

**BEFORE THE FEDERAL TRADE COMMISSION  
WASHINGTON, D.C.**

**IN THE MATTER OF:** )  
**TELEMARKETING SALES RULE--** )  
**COMMENT FTC File No. R41001** )

**COMMENTS OF THE NATIONAL ASSOCIATION OF  
CONSUMER AGENCY ADMINISTRATORS**

The National Association of Consumer Agency Administrators (“NACAA”) submits the following commentary in response to the Federal Trade Commission’s (“FTC” or “Commission”) Notice of Proposed Rulemaking to amend the FTC’s Telemarketing Sales Rule, (“Rule”) 16 C.F.R. Part 310, and request for public comment.

NACAA is a non-profit association representing over 160 consumer agencies at all levels of government in the United States, and several other countries. Member agencies provide direct constituent services, including consumer complaint mediation, consumer education, the dissemination of information to both consumers and businesses about their respective legal rights and responsibilities, and the enforcement of consumer protection laws and regulations. NACAA supports public agencies responsible for ensuring a fair and informed marketplace, and those representing the rights of consumers.

By these comments, NACAA seeks to encourage the Commission to continue its landmark efforts to provide consumers with protection from the invasion of both their privacy and their wallets by overeager or downright unscrupulous telemarketers, who fail to acknowledge that their “right” to enter

consumers' homes by telephone is not a right, but a privilege, the limits of which must be respected.

### The Proposal of a "Do Not Call" Registry

In order to supplement the current company-specific "do not call" provision of the Rule, the Commission proposes, in §310.4(b)(iii), the creation of a national "do not call" registry, maintained by the Commission, of information identifying consumers who do not wish to be contacted by telephone, by sellers and for-profit companies soliciting charitable donations. These lists will be sold to entities within the jurisdiction of the Commission, and who are subject to the terms of the Rule, to enable consumers to stop unsolicited calls.

NACAA applauds the Commission for its bold step to ensure that consumers can accomplish in one step what has heretofore taken them multiple contacts, in response to unsolicited calls, to notify sellers that they do not wish to be contacted by telephone to engage in business transactions which they have not solicited. The concept of a national registry is a good one, but it does create some problems that should be addressed.

First, the Commission proposes to make this a two year "test program," which will be re-evaluated at the end of the test period. This time limit on the program, along with the limited nature of the calls it might prevent, is a matter of some concern. Second, as the Commission itself has noted, a number of states have already passed state level "do not call" lists, which may provide greater protections than those afforded by the Commission. The interplay between the two categories of lists may provide questions of coverage for consumers.

### Test Period and Limited Coverage

NACAA urges the Commission to consider the creation of the Registry in light of consumer

expectations, and the greatest level of consumer protection. Consumers need the certainty that the creation of a “permanent” list would engender. Until and unless technology changes so that consumers can block all unwanted telephonic contacts, a national registry is the mechanism by which they can prohibit the greatest number of such calls. However, consumers need to be made aware of the limits of such a registry. Consumers need to know that the Commission believes that it cannot limit calls from charities soliciting on their own behalf, common carriers, banks and insurance companies. Consumers also need to know that the Commission’s list will not stop contacts by local businesses, operating intra-state. Their evaluation of the value of a national list will be predicated on such knowledge. If the list is available for only a two year period, many consumers may believe that there is no point in registering for such limited protections, for such a decidedly limited period. If the Commission is truly interested in protecting consumers from unsolicited calls, not only by unscrupulous telemarketers, but also from the overeager companies whose constant sales pitches bombard them with increasing regularity, NACAA urges the Commission to consider working with other federal agencies to limit calls by the enumerated entities listed above, for periods extending beyond a two year test period. Further, NACAA believes that the import of the USA Patriot Act was to stop unwanted or deceptive solicitations not only by for-profit entities seeking donations on behalf of charities, but such solicitations by the charities themselves, and urges that the Commission consider this view of its authority, further increasing the reach of protection to consumers.

While consumers can toss “junk” mail, and can refuse to answer the door if an unrecognized individual approaches, in order to keep out unwanted telephone calls, consumers must either “screen” calls through an answering device, endure an endless sales call, or terminate a call in a way that does

not offend the telemarketer, lest he or she make a series of annoying call-backs. As NACAA has found from many consumer complaints to its member agencies, the intrusion of a telephonic seller is annoying, and can be intimidating to those who find it difficult to say no, or to be dismissive or assertive, including countless seniors who believe that they must be courteous even to those who disturb them. This intrusion is even more damaging to those who cannot fully comprehend what is being disclosed to them as it is couched in words which do not truly convey all facts related to a proposed transaction, and who fall prey to the persuasive and honeyed words of an unscrupulous seller or solicitor, who persuades them gently that “this is just a trial offer,” or “if you give me your checking account number, I will not charge the account; it just identifies you to us.” A permanent list, to which the consumer can make exceptions by contacting sellers or solicitors from whom they wish to continue to receive sales calls and solicitations for charity, will provide the greatest degree of protection and security.

#### State v. National List--Limitations

NACAA believes that in line with its previous efforts on telemarketing sales, the Commission should consider that it works best in coordination with state and local agencies in enforcing its rules against deceptive telephonic sales practices. Towards that end, NACAA would urge the Commission to indicate by Rule that its provisions are a floor, not a ceiling, and that states can provide greater consumer protections by their own telemarketing sales statutes. NACAA also urges the Commission to make an affirmative statement within the Rule that it specifically does not pre-empt state laws on telemarketing sales and solicitation, and enforcement of those laws against those offers that come by way of the telephone from across state lines. States traditionally sue under the Rule and add pendant state law claims, addressing unfair or deceptive conduct not necessarily addressed by the Commission

in the Rule, in order to prohibit unfair or deceptive conduct which was not anticipated at the time of the drafting of the Rule. It is therefore essential that the Rule not be interpreted to pre-empt state consumer protection statutes or regulations.

NACAA believes that a central registry, compatible with state systems already in place, and future state systems anticipated, is an important consumer protection which could, at its best and highest level of function, prohibit all unwanted telemarketing sales and solicitation calls. Such a system would ensure that consumers are afforded privacy, peace of mind, and the ability to evaluate all sales offers and charitable solicitations in a fashion most conducive to clear, reasoned analysis, with the time to consider alternatives, and the true implication of what impact the offer will have on the consumers' life and finances. NACAA is aware from complaints that it receives that the immediacy of a telephone sales transaction means that consumers may not hear (or be offered) appropriate disclosures, and may not be able to connect the offer of a weekly or monthly cost with the total overall cost of a product, even if these disclosures are given in a non-deceptive manner. For those consumers who find it difficult to say no in the face of these pitches, they and their families may feel most comfortable with prohibiting such calls, both interstate and intra-state, in order to avert financial disaster.

#### Definitions

The Commission has asked whether its definition of "billing information" is broad enough to capture any information that can be used to bill a consumer for goods or services or a charitable contribution. Although at first blush the definition appears to cover all such information, "any data that provides access to a consumer's or donor's account, such as a credit card, checking, savings, share or similar account, utility bill, mortgage loan account or debit card," NACAA would urge the Commission

to consider providing a non-exclusive list of such information, based upon the technologies in place today. Thus, name, account number, telephone number, married and maiden names of parents, social security number, passwords to accounts and PIN's, and encrypted versions of this information, with or without the encryption device, should all be prohibited from use in any transaction but the immediate one in which the consumer is engaged. That the consumer has to provide this information to the seller provides a check on the transaction, and an assurance that the consumer does indeed wish to enter the transaction. The Commission's definition of "express verifiable authorization" through §310.3(a)(3) would thus have some teeth in it--not only would the consumer have to say "yes," but he or she would have to give substantial information to a telemarketer before that telemarketer could access the consumer's account. The damage done by the sharing of "pre-acquired account information" would thus be at an end, and legitimate, fully disclosed sales transactions could go forward.

#### Deceptive Telemarketing Acts or Practices

##### Prize promotions

The Commission is clearly aware of recent cases involving nationwide prize promotion and sweepstakes deception, and the proposal in §310.3(iv) of the disclosure of the odds of being able to receive the prize, along with the disclosure that purchases do not increase one's chance of winning are a good first step. However, the Commission should also make it clear that odds should be based on a reasonable anticipation of entries to be received, with the projection of a real number, not on the broad statement "odds based on numbers of entries received," which is the disclosure currently given in some contest promotions. Section (v) is troubling, as it permits a prize promoter to tell a consumer "all material costs or conditions" to receive or redeem a prize. While NACAA recognizes that there may

be conditions placed on receiving a prize--immediate family members of employees may not be eligible, for example, the traditional consumer warning "if you have to pay to receive it, it is not a prize" (and by implication therefore probably not a legitimate contest) is thus dismissed. There should be no costs to receive a prize. If there are, it is a sales pitch for add-ons, not a prize, and consumers are still at a disadvantage, banking on the reduced nature of the cost of the award (for example, one wins a trip, but has to pay to get to the free destination), to buy something that they would not otherwise have considered, through what is, essentially, a deceptive sales technique. NACAA would thus suggest removal of the "material costs" portion of section (v).

#### Credit Card Protection

NACAA applauds the Commission for recognizing the numerous current schemes to sell credit card protection--and notes that even certain banks are engaging in this deceptive sales pitch, offering "credit card protection" for their card at a monthly fee, after a "free trial period," when one signs up to activate the card. To avoid this costly product, the consumer must listen to the entire sales pitch, and hit button two on the telephone to cancel the "free trial period." Such tie-ins should be prohibited by the requirement that the bank disclose the almost valueless nature of the offered product--and the bank obviously has the consumer's account number, because this solicitation is, as noted, when one calls to activate the account. This conduct should also be addressed in the prohibition of the use of "pre-acquired account billing information," as the consumer, upsold in this one call, is at a serious disadvantage unless duly alert to the nature of the offer in what was supposed to be a simple activation call.

#### Total Cost of Goods Disclosures

While the Commission, in its comments to §310.3(a)(1)(I), believes it is not necessary for a seller to disclose the total contract cost of any goods or services ordered on a monthly installment payment, but only the incremental monthly fee, NACAA suggests that it is extremely important that the seller “do the math” for consumers, giving the total cost over the life of the transaction. Not all consumers, in the short time they have on the telephone with a rapid-fire seller, take the time or have the ability to total the monthly cost of “shipping and handling” for a “free” magazine transaction that in reality costs far more than a consumer, looking for bargains in printed advertisements, could achieve on his own.

#### Assisting and Facilitating

NACAA also notes with respect to deceptive telemarketing practices that pursuant to §310.3(3)(b), the Commission requires a very high standard of proof for “assisting and facilitating” fraudulent telemarketing sales practices, that the facilitator “knows or consciously avoids knowing that the seller or telemarketer is engaged in [violative conduct].” As most state consumer protection statutes require a “knew or should have known” standard, which is subject to rigorous review by state courts, NACAA proposes that this standard continue in the Rule. Consumer complaints to the facilitator should provide examples of notice that something is not right, and place a duty upon that party to investigate.

#### Blocking Caller I.D., Denying Right to be Placed on Do Not Call List

In §310.4(a)(6), the Commission proposes specifying that it is an abusive practice to block, circumvent, or alter the transmission of caller identification information to consumers on the receiving end of the call. This is a useful concept for those consumers who have systems compatible with those

of the telemarketer, in order to receive this information. NACAA notes that this information may give law enforcement the entree it needs to discover more information about the telemarketer, and consumers with the service are quick to either call back the company for further information, or to pass along the information to law enforcement when they believe a telemarketer may be engaging in unlawful conduct. NACAA suggests that the telephone number of the telemarketer's consumer complaint department would be the most appropriate telephone number to provide, so that consumers could easily correct any problems that a particular call might generate.

Pursuant to §310.4(b)(1)(ii), a telemarketer would be prohibited from interfering with or denying the right of a consumer to be placed on a "do not call" list, including hanging up on a consumer who is making such a request. NACAA believes that these prohibitions are both necessary and wise, to ensure that consumers feel they have a say in what calls they will receive, if they choose not to be included on a full "do not call" list. NACAA suggests that this violation should be interpreted to extend to all telemarketers and fundraisers with whom the consumer has contact, however, not just the limited parties over whom the Commission feels it has authority, so that consumers are empowered to stop calls from banks, insurance companies and common carriers, as well as charities.

#### Do Not Call "Safe Harbor"

NACAA believes that it is appropriate to provide "safe harbor" to those telemarketers who implement a plan and training surrounding the "do not call" list, that can establish that a call made to a consumer after that consumer requests to be placed on a "do not call" list can be demonstrated to be errors. This "best practices" provision should ensure that legitimate businesses take seriously their responsibility to their prospective customers.

## Other Abusive Practices

### Predictive Dialers

NACAA notes that consumers are very confused and angry over the continued use of predictive dialers. In these calls, the air is “dead” until the live telemarketer can pick up from her or her previous call when the dialer has hit a live target. Such calls are disturbing to those who cannot distinguish that the call is going to be picked up, and who may fear that their behavior is somehow being monitored by the mystery caller. NACAA proposes that unless a telemarketer can pick up when a caller says hello, the call should be terminated with a closing message identifying the calling company. This message can be reassuring to consumers and can identify the company calling so that consumers can ask to be placed on a do not call list if necessary, or to notify law enforcement of violations.

### Telemarketing by prisoners

NACAA wishes to express its continuing concern over the use of prisoners as telemarketers. Many NACAA members have indicated that consumers who have become aware that prisoners may be involved in the telemarketing process are both fearful and angry. NACAA believes that there is no acceptable business justification for the use of prisoners, who may have been convicted of either violent crime, or of white collar crime which may even have included telemarketing fraud, which permits them access to sensitive personal information about individual consumers.

### Couriers

NACAA also believes that the use of couriers or others to pick up consumer payments is wrong and susceptible of great abuse and should be banned. Both the use of couriers and the practice

of sending someone to pick up a payment, not necessarily a courier service, and in the most intimidating situation of which NACAA is aware, by a person representing him or herself as a public safety officer, put consumers at a disadvantage. Consumers thus do not have time to consider the implications of the transaction before their money is gone, with no right of recourse if it is cash or a money order.

### **CONCLUSION**

NACAA appreciates the opportunity to provide these comments to the Commission to assist in the development of amendments to the Telemarketing Sales Rule. NACAA invites the Commission to contact our Association for further clarification of our positions, or to request that NACAA respond to any questions that the Commission may have regarding these comments.

RESPECTFULLY SUBMITTED,

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