

PREPARED STATEMENT OF
THE FEDERAL TRADE COMMISSION ON
"PROPOSED LEGISLATION:
THE 'TELEMARKETING VICTIMS PROTECTION ACT' (HR 3180)
AND THE 'KNOW YOUR CALLER ACT' (HR 3100)"
Before the
SUBCOMMITTEE ON
TELECOMMUNICATIONS, TRADE AND CONSUMER PROTECTION
of the
COMMITTEE ON COMMERCE UNITED STATES HOUSE OF
REPRESENTATIVES
Washington, D.C.
June 13, 2000

Mr. Chairman, I am Eileen Harrington of the Federal Trade Commission's Bureau of Consumer Protection. The Federal Trade Commission is pleased to provide testimony today on two bills now under consideration, the "Telemarketing Victims Protection Act" (HR 3180) and the "Know Your Caller Act" (HR 3100).⁽¹⁾ Both of these bills address consumer protection issues relating to telemarketing, a longstanding focus of Commission concern both in the law enforcement and the regulatory arena.

The Commission's Authority

As the federal government's principal consumer protection agency, the FTC's mission is to promote the efficient functioning of the marketplace by taking action against unfair or deceptive acts or practices, and increasing consumer choice by promoting vigorous competition. To fulfill this mission, the Commission enforces the Federal Trade Commission Act ("FTC Act"), which prohibits unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce.⁽²⁾ There are two primary modes open to the Commission to enforce the prohibition against unfair or deceptive acts or practices. The Commission may pursue such acts or practices through administrative litigation that may ultimately result in the issuance of a cease and desist order. In addition, Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), empowers the Commission to file law enforcement actions in federal district courts to obtain preliminary and permanent injunctive relief, restitution for injured consumers, and, where restitution is not practicable, disgorgement of ill-gotten gains from fraud operators.

The Commission's Efforts Against Fraudulent and Deceptive Telemarketing

Using its authority under Section 13(b) and Section 5 of the FTC Act, the Commission has filed hundreds of law enforcement actions against fraudulent and deceptive telemarketers in the past 15 years. To assist the Commission in its vigorous efforts to combat fraudulent telemarketing, Congress, in 1994, added to the range of weapons available to the Commission in this law enforcement work by enacting the Telemarketing and Consumer Fraud and Abuse Prevention Act⁽³⁾ ("the Telemarketing Act" or "the Act"). The Act directed the Commission to promulgate a Trade Regulation Rule prohibiting "deceptive telemarketing acts or practices and other abusive telemarketing acts or practices."⁽⁴⁾ The Telemarketing Act also reached beyond hard-core fraud and deception, directing the Commission to include in the rule provisions designed to bolster consumers' right to privacy in their own homes, and their sovereignty over the issue of whether to receive telemarketing calls.

Specifically, the Telemarketing Act mandated that the rule include prohibitions against any pattern of unsolicited telemarketing calls "which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy,"⁽⁵⁾ and restrictions on the hours of the day and night when unsolicited telephone calls can be made to consumers.⁽⁶⁾ Accordingly, the Commission adopted the Telemarketing Sales Rule ("TSR") on August 16, 1995, which, *inter alia*, defined and prohibited certain deceptive telemarketing practices,⁽⁷⁾ prohibited calls by any telemarketer or seller to any consumer that had previously stated the wish not receive such calls from that telemarketer or seller,⁽⁸⁾ and prohibited calls to consumers before 8:00 AM or after 9:00 PM, local time for the consumer.

The Telemarketing Act enhanced the Commission's law enforcement tools by enabling the Commission to seek civil penalties of \$11,000 for each violation of the Rule, in addition to the equitable relief already available to the Commission under Sections 5 and 13(b).⁽⁹⁾ As discussed in greater detail below, the two bills currently under consideration would build further on the consumer protections adopted by the Commission under the Telemarketing Act. In this regard, it is important to note that the Commission is also in process of reviewing whether the TSR could be strengthened to provide greater consumer protection, consistent with avoiding any undue compliance burden on legitimate telemarketers, as part of a broad regulatory review of the TSR.⁽¹⁰⁾ As the opening action of this process, the Commission held a workshop conference on January 11, 2000, that focused on "do-not-call" issues. The regulatory review of the TSR will evaluate the costs and benefits of the Rule and its overall regulatory and economic impact since its adoption in 1995. Based on the information received during this rule review, the Commission will determine whether to recommend modifications to the Rule or to retain the Rule unchanged. The Commission will report its findings to Congress at the conclusion of this evaluation of the Rule's operation.

The Commission generally favors the underlying goal of the bills under consideration, which is to support consumer choice in the matter of whether to receive telemarketing calls. The Commission's views, set forth below, on each of the various requirements of

the bills are informed by oral and written comments supplied to the Commission at the workshop and in the regulatory review comments received to date, as well as the Commission's long law enforcement experience in the area of telemarketing.

The "Telemarketing Victims Protection Act" (HR 3180)

HR 3180 would amend the Telemarketing Act to mandate that the Commission include in the TSR the following:⁽¹¹⁾ (1) a requirement that telemarketers notify any consumer whom they call that the consumer has the right to be placed on the "do-not-call" list maintained either by the Direct Marketing Association ("DMA") or by the consumer's state; (2) a requirement that, if the consumer elects to be placed on a "do-not-call" list, the telemarketer notify the DMA or the appropriate state, as the case may be, within a reasonable time; (3) a requirement that telemarketers obtain and reconcile, on a regular basis, the "do-not-call" lists maintained by the DMA and the states with the telemarketers' lists of prospective purchasers; (4) a prohibition against telemarketing calls between 5:00 p.m. and 7:00 p.m.; and (5) a prohibition against telemarketers evading consumers' "caller-ID" devices. Like the existing provisions of the TSR, all of these additional rule provisions would be enforceable by both the FTC and the state attorneys general in federal court actions.⁽¹²⁾ The bill would also mandate a study by the Commission within one year covering violations of the Telemarketing Act, "especially of repeated violations by a single telemarketer."

The "Know Your Caller Act" (HR 3100)

HR 3100 would amend the Telephone Consumer Protection Act⁽¹³⁾ ("TCPA") by adding a provision that declares it unlawful for any person making "any telephone solicitation to interfere with or circumvent the ability of a caller identification service to access or provide to the recipient of the call" information to be specified in regulations that the bill directs the Federal Communications Commission ("FCC") to adopt within six months of enactment. HR 3100 further directs that the mandated FCC regulations must require that telephone solicitations be made in such a manner that the consumer on the receiving end who has a caller identification service will be provided with a name and number the consumer can use to assert his or her "do-not-call" rights. In addition, HR 3100 directs that the mandated FCC regulations must prohibit any telephone solicitor to whom a consumer directs a "do-not-call" request from using that consumer's name and telephone number "for any other telemarketing, mail marketing or other marketing purpose (including transfer or sale to any other entity for marketing use)" other than to effectuate the "do-not-call" request. The FCC would have responsibility for enforcement, but HR 3100 also would expand the TCPA's private right of action for failure to honor a "do-not-call" request, so that a consumer could also sue in state court to enjoin violation of the "Know Your Caller" provisions or regulations promulgated under them, and to recover actual damages or \$500 for such violation. States' attorneys general could also bring such actions in federal court.⁽¹⁴⁾ At the court's discretion, these damages could be tripled for willful or knowing violation. Finally, HR 3100 provides that there will be no preemption of state law that imposes more restrictive intrastate requirements or regulations on, or

which prohibits interfering with or circumventing, caller identification services.

Requirements That Telemarketers Notify Any Consumer Whom They Call That the Consumer Has the Right to Be Placed on a "Do-Not-Call" List, and That Telemarketers Notify the DMA or the Appropriate State of the Consumer's Desire to Be Placed on Such a List.

The "do-not-call" notification requirement in HR 3180 likely would benefit consumers. Some consumers object to receiving telemarketing calls because they view such calls as an intrusion on their privacy and a burden on their time. "Do-not-call" requirements give consumers the right to avoid receiving telemarketing calls. Consumers, however, need to be aware of this right if they are to make use of it. HR3180's "do-not-call" notification requirement likely would increase consumer awareness of the right not to be called, thereby assisting them in their exercise of this right.

The "do-not-call" notification requirement, however, also likely would impose costs on telemarketers. Telemarketing is likely to be less effective if consumers are promptly⁽¹⁵⁾ notified of their opt-out right. The "do-not-call" notification requirement also would charge telemarketers with the responsibility for communicating consumers' wishes to a centralized "do-not-call" list. While a telemarketer itself may fairly be required to comply with a consumer's stated desire not to be called again, it may be an undue burden to require the telemarketer to communicate to a third party the consumer's preferences as to other telemarketers.

Assuming that the "do-not-call" notification requirement is imposed, HR 3180 as drafted does not address the fact that many states administering "do-not-call" lists require payment of a fee by consumers who wish to be included on the list. Thus, it is not clear how such a fee, where applicable, would be paid or by whom. As an alternative, HR 3180 could require only that telemarketers inform consumers of the existence of "do-not-call" options or that they inform them of the existence of the options and provide the information about how consumers may directly contact the appropriate association or state regulatory body.

Even beyond the issue of fees, the Commission might be concerned about whether this approach would impose an undue burden on DMA, the industry association that developed its own "do-not-call" list and makes adherence to it a condition of membership.⁽¹⁶⁾ During the Commission's recent workshop conference on TSR "do-not-call" issues, DMA representatives noted that the cost of maintaining the list was high and growing.⁽¹⁷⁾ Requiring that all telemarketers - even non-DMA members - specifically tell consumers about the DMA's "do-not-call" list may result in substantially increased consumer use of that service. Legislation should encourage self-regulatory initiatives like DMA's "do-not-call" list, but not impose additional burdens on them.

The Requirement That Telemarketers Obtain and Reconcile the "Do-Not-Call" Lists Maintained by the DMA and the States with the Telemarketers' Call Lists.

The DMA requires that its members obtain and reconcile the DMA "do-not-call" list with their call lists. HR 3180 would add the force of law to that private requirement, and would enlarge it to encompass non-members of DMA. Currently, non-members of DMA can purchase the list to avoid making calls to consumers who have expressed a desire not to be called by telemarketers. HR 3180 requires telemarketers to offer consumers the opportunity to be placed on either DMA's "do-not-call" list or an appropriate state list. Since inclusion on DMA's list is free for consumers and inclusion on a state list may require payment of a fee, it is likely that DMA's list would effectively become a centralized, national "do-not-call" list. Since a number of states already administer their own "do-not-call" system, this requirement raises issues of federalism. Consideration should be given to including in HR 3180 language that makes explicit whether and to what extent Congress intends the proposed federal scheme to preempt existing state schemes.⁽¹⁸⁾

The Prohibition Against Telemarketing Calls Between 5:00 p.m. and 7:00 p.m.

If enacted, HR 3180 would prohibit telemarketing calls from 5:00 p.m. to 7:00 p.m. This would benefit consumers who do not want to be called by telemarketers during the dinner hour. On the other hand, it may be more difficult for telemarketers to sell their goods and services if they are prevented from making calls during this particular two-hour period, a time when many consumers are likely to be at home. As noted above, pursuant to the mandate of the Telemarketing Act to include "restrictions on the hours of the day and night when unsolicited telephone calls can be made to consumers,"⁽¹⁹⁾ the Commission specified in the TSR that such calls may be made only "between 8:00 a.m. and 9:00 p.m. local time at the called person's location."⁽²⁰⁾ The Commission specified these times in order to achieve consistency with existing similar restrictions included in regulations enforced by the Federal Communications Commission under the Telephone Consumer Protection Act of 1991.⁽²¹⁾

At the Commission workshop focusing on the "do-not-call" provision of the Rule, some participants suggested technological solutions which currently exist or may soon be available to give consumers the ability to accept and reject telemarketing calls selectively based on their individual schedules. It is important, however, to bear in mind the cost to consumers of technological solutions. A consistent thread in comments by consumers received thus far in the rule review suggests that consumers resent having to pay for the privilege of being free from telemarketing calls. In the ensuing stages of the TSR regulatory review, the staff of the Commission will be soliciting and reviewing information about possible technological solutions to give consumers sovereignty *vis-a-vis* telemarketers, including technologies that would enable consumers to determine the times they are willing to receive telemarketing calls.

Provisions Addressing the Evasion of Consumers' "Caller-ID" Devices by Telemarketers.

Both bills contain provisions designed to empower consumers to use their "caller-ID" equipment to screen unwanted telemarketing calls. The language in HR3180 as drafted would prohibit telemarketers, through FTC regulation (including the threat of civil

penalties), from actively blocking identifying information, but the proposal may not reach the widespread technological problem that results in what might be termed "passive blocking." According to representatives from telemarketers and common carriers, telemarketers generally do not actively "block" their identifying information; rather, such information is not transmitted because of the types of phone lines used by most telemarketers.⁽²²⁾

By contrast, HR 3100 takes a two-fold approach to accomplishing similar goals.⁽²³⁾ It prohibits any affirmative interference or circumvention of consumers' "caller-ID" service, and at the same time requires, via FCC regulation, that telephone solicitations transmit through "caller-ID" services the name of their company or the entity on behalf of whom they are soliciting and a valid working phone number at which the caller may be reached during business hours. The FCC would have enforcement responsibility, but HR 3100 would also be enforceable through a private right of action, and through actions by state attorneys general in federal court.⁽²⁴⁾

The approach taken in HR 3100 to require disclosure of identifying information has the added benefit of helping to remedy the situation where consumers answer calls only to find no one on the other end of the line. Telemarketing calls give rise to this occurrence because telemarketers use "predictive dialers." These systems - designed to maximize the time each telemarketing representative spends selling - simultaneously dial many more phone numbers than could be handled by available telemarketing representatives. If a consumer answers a call when there is no sales representative to handle it, the call is automatically disconnected or abandoned. Consumers who answer calls that are disconnected or abandoned by predictive dialers do so only to find no one at the other end. When a telemarketer hangs up without identifying himself or herself, consumers have no way to exercise their right to request to be placed on a "do-not-call" list unless the "caller-ID" system shows a number where the telemarketer or seller can be reached. The Commission therefore favors the approach taken in HR 3100, specifying that the phone number displayed be one that is useful to a consumer who wishes to call back and request that he or she be placed on the company's "do-not-call" list.

At the Commission's January 2000 workshop conference on TSR "do-not-call" issues, participants expressed disparate views on whether it is technologically possible for consumers' "caller-ID" equipment to display a telemarketer's name and phone number when the telemarketer is calling via a trunk line and, if so, at what cost.⁽²⁵⁾ As part of its rule review, the Commission has requested information on the feasibility and cost of transmitting this information. Based on the debate reflected in the TSR review proceeding to date, it may be that broader protection could be achieved through a requirement to disclose certain identifying information, as in HR 3100, rather than just a prohibition against blocking.⁽²⁶⁾

The Provision That Within One Year the Commission Conduct a Study of Violations of the Telemarketing and Consumer Fraud and Abuse Prevention Act, "Especially of Repeated Violations By a Single Telemarketer."

If the HR 3180 requirement for a study of the violations of the Telemarketing Act, as amended by HR 3180, is enacted, such a study would be based largely on the complaint data from the Commission's ongoing TSR enforcement effort. A central component of this effort is "Consumer Sentinel," the FTC's confidential database shared by law enforcement officials throughout the United States and Canada. Numerous organizations contribute complaint data to Consumer Sentinel, including the Federal Trade Commission, the National Fraud Information Center, the Better Business Bureaus, Canada's Phone Busters, and other federal and state sources. The Commission uses the database to assess the extent of law violations, to spot emerging trends, and to target its enforcement efforts on the most serious problems. Through Consumer Sentinel the Commission would be able to track trends in violations of the new law in the first year, but a study after the new law has been in effect for a longer time would likely be more informative, as it may take some time for trends to emerge and for consumer awareness of their rights to grow.

In conjunction with the regulatory review of the TSR, the Commission has undertaken a study of the life cycle of telemarketing generally: the historical nature of telemarketing, its current status, emerging trends, and how the industry is changing to meet the future. The goal of this study is to document the historical trends that have shaped the practice of telemarketing, and to document factors likely to shape its future, including technological innovations, shifting markets, consumer attitudes about choice, regulatory and law enforcement efforts at the state and federal levels, and telemarketers' self-regulatory efforts. The results of this study will help legislators, regulators, and law enforcement to better understand telemarketing and to anticipate and respond more effectively to changes on the horizon.

In conclusion, the Commission appreciates the efforts of the sponsors of HR 3100 and HR 3180 to protect the consumers' ability to choose whether to receive telemarketing calls, and to know the identify of callers so that they can decide whether to accept such calls. The Commission also is appreciative of the opportunity the Subcommittee has provided to present testimony today on these legislative proposals, and I would be pleased 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 and do not necessarily reflect the views of the Commission or of any individual Commissioner.

2. 15 U.S.C. § 45(a). The Commission also has responsibilities under 45 additional statutes, *e.g.*, the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*, which establishes important privacy protections for consumers' sensitive financial information; the Truth in Lending Act, 15 U.S.C. §§ 1601 *et seq.*, which mandates disclosures of credit terms; and the Fair Credit Billing Act, 15 U.S.C. §§ 1666 *et. seq.*, which provides for the correction of billing errors on credit accounts. The Commission also enforces approximately 30 rules governing specific industries and practices, *e.g.*, the Used Car Rule, 16 C.F.R. Part 455, which requires used car dealers to disclose warranty terms via a window sticker; the Franchise Rule,

16 C.F.R. Part 436, which requires the provision of information to prospective franchisees; and the Telemarketing Sales Rule, 16 C.F.R. Part 310, which defines and prohibits deceptive telemarketing practices and other abusive telemarketing practices.

3. 15 U.S.C. §§ 6101-08.

4. 15 U.S.C. § 6102(a)(1).

5. 15 U.S.C. § 6102(a)(3)(A).

6. 16 U.S.C. § 6102(a)(3)(B).

7. 16 C.F.R. § 310.3.

8. 16 C.F.R. § 310.4(b)(1)(ii).

9. While the FTC is empowered by Section 16(a) of the FTC Act, 15 U.S.C. § 56(a), to file its actions for injunctive relief, restitution, disgorgement and other equitable relief through its own attorneys, FTC actions for civil penalties are referred to the Department of Justice for filing.

10. The Telemarketing Act requires that five years following the promulgation of the TSR, the Commission review the implementation of the Act and its effect on fraudulent telemarketing and report the results of the review to Congress. 15 U.S.C. § 6108. On February 28, 2000, the Commission published a notice in the Federal Register soliciting comments on the TSR. 65 Fed. Reg. 10,428.

11. HR 3180 would not expand the scope of the TSR, which, pursuant to the Telemarketing Act, is limited to activities within the jurisdiction of the FTC as delimited by the FTC Act. 15 U.S.C. § 6105(a). The FTC Act limits the FTC's jurisdiction to entities which are "organized to carry on business for [their] own profit or that of [their] members," 15 U.S.C. § 44, and also expressly excludes the activities of several specific types of entities from coverage under that Act. The exclusions are: "banks, savings and loan institutions described in section 57a(f)(3) of this title, Federal credit unions described in section 57a(f)(4) of this title, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to part A of subtitle VII of title 49, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended (7 U.S.C. § 181 *et seq.*), except as provided in section 406(b) of said Act (7 U.S.C. § 227(b))." 15 U.S.C. § 45(a)(2). Also, the McCarran-Ferguson Act generally exempts the "business of insurance" from the FTC Act. 15 U.S.C. § 1012(b).

12. The FTC, through the Department of Justice, could file actions seeking civil penalties of \$11,000 per violation, as well as injunctive relief. States are empowered only to recover restitution for their citizens, and to obtain injunctive relief. 15 U.S.C. § 6103(a). There is also a private right of action with a jurisdictional threshold of \$50,000.

13. Codified at 47 U.S. C. § 227.

14. 47 U.S.C. § 227(f).

15. Like other disclosures mandated under the TSR, *see* 16 C.F.R. § 310.4(d), the "do-not-call" notification presumably would be required to be made "promptly and in a clear and conspicuous manner."

16. The "do-not-call" list maintained by the DMA for its members is currently offered as a free service to consumers.

17. DNC Tr. 98:4-99:12 (statement of Bob Sherman for the DMA, noting that their list is "getting out of control cost-wise."). Note: copies of the transcript pages cited in this letter are attached to this statement; the entire transcript may be accessed at the FTC's Web site at www.ftc.gov/bcp/rulemaking/tsr/dncforum/index.html.
18. Industry representatives and others at the workshop conference on TSR "do-not-call" issues strenuously argued in favor of ensuring that if a national "do-not-call" list were to take effect, it preempt existing state lists. *See* DNC Tr. 185:5-197:4.
19. 15 U.S.C. § 6102(3)(B).
20. 16 C.F.R. § 310.4(c).
21. 47 U.S.C. § 62.1200 *et seq.*; 47 C.F.R. § 1200(e).
22. DNC Tr. at 113:10-114:1 (comments of Annette Kleckner, a representative of MCI WorldCom, noting that telemarketing calls go out over T-1 or trunk lines and not through a local switch that would pick up a specific telephone number that could be transmitted to "caller-ID" equipment).
23. Because HR 3100 amends the TCPA rather than the Telemarketing Act, it does not incorporate the jurisdictional limitations written into the FTC Act, and included by reference in the Telemarketing Act (described, *supra*, at note 11).
24. As a practical matter, it would likely be difficult for consumers to bring a private right of action for violation of the "Know Your Caller" requirements, since such violation would deprive the consumer of a piece of information essential to bringing an action, namely, the identity and location of the potential defendant. Moreover, the consumer experiencing violation of these requirements would not have a realistic alternative for discovering this information.
25. *See generally*, DNC Tr. 109:8-121:25.
26. HR 3100 may raise other issues that would more appropriately be addressed by the FCC, the designated enforcement agency under that bill.