



November 13, 2014

VIA ELECTRONIC TRANSMISSION

Karen S. Hobbs; Craig Tregillus  
Division of Marketing Practices  
Bureau of Consumer Protection  
Federal Trade Commission  
Washington, DC 20580

**RE: Telemarketing Sales Rule Regulatory Review, 16 CFR Part 310, Project No. R411001**

Dear Ms. Hobbs and Mr. Tregillus:

The Professional Association for Customer Engagement (PACE) appreciates the opportunity to comment in response to the Federal Trade Commission's (Commission) Request for Comments (Request) related to the Telemarketing Sales Rule (Rule).

PACE is the only non-profit trade organization dedicated exclusively to the advancement of companies that use a multi-channel approach to engaging their customers, both business to business and business to consumer. These channels include contact centers, email, chat, social media, web and text. Our membership is made up of Fortune 500 companies, contact centers, BPOs, economic development organizations and technology suppliers that enable companies to contact or enhance contact with their customers.

PACE shares the Commission's objective to promote consumer protections and punish bad actors; however, we subscribe to the fundamental notion that regulations must balance consumer protections with legitimate business interests. To accomplish this and avoid unintended consequences that often stem from overregulation, industry must play an important role in the rulemaking process. Given the number and diversity of our members, PACE is uniquely positioned to assist the Commission, in the form of ongoing education and industry feedback, throughout this process.

In response to the Request, PACE commissioned a survey to solicit and collect member feedback related to the Commission's questions.<sup>1</sup> This Comment is an amalgamation of member feedback, which has been organized by substantive issue.

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<sup>1</sup> The survey was conducted by CustomerCount of Mobius VP, LLC on behalf of PACE.

### ***General Comments***

The Rule has had an overall positive impact on consumers and PACE believes there is a continuing need for the majority of its protections. The Rule's current provisions— along with Section 5 of the FTC Act— do, however, provide ample consumer protections and give the Commission the necessary enforcement authority to pursue bad actors. For example, the Rule contains provisions that restrict whether telemarketing calls may be made to a consumer and the manner in which permissible calls may be made. The Rule also sets forth what information must be provided to consumers during the call and what steps must be taken to ensure consumers provide adequate authorization for all charges associated with the sale of services. The vast majority of companies engaged in telemarketing, including PACE members, comply with both the spirit and letter of the Rule despite the significant costs of doing so. PACE understands the Commission has an important duty to continually evaluate the Rule; however, we are concerned that any additional substantive requirements will not further deter noncompliance with the Rule but will result in the majority of companies who strive in good faith to comply with the Rule incurring significant additional expenses to ensure compliance with the same. To that end, PACE believes that no additional substantive changes are necessary at this time.

PACE also applauds the overall success of the National DNC Registry, which has helped eliminate unwanted telemarketing calls to consumers, and supports strong enforcement against companies that intentionally violate the Rule's DNC provisions. PACE members do, however, have significant concerns related to the rising cost of purchasing a subscription to the DNC Registry (currently \$60 per area code up to a maximum of \$16,482 for all the area codes in the US with the first five area codes being free). In today's business world, it is not uncommon for small companies to have customers or prospective customers in all 50 states. These companies, however, have a difficult time paying an annual fee of \$16,482 for access to the DNC Registry. Additionally, the fact that the first five area codes are free has become less relevant, as area codes continue to be added and consumers often keep their phone numbers when moving from one location to another. PACE asks the Commission to review the cost of the purchasing a subscription to the DNC Registry to determine if the fee can be lowered.

### ***Government Regulation***

In addition to the Rule, telemarketing practices are regulated by the Telephone Consumer Protection Act and its implementing rules adopted by the Federal Communications Commission (collectively "TCPA") and a plethora of state laws and regulations. While there are common themes that permeate each jurisdiction's laws and regulations, numerous differences exist, which create compliance difficulties for companies operating on a national scale. A uniform set of rules would be preferable; however, PACE acknowledges that the Commission does not have the authority to preempt state laws.

The Commission should, however, consider the impact other laws and regulations have had on businesses before adopting any additional regulations of its own or expanding the reach of its current regulations. For example, when PACE solicited member feedback in response to the

Request, we received an overwhelming number of responses related to the recent TCPA changes.<sup>2</sup> Our members have expended a substantial amount of money and resources on new technologies in order to comply with the TCPA's amended rules for calls to cell phones and have seen a significant decrease in business productivity as a result of using less efficient technologies to make these calls.<sup>3</sup> Members also cited the increased risk of class action litigation associated with the TCPA changes as a significant business concern. PACE shares the sentiment expressed by the U.S. Chamber of Commerce in their article "*The Juggernaut of TCPA Litigation*"<sup>4</sup> regarding increased costs incurred as a result of the TCPA Amendments.

While PACE understands the Commission does not enforce the TCPA, the recent changes adopted by the FCC are an example of how the teleservices industry has recently been impacted by burdensome federal regulations. Members fear that additional regulations and increased exposure to regulatory actions or lawsuits will significantly impair their ability to continue contact center operations. For those companies that can survive the tide of increased regulation, the costs of these regulations will ultimately be passed on to consumers in the form of higher prices for goods and services.

### ***Self-Regulation***

PACE encourages the Commission to continue to work with self-regulatory organizations (SROs) to enhance consumer protections. PACE supports the notion that SROs are meant to be an enhancement of— not a substitute for— existing regulation. The Commission has long shared the belief that SROs provide increased consumer protections, promote greater adherence to laws and regulations and provide greater flexibility for constantly changing business environments and technologies.<sup>5</sup> Ultimately, effective SROs are a strong tool that can assist in preventing the need for increased regulations.

PACE has adopted an SRO program that accredits contact centers that comply with all federal and state telemarketing laws and regulations, as well as industry best practices.<sup>6</sup> To obtain and

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<sup>2</sup> See *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, FCC Report and Order, CG Docket No. 02-278 (Feb. 15, 2012).

<sup>3</sup> Members have reported that contacts-per-hour, a metric related to the number of individuals reached per hour, have decreased between 30 and 50 percent since the recent TCPA changes.

<sup>4</sup> Becca J. Wahlquist, *The Juggernaut of TCPA Litigation: The Problems with Uncapped Statutory Damages* (prepared for the U.S. Chamber Institute for Legal Reform) at 1, (Oct. 2013), *available at* [http://www.instituteforlegalreform.com/uploads/sites/1/TheJuggernautofTCPALit\\_WEB.PDF](http://www.instituteforlegalreform.com/uploads/sites/1/TheJuggernautofTCPALit_WEB.PDF).

<sup>5</sup> See FTC Chairman Deborah Platt Majoras, *Self Regulatory Organization and the FTC*, Address Before the Council Better Business Bureaus (April 11, 2005), *available at* [http://www.ftc.gov/sites/default/files/documents/public\\_statements/self-regulatory-organizations-and-ftc/050411selfregorgs.pdf](http://www.ftc.gov/sites/default/files/documents/public_statements/self-regulatory-organizations-and-ftc/050411selfregorgs.pdf). See also FTC Commissioner Maureen K. Ohlhausen, *Success in Self-Regulation: Strategies to Bring to the Mobile and Global Era*, Address at the BBB Self-Regulation Conference, (June 24, 2014), *available at* [http://www.ftc.gov/system/files/documents/public\\_statements/410391/140624bbbself-regulation.pdf](http://www.ftc.gov/system/files/documents/public_statements/410391/140624bbbself-regulation.pdf).

<sup>6</sup> More information is available at <http://www.pacesroconnect.org/>. Other notable examples of effective self-regulation include the Advertising Self-Regulation Council, the Payment Card Industry Data Security Standard, Online Interest-Based Advertising Accountability Program and the Funeral Rule Offenders Program.

maintain accreditation, companies must undergo an initial and recurring onsite compliance assessment and are subjected to quarterly data audits of their outbound calling records. Companies that do not comply with applicable laws, regulations or best practices will not be accredited or will have their accreditation revoked.

### ***Retention and Sharing of Billing Information***

PACE opposes any amendments to the Rule that would require sellers to get explicit consent to retain consumers' billing information. The retention of billing information for use on future transactions and/or modifications of previous transactions is an important benefit to both the consumer and the company. Restrictions on the ability of businesses to retain billing information would decrease business productivity (requiring businesses to ask for this information each time) and negatively impact businesses' ability to collect for ongoing services provided to the customer. Such restrictions would also impact consumers in the following notable ways:

- *Increased difficulty modifying previous orders.* The consumer would be burdened to recall which card they used for the transaction, have that card available when modifying the order and provide all of the information again;
- *Increased difficulty making returns or exchanges.* Currently, consumers can return items in a number of ways and refunds are processed quickly to the same card that was used for the transaction. If businesses cannot retain this information, consumers will have to contact the company and provide the billing information again in order for the refund to be applied to that card.
- *Delayed refunds for returns or exchanges.* Unless the billing information is provided a second time by the consumer, refunds will need to be issued via check, resulting in additional costs to the company and delays before the consumer receives the refund.

Simply put, the ability to retain billing information benefits both the business and the consumer. Requiring an extra layer of formality for businesses to have this ability is an unnecessary step that would be considered onerous by all parties to the transaction and negatively impact the customer experience in many situations. Moreover, businesses are already required to get authorization to **charge** the consumer's account, even if they have the billing information on file. This provides adequate protection to consumers and the Commission with ample authority to pursue entities charging accounts without proper authorization.

If the Commission does restrict a business's right to retain billing information prospectively, existing consumer's previously obtained billing information should be "grandfathered in" under the new rules. Failure to do so would impose significant costs on businesses (e.g. reaching out to each consumer to request permission to keep the information on file) and/or burden consumers (e.g. must contact each company to provide this consent).

Similarly, it is crucial for telemarketers conducting campaigns on behalf of one or more sellers to be able to send encrypted billing information **to the seller(s) on whose behalf sales are made**. Customers understand that this information will be provided to such entities and restrictions on

the telemarketer's ability to share billing information with them would effectively prevent sellers from using any third party contact centers. This would not only result in the shutdown of numerous businesses and the loss of countless jobs, it would negatively impact sellers in all industries, which rely on the expertise and flexibility that outsourced call centers provide.

### ***Payment Authorizations and Pre-Acquired Account Information***

The Rule's current payment authorization rules found in 16 CFR 310.3(a)(3) and 16 CFR 310.4(a)(7) adequately protect consumers; therefore, additional payment authorization requirements are an unnecessary burden placed on businesses. The Rule already requires telemarketers to disclose all material terms and conditions of the offer, make specific negative option disclosures (if applicable) and get consumers' express informed consent or express verifiable authorization (depending on the payment method) for each purchase. Records of this consent must be retained for two years. In the event that pre-acquired account information is used for the transaction, the telemarketer must identify the account to be charged and obtain the consumer's express agreement for the charges. Additionally, if the transaction involves both pre-acquired account information and a free-to-pay conversion feature, telemarketers must obtain the last 4 digits of the account number to be charged and record the entire call from start to finish.

As long as the telemarketer follows existing regulations and the consumer understands which account will be charged and the material terms of the sale, the consumer is sufficiently informed prior to making a purchase decision. Requiring the consumer to repeat his/her full account number for each new sale or order modification not only decreases business productivity, but also it wastes consumers' time and often leads to a poor customer experience.<sup>7</sup> Similarly, imposing a heightened evidence requirement on sellers or telemarketers is an unnecessary burden that will add to the increasing recordkeeping costs businesses are already struggling with while adding little to no benefit to consumers, who are adequately protected by the Rule's existing evidence requirements and additional protections built into the Truth in Lending Act, Regulation Z, the Electronic Fund Transfer Act and Regulation E.

### ***Recordkeeping***

The existing recordkeeping requirements in 16 CFR 310.5, including the mandatory two year retention period for payment authorizations, impose significant burdens on sellers and telemarketers. For example, retention of call recordings— especially those containing credit card information, thus, implicating Payment Card Industry Security Standards— requires significant capital and infrastructure investments by large businesses and is cost prohibitive for many smaller companies. PACE, therefore, opposes any additional rules that expand the scope of records that must be kept or the length of time that such records must be kept.

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<sup>7</sup> PACE members are increasingly dealing with consumers that are frustrated with the amount of time it takes to make a purchase and the number of disclosures that they must listen to before a sale is completed. While we understand that many of these disclosures serve important consumer protection interests, we believe the Commission should also consider the impact that unnecessary regulations have on both business productivity and the overall customer experience.

### ***Exemptions***

The current exemptions in 16 CFR 310.6 help strike a balance between consumer protection and overregulation and should be left intact. For example, home-based businesses should continue to be treated the same as other businesses. The Commission has clarified that the Rule applies to calls made to business telephone numbers to sell consumer goods or services to employees of the business. The Commission's focus was on the type of product or service sold, not whether the number was classified as a residential or business number by the phone provider. The same approach should apply to calls to home businesses. Calls made to numbers held out as business numbers to sell goods or services to that business should continue to be exempt from the Rule. In addition to maximizing consistency with the Commission's prior interpretations, this represents sound public policy and equitableness because it is impossible for callers to know whether the phone provider classifies the number as a residential or business number.

Similarly, while PACE agrees that all material terms and conditions, including negative option features, should be disclosed to consumers prior to effectuating any sale, we believe it is unnecessary to expand the scope of the Rule to impose additional restrictions on inbound calls. The Commission already has jurisdiction, under Section 5 of the FTC Act, to bring enforcement actions against any company engaging in unfair or deceptive acts or practices, including companies that do not disclose the material terms and conditions of an offer prior to sale.

### ***Calls to Cell Phones***

As discussed above, PACE members have been significantly burdened by the recent TCPA amendments related to calls to cell phones. PACE supports the Commission's position on the regulation of calls to cell phones and applauds it for not adopting specific rules for calls to cell phones. Instead, consumers that do not want to receive telemarketing calls on their cell phones can register for the DNC Registry and/or make internal DNC requests to specific companies. These mechanisms provide consumers sufficient protection to shield unwanted calls to their cell phones. Moreover, recent statistics show that more and more individuals use cell phones as their primary or only personal telephone.<sup>8</sup> Simply put, there is no reason to change the Commission's longstanding position that calls to cell phones are treated the same as calls to landlines.

### ***Equipment and Technology***

As currently written, the Rule does not regulate the use of specific types of equipment or technologies to make telephone calls. Instead, the Rule's provisions focus on the type of calls made (e.g. prerecorded message restrictions) and/or the substantive impact such equipment

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<sup>8</sup> See, e.g. Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July-December 2013, Department of Health and Human Services, National Center for Health Statistics, July 2014, available at: <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201407.pdf> (finding that 41% of Americans live in cell phone only households, 65.7% of adults aged 25-29 live in cell phone only households and that, among households that use both cellular and landline telephones, 33.6% received all or almost all of their calls on their cell phone).

might have (e.g. the call abandonment rules). PACE encourages the Commission to not deviate from this model. Modern dialing equipment and technology has the ability to enhance compliance with federal and state regulations. For example, dialers can block calls to specific area codes outside of allowable calling times, restrict the number of calls that may be placed to a consumer's phone number and conduct real time scrubs against wireless number and/or applicable DNC lists. Application Programming Interface (API) services being provided by the DNC compliance industry all provide real time look-ups and scrubs based on applicable rules.<sup>9</sup> The inability to use these technologies would significantly undermine call centers' compliance capabilities. The Commission's regulations should continue to focus on businesses' substantive conduct and the impact of the same on consumers, not specific technologies used to improve business processes.

### ***Conclusion***

Thank you for the opportunity to comment on the Commission's Request. PACE supports the Commission's consumer protection initiatives; however, we are dedicated to ensuring regulations appropriately balance such initiatives with legitimate business interests. We do not believe any new substantive requirements are necessary at this time. In the event that the Commission proposes specific amendments to the Rule, we look forward to the opportunity to work with the Commission throughout the rulemaking process to ensure any new regulations properly balance consumer and business interests and that such regulations do not result in unintended consequences.

Respectfully submitted,

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<sup>9</sup> PACE members CompliancePoint, DNC.COM, Gryphon Networks and PossibleNow all provide such API services.