UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

PREPARED STATEMENT OF
THE FEDERAL TRADE COMMISSION ON

PROPOSED AMENDMENT OF THE TELEMARKETING SALES RULE TO ESTABLISH A NATIONAL "DO-NOT-CALL" REGISTRY

Before the

JUDICIARY COMMITTEE

SENATE OF THE COMMONWEALTH OF KENTUCKY

Frankfort, Kentucky

February 6, 2002

Mr. Chairman, my name is Eileen Harrington, and I am the Associate Director for Marketing Practices in the Federal Trade Commission's Bureau of Consumer Protection. I am pleased to provide the Commission's views on its recently announced proposal to amend its Telemarketing Sales Rule ("TSR" or "Rule").(1) A key element of that proposal is to establish a national centralized "do-not-call" registry.

Background: The Telemarketing Act and the TSR

The Rule was adopted in August 1995 under the Telemarketing Consumer Fraud and Abuse Prevention Act ("Telemarketing Act"). In that Act, Congress directed the Commission to adopt a rule to define and prohibit deceptive and abusive telemarketing practices. With respect to abusive telemarketing practices, the Act, among other things, directed that the Rule include "a requirement that telemarketers may not undertake a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy." Accordingly, the TSR includes a "do-not-call" provision, prohibiting a seller or telemarketer from calling a person who has previously asked not to be called by or on behalf of the seller whose goods or services were being offered.

The "do-not-call" provision of the current Rule is company-specific: after a consumer requests not to receive calls from a particular company, that company may not call that consumer again. Other companies, however, may lawfully call that same consumer until he or she requests each of them not to call. The effect of this provision is to permit consumers to choose those companies, if any, from which they do not wish to receive telemarketing calls. Each company must maintain its own "do-not-call" list of consumers who have stated that they do not wish to receive telephone calls by or on behalf of that seller. This seller-specific approach tracks the approach that the FCC adopted pursuant to its mandate under the Telephone Consumer Protection Act ("TCPA").(2)

Regulatory Review of the TSR

The FTC subjects its trade regulation rules to periodic regulatory review to determine whether each rule continues to serve the public interest, and whether it could be modified to increase benefits to consumers without unduly burdening industry, or to reduce compliance costs without sacrificing important protections for consumers. In accordance with the Commission's overall

policy of regulatory review, and as mandated by the Telemarketing Act,(3) the Commission commenced a review of the TSR in November 1999.

As part of the regulatory review of the TSR, the Commission in January 2000 conducted a public workshop forum on the TSR's "do-not-call" provision. Evidence emerged during the workshop, and in written comments submitted in subsequent stages of the regulatory review, indicating that, despite the TSR's "do-not-call" provision, there is widespread consumer frustration over unwanted telephone solicitations. Many states have responded to this frustration by enacting or considering legislation to establish statewide "do-not-call" lists. As of January 2002 twenty (20) States had passed "do-not-call" statutes.

Consumers also have demonstrated great interest in being placed on "do-not-call" lists. For example, more than 1 million New York households had signed up for the state "do-not-call" list by the time it took effect on April 1, 2001. More than 332,000 phone lines were listed on Missouri's "do-not-call" list within a short time of its passage. And nearly one-third of Connecticut's households are on that state's "do-not-call" list. Similarly, in June 2001 the Direct Marketing Association ("DMA") reported that the number of names registered with the "Telephone Preference Service," a "do-not-call" program maintained by the DMA for its members, has grown to 4 million, up 1 million since June of 2000.(4)

Additional evidence emerged during the TSR regulatory review indicating that the existing company-specific approach is inadequate to enable consumers to control telemarketing calls received in their homes. Consumers and consumer groups who contributed their views during the Rule review stated that the primary problem with the current federal company-specific "do-not-call" approach is that it is burdensome to the consumer. Every company gets "one bite of the apple" with the consumer, who must repeat the "do-not-call" request to each company whose telemarketers call him or her.

Industry participants in the TSR regulatory review process generally supported the Rule's current company-specific approach, stating that it provides consumer choice and satisfies the consumer protection mandate of the Telemarketing Act while not imposing an undue burden on industry. They expressed skepticism about the need to strengthen the "do-not-call" provisions of the Rule. Industry participants argued that, although many consumers may broadly express the view that they would prefer not to receive any telemarketing calls, when it comes down to particulars, their true wishes may be somewhat different. They expressed the view that the same consumers who say they would like to stop receiving telemarketing calls may actually welcome certain types of telemarketing calls - for example, special sale price offers from companies with which they have previously transacted business.

The Proposal for a National Centralized "Do-Not-Call" Registry

Taking all the record evidence into account, the Commission has proposed to modify the TSR, among other things, by establishing a national centralized "do-not-call" registry that would enable consumers to stop most telemarketing calls by making just one phone call to the FTC.(5) Telemarketers would be required to "scrub" their lists, removing all consumers who have placed themselves on the FTC's centralized registry.

Included in the proposal is a provision that would enable consumers who have placed themselves on the FTC's national "do-not-call" registry to receive some telemarketing calls. Under that provision, consumers would be able to receive calls from or on behalf of specific sellers, or on behalf of specific charitable organizations, by providing express verifiable authorization to the seller, or telemarketer making calls for or on behalf of a seller or charitable organization, that the consumer agrees to accept calls from that seller or telemarketer.(6) This feature of the proposal addresses industry's suggestion that consumers may not desire an all-or-nothing approach to

telemarketing calls. The proposed Rule would provide consumers with a wider range of choices than the current Rule provides:

- they could opt to use the FTC's centralized registry to eliminate all telemarketing calls from all sellers and telemarketers covered by the TSR;
- they could eliminate all telemarketing calls from all sellers and telemarketers covered by the TSR by placing themselves on the central registry, but subsequently agree to accept telemarketing calls only from or on behalf of specific sellers, or on behalf of specific charitable organizations, with respect to which they have provided express verifiable authorization; or
- they could opt to eliminate telemarketing calls only from specific sellers, or telemarketers on behalf of those sellers, or on behalf of charitable organizations, by using the company-specific approach in the current Rule provision and the current FCC regulations.

In addition, the Commission specifically seeks comment on whether consumers should be able to select other options such as restrictions on the days or hours of the day that calls may be received.(7)

Interplay Between the Proposed National "Do-Not-Call" Registry and State "Do-Not-Call" Laws

The Commission recognizes that the interplay between the proposed national "do-not-call" registry and state "do-not-call" laws is very important. The Commission's notice of proposed rulemaking, published in the Federal Register on January 30, 2001, and also available on the FTC's website at www.FTC.GOV, is neutral on the issue of preemption. It seeks comment on this issue and does not advance any particular view on how the national "do-not-call" registry should interface with existing state "do-not-call" requirements. There are a number of possible scenarios, including sharing of state and FTC "do-not-call" databases.

In addition, the Commission is seeking specific comment regarding the states' experience with various approaches to funding a centralized "do-not-call" registry. The Commission recognizes that the proposed national "do-not-call" list will entail costs. In its request for public comment on the proposal, the Commission notes that some states charge telemarketers for access to the state "do-not-call" list, and some charge consumers a fee for including their names or phone numbers on the state "do-not-call" list. The Commission asks about the effectiveness of these approaches and any problems that have arisen with them.(8)

In considering how a national registry might interface with state "do-not-call" registries, an important factor to remember, however, is that if the proposed national "do-not-call" registry is adopted, all of the states, regardless of whether they have a centralized "do-not-call" registry, will continue to have the authority, conferred by the Telemarketing Act, to enforce all provisions of the TSR, including any amended "do-not-call" provision, through actions in federal district court. Preliminary and permanent injunctive relief will continue to be available to the states for all TSR violations, including violations of the "do-not-call" provision, as will recovery of damages on behalf of state residents.

Conclusion

On behalf of the Federal Trade Commission I wish to express appreciation for the opportunity to come here and share with the Committee the Commission's views on its proposal to amend the TSR. I would be happy to answer any questions.

Endnotes:

1. The views expressed in this statement represent the views of the Commission. My responses to any questions you may have are my own.

2. P.L. 102-243, 105 Stat. 2394, codified at 47 U.S.C. § 227. The FCC's regulations are set out at 47 C.F.R. § 64.1200.

3. 15 U.S.C.§ 6108.

4. The Telephone Preference Service ("TPS") is a list of consumers who do not wish to receive outbound telemarketing calls. Although not advertised, it was established in 1985 and has been administered by DMA, which subsidizes the cost. DMA charges consumers $5 to register online, but does not charge for registration in writing through conventional mail. At this time, DMA does not allow consumers to put themselves on the TPS by telephone. DMA requires its members to adhere to the list; the penalty for non-compliance is expulsion from the association. Sellers and telemarketers that are not members of DMA may purchase the TPS for a fee.

5. Not all calls would be stopped because certain entities are specifically exempt from coverage under the Telemarketing Act and the FTC Act. 15 U.S.C. §§ 45(a)(2) & 6105. Exempt entities include banks, credit unions, savings and loans, companies engaged in common carrier activity, non-profit organizations, and companies engaged in the business of insurance. With regard to the exemption of non-profit organizations, the USA PATRIOT Act of 2001, Pub. L. 107-56 (Oct. 25, 2001) amends the Telemarketing Act to extend the coverage of the TSR to reach not just telemarketing to induce the purchase of goods or services, but also charitable fund raising conducted by for-profit telemarketers for or on behalf of charitable organizations. The Commission has also determined that the USA PATRIOT Act is inapplicable to political contributions, including contributions to political parties and candidates. In addition, the Telemarketing Act exempts from the Rule's coverage a number of entities and individuals associated with them that sell investments and are subject to the jurisdiction of the Securities and Exchange Commission or the Commodity Futures Trading Commission. 15 U.S.C. §§ 6102(d)(2)(A) & 6102(e)(1).

6. The proposed Rule lists two specific means of obtaining the express verifiable authorization of a consumer to receive telemarketing calls despite their inclusion on the national "do-not-call" list: written authorization including the consumer's signature; and oral authorization that is recorded and authenticated by the telemarketer as being made from the telephone number to which the consumer is authorizing access. The Commission expects that written authorization will be necessary in most instances because once on the national "do-not-call" list, a consumer could not be contacted by an outbound call to request oral authorization of future calls. Oral authorization could be obtained, however, if the consumer were to place an inbound call, and were asked by the sales representative during that call whether he or she would consent to further telemarketing solicitations from the party called.

7. The Commission is also soliciting comment on whether the proposed "do-not-call" registry should be structured to treat requests not to be called by telemarketers selling goods or services separately from requests not to be called by telemarketers soliciting charitable contributions.

8. 67 Fed. Reg. 4539 (Jan. 30, 2002) Question # 5. j. addresses this issue.