules provide an exception for established customers, apparently recognizing the value to customers. We strongly suggest that the FTC follow this approach.

Exception for express verifiable authorization.

The proposed Rule allows calls to consumers on the do not call list if the business has obtained the consumer's express verifiable authorization, which may be written or oral. While we appreciate the option, we do not believe that this provision will be very useful. As a practical matter, we believe that the only practical opportunities to obtain the authorization is at the time of account opening or during a service call about an existing account. These opportunities are obviously not available to those without an established relationship.

Allowing consumers to designate categories of products that telemarketers may call about will be more beneficial to consumers and to businesses and will facilitate competition. For example, consumers interested in financial products could choose to allow calls for such products. The FTC should explore the feasibility and costs of this option.

Name and/or telephone number.

The proposal prohibits calls to people who have placed their "name and/or telephone number" on the do not call registry. We suggest that the FTC only use telephone numbers.

First, if the name and numbers are included, criminals can use it as a shortcut to commit identify theft. They simply sign up as telemarketers and use the information to build files of personal information. The fact that it is illegal will not impede these unscrupulous abusers. Second, names can be problematic for ensuring proper matching. Sometimes middle names or initials are used, sometimes not. Sometimes people include roman numerals "II" or "III" etc. and sometimes not. Maiden and married names can also pose problems. Listing only telephone numbers also avoids requiring all those living in the household to register. Relying on the telephone number, a unique item, is most practical and less prone to confusion and mistakes.

Other potential features.

The FTC has asked about other potential features of the do not call list: e.g., consumers ability to verify inclusion on the list; treatment of telephone numbers that are changed or reassigned; and consumer option to designate times they may be called. In large part, the cost of providing them is an important factor in evaluating their adoption. Most of these features, while positive and beneficial because the may refine the list, are not so critical as to justify much expense.

Frequency of reconciliation.

The FTC should only require quarterly reconciliations with the list, as is the case in virtually all states. Quarterly reconciliations will reduce costs significantly with little inconvenience to the consumer.

310(4)(d) Abusive Telemarketing Acts or Practices Predictive dialers.

The FTC is requesting comment on the use of "predictive dialers." Predictive dialers are automatic dialing software programs that automatically dial consumers' telephone numbers in a predetermined manner such that the consumer will answer the phone at the same time that a telemarketer is free to take the call. In some instances, however, there is no telemarketer free to take the call when the consumer picks up. The consumer hears nothing or just a click as the dialer hangs up. Consumers have complained that they rush to pick up the phone, only to be met with dead air and no ability to determine the source of the call.

The FTC asserts that this is a "clear" violation of Section 310.4(d) of the Rule. This effectively means predictive dialers are prohibited which, as the FTC notes, have been used for many years. We strongly disagree that such an interpretation of the Rule is clear. Nevertheless, we agree that the issue should be addressed.

The FTC is seeking recommendations regarding alternative approaches to addressing predictive dialers. We recommend an approach built on the Direct Marketing Association ("DMA") guidelines. In addition, depending on costs and feasibility, some kind of caller identification, by number or name, may be an alternative.

In recognizing the industry's good faith efforts to respond to the issue, the FTC notes the DMA guidelines that set acceptable maximum abandonment at 5 percent per day. The DMA guidelines also limit the number of times a marketer can abandon a consumer's telephone number in one month. We believe this is an appropriate and flexible standard. At this time, it is not feasible to eliminate all abandoned calls and a zero tolerance would, in effect, eliminate an efficient tool.

The FTC has also suggested requiring that telemarketers be able to transmit caller identification information, including a meaningful number. This approach could at least alleviate consumer concern that the hang-ups are due to harassment, for example.

However, there may be technical impediments and any Rule should make clear that telemarketers are only responsible for transmitting the identification information, not for ensuring its receipt, which is beyond their control. Any rule should also be flexible so that either a number or name is

acceptable and that the name and number may relate to either the telemarketer or the seller.

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The ABA appreciates the opportunity to comment on this important telemarketing issue. We urge the FTC to be conscious of unintended practical consequences of some of the proposed provisions that may inconvenience and confuse consumers. We also ask it be to aware of costs when reviewing details of proposed provisions, especially those related to the do not call list. Finally, we strongly recommend that the FTC work for federal preemption of state laws to minimize costs and maximize effectiveness. We are happy to provide additional comments.

Regards,

Nessa Eileen Feddis