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March 27, 2002

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

Re: Telemarketing Rulemaking – Comment
FTC File No. R41 1001

To the Commissioners:

The Federal Trade Commission (“FTC” or “Commission”) is to be commended for the thorough and thoughtful analysis and proposals contained within the above referenced Notice of Rulemaking proceeding (“Notice”). The telemarketing industry is an important link in the commercial activity of the country providing a valuable avenue for the distribution of information about goods, services and philanthropic endeavors. The Notice continues on the path of protecting consumers against fraudulent and inappropriate practices, thereby enhancing consumer confidence in the medium and ultimately benefiting the economy as a whole – providers and consumers alike.

As the FTC recognizes in the Notice, the goal must be to “strike the appropriate balance (between) maximizing consumer protections while avoiding the imposition of unnecessary burdens on the legitimate telemarketing industry.” With this goal in mind, the following comments, observations and or suggestions are provided to assist the FTC in crafting the final rules to ensure that the intended consequences are realized and that any unintended negative consequences are foregone.

¹ See Section I(D) page 9 of the Notice

1. Proposed Rules §310.4(b)(1)(iii)(1) and §310.4(b)(1)(iii)(2) (“DNC registry”) presents a number of issues that the Commission during its deliberations and final crafting of the rules should take into consideration.

A. The Commission should consider the implications of establishing a national database of phone numbers and/or citizens and its impact on citizens confidence in the federal government and potential abuses thereby; the methodologies or lack thereof of the states as regards a DNC registry is better suited to reflect the concerns of citizens.

1. The creation of a database of citizens of any kind by the federal government is a significant initiative that historically citizens have demonstrated grave concerns about. As discussed below, if the database is to have the integrity to accomplish the goals of the Commission and at the same time address legitimate legal and industry concerns, it will by necessity have a substantial array of information within it. The type of information inherent in such a database, name, address, phone number, date of contact, form of contact, etc. is highly vulnerable to misuse. In light of these concerns, the tremendous costs associated with the database and the small number of improper practices by legitimate telemarketers the registry will curtail, it is highly questionable on balance that such a registry is warranted. As the Commission recognized, “rogue” telemarketers will not comply with the rules in any event, and consequently legitimate telemarketers will carry this unnecessary burden..

2. While states have experimented with the type of database the Commission is considering, a national database is inherently different. As the Commission is aware by virtue of its proceedings on privacy and the Internet, citizens are quite concerned about the concentration of any personal data in large databases. There is no basis to believe that such concerns will be alleviated merely by the fact that a federal agency is the entity maintaining such a database. The continued confidence in the manner in which the federal government collects, maintains and disseminates citizen information and the overriding need for such activity is critical to the efficient and safe functioning of our society. Should such confidence be impacted in any way, other legitimate activities which involve the collection and maintenance of citizen information (e.g. the IRS, immigration, war on terror, etc.) will be materially damaged. The risk of undermining such confidence and the cost of the national DNC registry does not outweigh the projected value to the relatively small segment of consumers who will avail themselves of the DNC registry. The two year evaluation period does not alleviate this concern inasmuch as the harm may already be done.

B. The proposed rules §§310.4(b)(1)(ii) & (iii) which address the company specific do not call prohibitions are sufficient, if enforced, to protect consumer privacy.

1. Under the proposed rules, a consumer need only receive one call from any given business before he or she is able to curtail the activity. By this

proposal, the Commission has acknowledged the consumer's ability to choose which calls he or she wishes to receive and which he or she does not. In effect, the Commission has empowered the consumer to make these rational decisions on a segmented basis. To a large degree it is the failure of enforcement which has resulted in the proposed DNC registry. However, the creation of a national DNC registry by the Commission has the inherent risk of failing to protect those citizens that the Commission is seeking to most protect and instead create greater difficulties for them. As the Commission acknowledges, telemarketers which fail to abide by the do not call request will also fail to comply with the DNC registry. The allocation of resources to the DNC registry will only take away resources from enforcement activities and inappropriately burden legitimate telemarketers with unnecessary costs. Without significant additions to the enforcement budget, the belief that the DNC registry will curtail improper activities is illusory, and it will only add further aggravate consumer frustration and "underground telemarketing. the money and resources of the Commission would be better spent on enforcement of the current DNC rules.

C. Involvement of the telemarketing industry in the development of the software and database to implement the DNC registry is critical.

1. Should the Commission decide to proceed with the implementation of the DNC registry, the involvement of the telemarketing industry in the development of the specifications and format for the underlying software and database is critical. As the Commission recognizes, the DNC registry must be user friendly to both the industry and the Consumer. The specifications of the software and database must be compatible with formats typically utilized in the industry to allow the updates the Commission is proposing and avoid costly reconfiguration of current systems. It also must be flexible enough to adapt to future changes in technology and practices without the need for expensive reconfigurations.

D. The Commission should consider levying on consumers a small charge for inclusion on the DNC registry.

1. As other states have recognized, the cost of inclusion on a do not call registry is not properly borne by all taxpayers, but instead should be borne by the party benefiting from such inclusion.² It is unfair and inappropriate to burden all taxpayers generally with the cost of the establishment and maintenance of the DNC registry which only benefits those availing themselves of the service. There is no overriding public welfare argument which sustains this general levy/tax. It is an accepted and historical practice of the local phone companies, sanctioned by the respective regulatory authorities, to levy a small fee on those wishing to maintain a non-published number designation. Inclusion on the DNC registry is

² See Florida Title XXXIII, Chapter 501.059(3)(9) in which a \$10 initial fee and an annual \$5 renewal fee is imposed.

analogous to the non-published number scenario, and it is reasonable to expect that the cost of inclusion be borne by the requester.

E. Appropriate verification of the party placing a telephone number on the DNC registry as the duly authorized party to do so is important to avoid unnecessary future conflict.

1. Control and ownership of the phone line is controlled by the account holder of record, and the Commission must ensure that a verification system be put in place that has the integrity to validate that the account holder of record is the party making the registry request. While the imposition of a fee as outlined above would go a long way to ensuring that the record holder was in fact the party making the request, the Commission should avoid any future conflict or legal issues by also establishing a rigorous verification system. As the Federal Communications Commission knows only too well³, the failure to provide such a system which ensures the integrity of the record account holder's ability to make determination over the use or non-use of his or her line leads to unnecessary and expensive conflicts. Furthermore, the precedent that a non record account holder can make such a determination is problematic as the use of phone lines evolve. If the party making the request is not duly authorized as verified through the process supporting inclusion in the DNC registry, any future development of rules, enforcement action or litigation will necessarily be hampered. For these purposes, the Commission should consider the third part verification rules that the FCC has adopted in respect to the switching of long distance providers.

F. Extra care should be taken to verify that a home business is not improperly placing its number on the DNC registry.

1. The proposed rules, along with the exemptions, clearly manifest the appropriate policy of the Commission to allow for business to business telemarketing to continue relatively unencumbered. However, in light of the pricing disparity in most, if not all, states for a business phone line versus a residential phone line, many "home" businesses subscribe for a residential line, but in fact primarily utilize it for business. Telemarketers may legitimately acquire, verify and utilize such business numbers. It is inappropriate for a business to claim the protections of the rules addressed to residential lines and at the same time arbitrage the pricing differential of a business versus residential phone line. In order to provide to fulfill the Commission's policy objectives in this area, it is critical that any database entries be scrubbed against master lists of business lines maintained by local providers, both at the time of attempted entry into the database and during subsequent maintenance and update periods. Furthermore, the Commission should clearly provide a safe harbor provision that insulates telemarketers from claims by business line owners that, by virtue of termination of the line in their home, claim protection under the residential

³ See FCC slamming rules and the comprehensive history and docket surrounding the development of the rules.

provisions. Action by the Commission in this regard will avoid many unnecessary complaints and proceedings. Finally, local phone providers and the Commission should be encouraged to prominently inform their business customers that as a business line subscriber they can not avail themselves of the restrictions of the rule in this regard.

G. To allow for future changes and additional flexibility for the consumer, a process should be developed whereby the consumer is able to segment offers or businesses on the DNC registry.

1. It is clear that the direction of communications is towards an increasing segmentation of customer choices. In order to accommodate such segmentation, the Commission should embed within the specifications of any DNC database the ability by the consumer to segment either companies or types of offers that are exempt from the DNC prohibition. Additionally, this segmentation should allow for easy and quick updating. In this manner, consumers who desire contact by certain companies or the presentation of certain offers based upon current circumstances (i.e. a consumer thinking of refinancing) would be able to allow such contacts or offers without undermining other prohibitions.

2. Proposed rule §310.4(a)(6) should be clarified to make it explicit that the mere purchase of equipment or use of services that lack the functionality to transmit Caller ID information does not constitute the prohibited act of blocking, circumventing or altering the transmission of Caller ID information.

A. The mere fact that a telemarketer is using equipment or transmission services which do not allow for the transmission of Caller ID should not, in and of itself, constitute a violation of the rule. The present language could be interpreted to mean that the mere use of the equipment or service was a prohibited act and thereby a violation. Telemarketers have invested significant amounts of capital into equipment or services which may lack the requisite functionality to transmit the Caller ID information. This is especially true as Internet telephony becomes an increasing part of the communications network. Inasmuch as Internet telephony does not rely on the plain old telephone service (POTS) network or SS7 technology, a telemarketer employing such means of calling would not be able to transmit Caller ID information. Telemarketers have legitimate reasons to choose either equipment or services which are not able to transmit the requisite information such as other functionality or cost of use. Should the Commission leave the rule as phrased, the technological choices and innovation thereof will be constrained unnecessarily. Clarification that the prohibited blocking, circumvention or altering of transmission need be qualified by intention will strike the appropriate balance between consumer protection against fraud and the need for certainty and innovation in the industry.

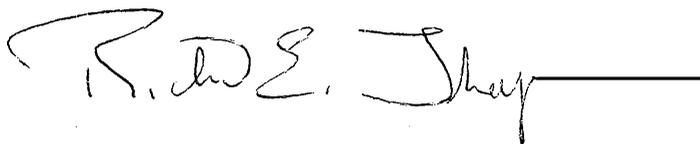
3. The calling hours in proposed rule §310.4(c) appropriately balance a consumer's desire for privacy and the telemarketing industry's legitimate need for a communications window with prospective customers.

A. The Commission sought comment on further refinement of proposed rule §310.4(c), calling hours, querying whether further refinement to the Rule is in order. For example, the Commission questioned whether it would be possible for consumers to designate certain days or hours that the consumer would be willing to receive telemarketing calls, thereby prohibiting calls outside of these windows. While such customization of a consumer's preference may in the future be technically possible, it is inadvisable for the Commission to add this level of complexity to the Rules and compliance at this time. Furthermore, to the degree that the options go beyond a blanket time of call prohibition, the possibility of confusion by the consumer as to his or her choices and their ability to so amend the choices is significant. Insofar as enforcement of the Rules require the parties to understand their respective choices and obligations, this level of complexity will inevitably lead to confusion, enforcement difficulty and unnecessary administrative burden.

4. Within the definitions sections, the Commission may want to consider clarifying the definition of the term "Investment opportunity" in §310.2(p) to include "tax benefits".

A. Within the investment community there are investment opportunities that have, as their fundamental value proposition, significant tax benefits. These opportunities do not necessarily involve "past, present or future income, profit or appreciation"⁴ opportunities as much as they involve the potential for significant tax savings. It is incumbent upon the Commission to included "tax benefits" under the definition to ensure that sellers of tax advantaged investments do not avoid the rules by arguing that they are not offering investment opportunities as defined by the Commission.

Submitted by,

A handwritten signature in black ink, appearing to read "R. E. Thayer", followed by a horizontal line extending to the right.

Richard E. Thayer, **Esq.**

⁴ See proposed Rule 310.2(p).