BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of	)	
	)	
	)	
Telemarketing Review—Comment	)	FTC File No. P994414
	)	
	)	May 30, 2000

Submitted on behalf of Direct Marketing Association, Inc.
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These comments are submitted on behalf of the Direct Marketing Association ("DMA") in response to the Federal Trade Commission's ("Commission") request for public comment on the Commission's Telemarketing Sales Rule ("TSR" or "Rule"). Inasmuch as the only public forum held to date to discuss provisions of the TSR addressed only the do-not-call provision of the Rule, DMA will confine its comments to that provision in addition to providing industry information and background.

Direct Marketing Association

DMA is the largest trade association for businesses interested and involved in interactive and database marketing, with approximately 5,000 member companies from the United States and more than 50 other nations. Founded in 1917, its members include direct marketers from every business segment as well as the non-profit and electronic marketing sectors. Quite importantly, all aspects of the teleservices industry are represented in DMA's membership. Accordingly, any change in the legal requirements for that segment necessarily will have an impact on DMA and its members.

The Telemarketing Consumer Fraud and Abuse Prevention Act (the "Act") was signed into law in an effort to protect consumers from telemarketing fraud. The Act, consistent with all domestic legislation, addressed real harm, not mere annoyance. The Act directed the Commission to issue a rule prohibiting deceptive and abusive telemarketing acts or practices. DMA participated in that rulemaking proceeding and was in favor of reasonable and responsible requirements being imposed on those engaged in outbound telemarketing. It favored reasonable regulation as long as any resultant rule had

a material benefit for consumers and did not punish legitimate marketers or impose artificial restraints that would be expensive and difficult to follow. DMA believes that the do-not-call provision of the Rule, in its current form, satisfies the consumer protection mandate of the Act, while at the same time does not impose an undue burden on commerce.

The Telemarketing Industry

Outbound telephone marketing expenditures, by a large margin, represent the largest category of media spending for direct marketers. Economic Impact, U.S. Direct and Interactive Marketing Today, 1999 Forecast (the WEFA Group), at p. 11. Telephone marketing ad spending was expected to grow to $66.9 billion in 1999 and to comprise 37.9% of all direct marketing expenditures. Id. It also is an enormously valuable medium in business-to-business direct marketing, although DMA recognizes that sales generated in that segment (b-to-b) largely is outside the scope of the Rule.

Consumer telephone marketing generated $230 billion in 1999 sales, accounting for 27.3% of all consumer direct marketing sales. It is expected that consumer telemarketing will grow by 7.4% per year to an expected of $328.6 billion in 2004. Id. at 14.

Employment and employment growth rate in the telemarketing industry are equally impressive. In 1999, the telemarketing industry was estimated to employ 5.4 million workers. Id. at 36. During the five years preceding that date, employment growth

was at a 5.5% rate. It is clear that telemarketing continues to be an enormously popular, effective and important medium in the U.S. economy.

The Do-No-Call Provision of the Rule

DMA has not undertaken a cost-benefit analysis of the do-not-call aspect of the Rule. Nonetheless, it is clear that there is benefit to the consuming public to be able to request that a specific telemarketer not contact them again in the future. Regardless of the reason, whether it is considered or whimsical**,** no one will quarrel with the benefit to consumers of having their choice honored.

Again, without having undertaken an actual study, DMA believes that the do-not-call provision in its current form is an acceptable burden to place on business and is not cost prohibitive. The salutary effect on consumers is obvious – – that they know they can exercise their choice and have it respected. If there is any level of frustration, however, caused by the continued receipt of unwanted telephone calls, it may well be a function of the limits on the Commission's authority, not of the substantive provisions of the Rule itself. DMA urges the Commission to review the reach of the existing law and the Commission's jurisdictional limits as potential grounds for any ineffectiveness before making any recommendation to change the Rule from its current form.

The Commission should undertake an analysis of the complaints it has received to determine whether the alleged "violators" simply do not come within the Rule.

It could be that the Commission's working with those federal agencies that have jurisdiction over the non-covered entities would resolve any consumer concerns that may exist.

Time to Implement a Do-Not-Call Request

During the forum held on January 11, 2000, there was discussion as to whether an "industry standard" could be developed with respect to how long it should take to implement a consumer's do-not-call request. The answer to that question is much simpler for some telemarketers than it is for others. It largely depends on one's technology, geographical dispersion of corporate offices, centralization versus decentralization of operations and frequency of updating.

It is common in the industry for telemarketers to update their do-not-call list once a month. When a consumer's request is received could make an "industry standard" of 30 days impossible to satisfy, whereas a 45- day guideline might be more practical.

DMA and its members are not yet in a position to commit to a particular standard, although DMA is willing to discuss that concept with industry members in an attempt to arrive at a consensus that also makes sense from the consumer perspective. If a reasonable guideline could be worked out, DMA would then be in a position to adopt it as one of its guidelines for ethical business practice and to recommend that everyone follow it, with a requirement that anyone who cannot meet the stipulated timing requirement be

asked to so notify any consumer that makes a do-not-call request. The above, at this point, is merely conceptual, but something that DMA is willing to take up with its affected members.

Freedom of Choice

DMA is a strong believer in consumer choice, allowing individuals to determine on a case-by-case basis those marketers with which they choose not to do business. That process, codified in the current Rule, is the ultimate form of consumer choice. A consumer may pick and choose what company it no longer wants to hear from. All a consumer must do is so notify the company and be placed on that company's do-not-call list. An across-the-board **"**go/no-go" system does not allow for consumer selectivity and undoubtedly would prejudice consumers by removing their ability to opt for meaningful choices.

Overlapping Regulation

The Rule does not enjoy preemptive status. Accordingly, each state is free to enact its own legislation which may be more restrictive, less restrictive or the same as the Rule itself. Additionally, state statutes may have exemptions that vary in degree or kind from those contained in the Rule. The result is a virtual obstacle course for telemarketers.

Hardly any national telemarketing campaigns are conducted one state at a time. Accordingly, telemarketers call from multiple locations into multiple states nearly simultaneously. Compliance with the various state no-call lists, which continue to grow in number, is becoming increasingly more complex and burdensome in view of the patchwork of requirements and regulations that exists. State statutes vary from each other as well as from the Rule. As a practical matter, any state that passes the most restrictive regulation in this area will de facto become the national standard inasmuch as telemarketers will have to satisfy the most restrictive state requirements and likely will find it too difficult and too expensive to vary its practices on an ad hoc basis. DMA does not believe that the Rule was intended to function in that way.

If the Commission is giving any consideration whatsoever to a national do-not-call list, it should do so only if preemption is part of that consideration. Otherwise, the result would be little more than fifty-one different "national" lists. To be fair to industry, some way of harmonizing the various state laws should be addressed with the least restrictive measures being used as the common denominator. One approach might be to coordinate its effort with the states so that state no-call lists apply only to intrastate calls and cover those entities that are outside the jurisdiction of the Commission and of the Rule.

In the administrative history that accompanied passage of the

Rule, the Commission made it clear that the scope and enforcement of the do-not-call provision was intended to be identical to the corresponding provision of the Telephone Consumer Protection Act, enforced by the Federal Communications Commission. The FCC has made it clear that a sponsor of an outbound telemarketing call need only honor a request that comes directly from a consumer, not from a third party. Accordingly, if the Commission were to address the do-not-call provision of the Rule at all, it should only be to clarify that a do-not-call request as contemplated by the Rule must come directly from the requesting consumer, and not from a third-party organization (that may not have explained the implications of a do-not-call request to the consumer and which may have reasons different from the consumer's for requesting do-not-call status).

Telephone Preference Service

DMA has had in place since 1985 its Telephone Preference Service ("TPS"). TPS covers all consumer telemarketers with no exceptions or exemptions. Any consumer who wants to reduce the amount of unwanted national telemarketing calls that he or she receives, can place his or her name on the TPS list for that purpose free of charge.

Although TPS is available to all telemarketers, members and non-members of DMA alike, all DMA members are required to use TPS before engaging in outbound

prospect solicitations. The use of TPS in that manner is a condition of membership in DMA and is expected to be honored.

Information about how consumers can register with TPS is provided in most telephone book white pages. The number of consumers who have chosen to list their names on TPS is strong evidence that consumers are aware of the service and, for those who choose to, know how to take advantage of it. There currently are more than 3 million consumers signed up with TPS.

DMA has subsidized the cost of maintaining TPS and is experiencing an increased deficit in continuing the program. It offers its cooperation and participation with the Commission or any other public agency that is interested in learning more about maintaining such a consumer service. The Commission should not take any steps or official action, however, that would result, directly or indirectly, in an increase in DMA's expense of running TPS.

Education

DMA always favors public education on consumer protection issues and programs. Although DMA is unaware of any other law or rule that has been singled out for a public educational campaign, it would be pleased to participate in any reasonable and effective program. DMA does point out, however, that during the nearly five years that the Rule has been in place, the number of consumers that have signed up with individual

company do-not-call lists is potent evidence that the consuming public is well-aware of its rights under the Rule. DMA does not know the precise number or percentage of consumers that make such requests but is aware that individual company do-not-call lists may contain millions of names. Because such information (which includes, e.g., response rates) is considered proprietary, DMA was unable to obtain individual, more specific information. Nonetheless DMA would be willing to participate in any discussion regarding the merits of an educational program.

Conclusion

The do-not-call provision of the Telemarketing Sales Rules appears to be an effective way of providing consumers with choice. A significant number of consumers are aware of the Rule, as evidenced by their exercising their choice with individual companies (in addition to those who have signed up with DMA's Telephone Preference Service).

Before contemplating any changes to the do-not-call provision, the Commission first should explore the current reach of the Rule and determine whether companies not currently covered by the Rule are the ones creating consumer concern. DMA submits that unless that determination is made, there is no reason or basis for changing the do-not-call provision from its current form.

Respectfully submitted,

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