12 April 2002

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

Dear Mr. Clark:

As provided for by the Federal Register notice of 30 January 2002, Notice of Proposed Rulemaking, the American Teleservices Association (ATA) forwards its written comments on the proposed changes to the Telemarketing Sales Rule. As the cover notes, this is our "Telemarketing Rulemaking – Comment. FTC File No. R411001."

Enclosed are the requisite six (6) paper copies of the comments, plus an appropriately labeled floppy disk with an electronic copy of our response.

Under separate cover, ATA has forwarded a formal request to participate in the public forum announced for June 5-7, 2002.

Please forward any questions regarding this submission to the undersigned at (202) 293-2452.

Sincerely,

GM Matt Mattingley
Director, Government Affairs

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In The Matter Of Telemarketing Rulemaking -

FTC File No. R411001

COMMENTS OF THE AMERICAN TELESERVICES ASSOCIATION ON THE PROPOSED REVISIONS TO THE TELEMARKETING SALES RULE

INTRODUCTION

The American Teleservices Association (the "ATA"), respectfully submits these comments to the Federal Trade Commission's (the "Commission") proposed revisions to the Telemarketing Sales Rule ("Rule"), which implements the Telemarketing and Consumer Fraud and Abuse Prevention Act of 1994 (the "Act"). These comments are submitted pursuant to the Notice of Proposed Rulemaking ("NPRM" or "proposed Rule") issued by the Commission on January 30, 2002 at 67 Fed. Reg. 4492. The ATA is the trade association dedicated to the teleservices industry, representing the providers and users of teleservices in the United States and around the globe. The ATA was founded in 1983 to provide leadership and education in the legal, professional and ethical use of the telephone, to increase service effectiveness, enhance customer satisfaction and improve decision making. Today, the ATA has more than 2,500 members representing all

segments of the industry, including telemarketing service agencies, consultants, customer service trainers, providers of telephone and Internet systems, and the users of teleservices, such as advertisers, non-profit organizations, retailers, catalogers, manufacturers, financial service providers, and others, (a copy of our membership list is attached as Exhibit A).

The Association is dedicated to promoting a positive image of telephone marketing through the highest standards of ethical practices throughout the industry.

A primary mission of the ATA is to educate its members on the laws that govern teleservices through its annual law/legislative conferences and other educational seminars and conferences, and through its legal bulletins detailing trends in legislation affecting the industry. The ATA also serves as a resource to state legislatures, state attorneys general and federal regulatory agencies in drafting appropriate and focused legislation and rules to combat deceptive practices.

The ATA's commitment to encouraging and conducting legitimate and honest telemarketing programs is without question. It is with that background that we submit the following comments regarding the proposed revisions to the Rule.

I. *EXECUTIVE SUMMARY*

The proposed Rule must be drastically modified. The proposed Rule: (1) is inconsistent with the language of the Act; (2) unduly infringes on First Amendment rights; (3) exceeds the limitations imposed on rulemaking under the Administrative Procedures Act ("APA"), 5 U.S.C. sec. 553, and the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. sec. 58; (4) will prove too costly in terms of expenditures by the

Commission and jobs destroyed; and (5) is in many respects, impossible to establish, implement or enforce. In its proposed form, the scope of activities covered by the Rule are so broad, and certain provisions are so onerous and unwieldy, that legitimate telemarketing activities will be severely impaired and certain widely used industry practices will become effectively banned with little or no benefit to consumers.

II. *THE MAJORITY OF THE PROPOSED AMENDMENTS TO THE RULE WILL CAUSE IRREPERABLE HARM TO LEGITIMATE BUSINESS, COSTING JOBS, HARMING CONSUMERS AND DAMAGING ECONOMIC GROWTH AND AS SUCH ARE BAD PUBLIC POLICY*

While many of the proposed amendments to the Rule are well intentioned, should the Rule be adopted as proposed, it is only consumers and legitimate users of the telephone that will ultimately be the ones who bear the burden of these changes. As discussed more fully below in Section III(A), Congress and the FTC have recognized in the past that telemarketing provides many benefits to the consumer, the country and the economy. Telemarketing provides a cost-effective way for legitimate businesses to reach potential consumers. Telemarketing also provides consumers with lower costs for goods or services, a wider variety of choices, and increased convenience to make their purchasing decisions. Consumers are able to complete their transactions quickly and conveniently from the comforts of their own home, thereby saving the time, effort and possibly the inconvenience of traveling to the store.

Additionally, the business-to-consumer telemarketing industry is one of the fastest growing industries in America. It is now the single largest direct marketing system in the country, employing more than 5.4 million people nationwide, and generating $275 billion in annual revenue. *See* WEFA Group study, *Economic Impact, U.S. Direct and Interactive Marketing Today* from the Direct Marketing Association. Job growth in the industry is more than twice that of the overall national job growth average. With those kind of numbers, it is

obvious that US consumers are making use of the telephone to purchase goods and services, they enjoy having that option, and will continue to use it. Those numbers also suggest that the vast majority of telemarketing companies are operating legally, ethically and responsibly.

In the past, the benefits of telemarketing have been substantial in effect but somewhat limited in scope. In addition to providing consumers with access to goods or services at a low price, telemarketing has also provided employment opportunities for many individuals who may not be able to maintain more rigid employment. The flexible nature of the call center offers ideal employment opportunities for single moms, disabled individuals and students seeking to help pay for their tuition.

That being said, in recent years, the successful growth of the industry has expanded across the entire spectrum of the US population providing additional benefits to businesses, consumers and the economy. Nowadays, the telemarketing industry contains high numbers of college graduates and MBAs, most of whom are entrepreneurs looking for a cost effective way to market innovative products and services. These legitimate telemarketers face a competitive marketplace. They rely on the low overhead associated with telemarketing to introduce their products to consumers in a cost effective manner. In many instances, telemarketing is the only reasonable option for legitimate businesses with a new product or service to distribute those goods or services. These new startups compete with Fortune 500 companies on a daily basis for the attention and dollars of consumers.

Given the wide range of companies that use telemarketing as a tool of commerce, it is easy to see that any restrictions on legitimate telemarketing will ripple throughout the nation's economy. We are not just talking about telemarketing jobs that are at risk here. We are talking about a sizable impact on the overall growth of the US economy. For example, restricting the ability of telemarketers to make reasonable and viable contact with consumers will obviously cause a telemarketing company to need fewer callers, resulting in the layoff of employees. But the impact of these restrictions does not stop with those individual layoffs. With fewer calls being

made, comes fewer sales. Fewer sales will trickle down to the manufacturer of the goods or the provider of the services that are being telemarketed and result in either (1) a reduction in the number of goods or services needed to fulfill orders, thus costing jobs from the manufacturer and the service provider, or (2) a complete failure of the manufacturer or the service provider. In the latter case, not only do the employees of such a company suffer the consequences, but consumers will suffer as well. The satisfied customers of such a company will no longer be able to purchase the goods or services that they desire at a price that is competitive. Likewise, many consumers will be denied knowledge of the very existence of certain products and services that may be of interest to them.

Despite some of the rhetoric flowing around the telemarketing industry, there are not many other options for sellers. Telemarketing exists because it works. If it didn't, it is unlikely that most of the Fortune 500 companies in America would use it. It is the most effective (both cost effective and successful sales) means for many sellers to offer their products to consumers. Without it, companies cannot simply go to the Internet, direct mail, broadcast advertising, or some other means for contacting consumers. For larger companies, an effective ban on legitimate telemarketing, which some of the proposed amendments to the Rule would create, would result in a notable decrease in revenues. However, for those smaller independent businesses and their innovative products and ideas, without a viable telemarketing option, their businesses will fail and the chain reaction on the economy will be sizeable. This is significant, for as the Small Business Administration notes, there are "25 million small businesses in America that employ <u>more than half the country's private workforce, create 3 of every 4 new jobs, and generate a majority of American innovations</u>." Small Business Week Fact Sheet May 5 – 11, 2002 (emphasis added).

As a result of the importance of small businesses on the American economy and in response to the recent economic downturn in this country, government at all levels has been looking for ways to help the small business owner. Given this record of job creation, it makes good

economic sense and is sound public policy to promote the growth of such small businesses. The amendments to the Rule run contrary to all of these other growth initiatives. The FTC's proposed Rule will strike at the very core of the small business model and not only inhibit their growth, but threaten their very existence.

III. *LEGAL STANDARDS GOVERNING THE PROPOSED REGULATIONS*

The Act, 15 U.S.C. sec. 6101 *et. seq.*, requires the Commission to issue regulations prohibiting deceptive and abusive telemarketing practices. However, as the Commission is well aware, the Commission's authority to issue these regulations is not without limits. In particular, any regulations adopted by the Commission must: (1) be consistent with the language of the Act; (2) must not unduly infringe on First Amendment rights; and (3) must comply with the limitation imposed by the APA and the FTC Act. Many of the proposals offered by the Commission do not meet these standards.

A. The Rule Must Not Contravene The Limited Congressional Mandate Established By The Act.

An administrative agency's authority to promulgate regulations is limited to the authority delegated to it by Congress. Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988). An agency may not use its rulemaking authority to amend a statute or to insert something into the statute which is not already there, Iglesias v. United States, 848 F.2d 362, 366 (2d Cir. 1988), and any regulation inconsistent with the statutory mandate is invalid. Federal Election Comm'n v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 32 (1981). For example, in Public Citizen v. FTC, 869 F.2d 1541, 1553-56 (D.C. Cir. 1989), the court ruled that absent evidence that Congress intended to exempt

utilitarian items from the smokeless tobacco law's labeling requirements, a Commission rule which granted such an exemption exceeded the Commission's authority.

The Act does not give the Commission unfettered authority to promulgate regulations concerning telemarketing. Congress directed the Commission to accomplish only the following three objectives:

- To prescribe rules prohibiting deceptive telemarketing acts or practices, which may include acts or practices of entities or individuals that assist or facilitate deceptive telemarketing, including credit card laundering, 15 U.S.C. sec. 6102(a)(1), (2);

- To prescribe rules prohibiting abusive telemarketing acts or practices, including:
  1. a requirement that telemarketers may not undertake a pattern of unsolicited calls which the reasonable consumer would consider coercive or abusive of such consumer' right of privacy.
  2. Restrictions on the hours of the day and night when unsolicited telephone calls can be made to consumers; and
  3. A requirement that any person engaged in telemarketing for the sale of goods or services shall promptly and clearly disclose to the person receiving the call that the purpose of the call is to sell goods or services and make such other disclosures as the Commission deems appropriate, including the nature and price of the goods and service.

- To "consider" recordkeeping requirements.

Deceptive conduct is a material representation, omission, or practice that is likely to mislead consumers acting reasonably under the circumstances. Deception Policy Statement, reprinted in Cliffdal Assocs., Inc., 103 F.T.C. 110, 174-84 (1984). In contrast, it is clear that Congress did not intend "abusive" conduct to be synonymous with "unfair" acts or practices:

> In directing the FTC to prescribe rules prohibiting abusive telemarketing activities, it is not the intent of the Committee that telemarketing practices be considered per se "abusive." . . . Abusive practices could take the form of such clearly inappropriate practices as threats or intimidation, obscene or profane language, refusal to identify

> the calling party, or continuous or repeated ringing of the telephone or engagement of the called party in conversation with the intent to annoy, harass, or oppress any person at the called number. An abusive practice under this legislation could also take the form of a sales strategy of unsolicited telephone calls by a telemarketer where a pattern of calls could be considered by reasonable consumers to be coercive of a consumer's right to privacy.

House Comm. On Energy and Commerce, Consumer Protection Telemarketing Act, H.R. Rep. No. 20, 103d Cong., 1st Sess., at 4-5 (1993) ("House Report"). Specifically, Congress expressly stated its legislative intent that the Commission "draw upon its experience in enforcing standards established under the Fair Debt Collection Practices Act" in determining what is abusive. Id. At 8.

Additional guidance on what Congress considered to be abusive conduct is included in the Senate Report accompanying the Act. Senate Comm. On Commerce, Science, and Transp., Telemarketing and Consumer Fraud and Abuse Prevention Act, S. Rep. No. 103-80, 103d Cong. 1st Sess. (1993) ("Senate Report"). In particular, Congress required the FTC to consider several rules aimed at eliminating abusive conduct. Although the final Act did not direct the Commission to include each of the following items, they illustrate what Congress considered to be examples of abusive conduct. Specifically, Congress directed the Commission to consider, among other things, rules providing: (1) that goods or services be shipped within a stated time period; (2) specified hours during which unsolicited telemarketing calls can be made; (3) that the use of telemarketing calling equipment which does not permit consumers to terminate the call be prohibited; and (4) that telemarketers be required to maintain records of their activities. Senate Report at 8.

Accordingly, in considering conduct beyond those items that Congress expressly mandated the Commission to regulate as abusive, the Commission's proposals must be

consistent with the Congressional intent. As we will discuss in more detail below, several acts and practices that the Commission has proposed as abusive, clearly do not meet this test.

Further, Congress expressly recognized that legitimate telemarketing provides many benefits to consumers and businesses. Telemarketing is a cost-effective way for many legitimate businesses to reach potential customers. House Report at 2. In addition, telemarketing helps increases productivity and provides consumers increased convenience, lower costs, and a wider variety of choices. See 139 Cong. Rec. H 934 (daily ed. March 2, 1993) (statement of Rep. Oxley); see also 140 Cong. Rec. H 6161 (daily ed. July 25, 1994) (statement of Rep. Moorhead).

Congress was unequivocal that the aim of the legislation, and therefore the Commission's regulations, is to proscribe the activities of "boilerroom" operators, while leaving legitimate telemarketers' operations intact. To that end, the House Report stated:

> The Committee recognizes that legitimate telemarketing activities are ongoing in everyday business and may provide a useful service to both businesses and their customers. Regulating legitimate, mutually-beneficial activities is not the purpose of this legislation. Instead, the Committee has focused the legislation on unscrupulous activities from which no one benefits but the perpetrator. The legislation strikes an equitable balance between the interest of stopping deceptive (including fraudulent) and abusive telemarketing activities and not unduly burdening legitimate businesses. . . .
>
> The Committee is not interested in further regulating the legitimate telemarketing industry through this legislation. Rather the goal is to curtail any deceptive (including fraudulent) and abusive practices by specific telemarketers.

House Report at 2, 4, 9 (emphasis added); see also 140 Cong. Rec. H 6160 (daily ed. July 25, 1994) (statement of Rep. Swift); 139 Cong. Rec. H 933 (daily ed. Mar. 2, 1993) (statement of Rep. Smith).

Indeed, in the Senate, both the Committee report and floor debates are awash with references to fraud and boilerrooms. Moreover, both the Chairman of the Consumer Subcommittee and the Chairman of the full Commerce Committee indicated that the Act was intended to protect "consumers and legitimate businesses" from fraudulent telemarketers. 140 Cong. Rec. S 10269 (statement of Sen. Bryan), S 10270 (statement of Sen. Hollings) (emphasis added). Senator McCain, one of the original cosponsors of the legislation, observed that he had "stated repeatedly that this legislation is not directed at the legitimate telemarketing industry." 102 Cong. Rec. S 17193 (daily ed. Oct. 7, 1992). At the time of passage, he noted that the bill might "slightly increase redtape for businesses . . . ." 103 Cong. Rec. S 2795 (daily ed. Mar. 11, 1993) (emphasis added).

Accordingly, the Commission has an affirmative duty in promulgating revisions to the Rule to proscribe the conduct of boilerroom operators while carving out an area for legitimate telemarketers to conduct business. As will be more fully discussed in Sections III(B) and III(C) *infra*, if the Commission adopts the proposed Rule as it has been drafted, , The Rule will prohibit several entirely legitimate business practices simply because some unscrupulous operators have used them to commit fraud. The ATA further submits that the Rule goes far beyond the "slight" increase in redtape envisioned by the Act's sponsors.

B. **Provisions Of The Proposed Rule Revisions Will Have A Chilling Effect On Constitutionally Protected Speech.**

Both the United States Supreme Court and the FTC have recognized that "commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in a free enterprise system." Bates v. State Bar of Ariz., 433 U.S. 350, 364 (1977); Massachusetts Bd. Of Registration in Optometry, 110 F.T.C. 549, 604 (1988). For those reasons, commercial speech is protected by the First Amendment. Bates, 433 U.S. at 364. As a result, restrictions on commercial speech will be upheld only if there is a "reasonable fit" between the ends and the means chosen. Board of Trustees v. Fox, 492 U.S. 469, 480 (1989). A restriction is a "reasonable fit" only if it is narrowly tailored so that it does not "burden substantially more speech than is necessary to further the government's legitimate interest." Id. At 478 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989)); see also Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 472 (1988) ("rules that are designed to prevent the 'potential for deception and confusion . . . may be no broader than reasonably necessary to prevent the' perceived evil"). Because of the value of commercial speech, it is the would-be regulator who carries the burden of showing that the regulation is narrowly tailored. Shapero, 486 U.S. at 478.

For example, in FTC v. Brown & Williamson Tobacco Corp., 778 F.2d 35 (D.C. Cir. 1985), the District of Columbia Court of Appeals struck down an injunction against Brown & Williamson prohibiting them from advertising that their cigarettes contain only 1-2 mg. of tar without prior FTC approval. The court found the injunction to be overly broad because it prohibited Brown & Williamson from devising a new testing system and advertising the results, even if the advertisement contained a prominent disclaimer

regarding the test results. Id. At 45. Because the injunction prohibited even advertising that would not be deceptive, the injunction ran afoul of the First Amendment. Id. Likewise, some of the proposed revisions to the Rule, establishing a national do-not-call registry and requiring certain disclosures (discussed infra in Section IV) suffer from the same fatal flaw as the Brown & Williamson injunction – they are broader than necessary to achieve the goals of the Act and, therefore, unconstitutionally limit free speech.

Moreover, the Commission's "burden is not slight" to show that its regulations are sufficiently tailored to achieve their stated objective: "the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful." Ibanez v. Florida Bd. of Accountancy, -- U.S. --, 114 S.Ct. 2084, 2088-89 (1994) (quoting Zauderer v. Office of Disciplinary Counsel of Supreme Ct. of Ohio, 471 U.S. 626, 646 (1985)). Here, particularly with respect to the national Do-Not-Call list, while the Commission has a substantial interest in protecting consumers from deceptive and abusive telemarketing acts or practices, the Commission has not met its constitutional burden of regulating deceptive and abusive telemarketing speech without also capturing entirely truthful, nondeceptive, nonabusive commercial speech.

Furthermore, the Commission has the "burden to demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." Id. at 2090 (quoting Zauderer, 471 U.S. at 626 and Edenfield v. Fane, -- U.S. --, 113 S.Ct. 1792, 1800 (1993)). For example in Edenfield v. Fane, the court invalidated a Florida ordinance prohibiting certified public accountants from soliciting clients. While the court

recognized the state's interest in protecting consumers against fraud and overreaching by CPAs, nevertheless it held that an absolute prohibition was not reasonably designed to serve those interests where "truthful and nonmisleading expression will be snared along with fraudulent and deceptive commercial speech." Id. at 1799-1800.

Similarly, requiring additional disclosures simply because the seller has already discussed a different good or service is not in and of itself a deceptive or an abusive practice. If promulgated as proposed, "truthful and nonmisleading expression" will be unconstitutionally restricted.

Further, the potential for chilling truthful commercial speech is substantial in this rulemaking because civil penalties and enforcement by more than fifty-one independent enforcement authorities, as well as untold numbers of private parties (including any competitor who feels "adversely affected" by a technical rule violation), are directly at stake for first-time violations of the Rule. Legitimate telemarketers will be compelled to avoid conducting up-selling and cross-selling altogether rather than risk the sanction of civil penalties and multiple actions in a variety of jurisdictions and venues. In sum, unless certain provisions of the Rule as they relate to the do-not-call registry, up-selling and cross-selling, and certain disclosures are eliminated altogether, and other provisions of the Rule are significantly modified, these proposals will be struck down as violating the First Amendment.

C. Provisions Of The Rule Violate The Administrative Procedure Act And The Commission's Own Restrictions On Issuance Of Rules.

The Act (15 U.S.C. § 6102(b)) requires the Commission to prescribe rules in accordance with the notice and comment procedures set forth in the APA, 5 U.S.C. § 553,

and, as a result, in accordance with the substantive rulemaking requirements which ensue from § 553. Furthermore, with respect to provisions in the Rule that are not mandated by this special Act, the Commission must comply with all of the requirements of Section 18 of the FTC Act, 15 U.S.C. § 58.

In interpreting the rulemaking requirements of § 553 of the APA, Motor Vehicle Manuf. Ass'n v. State Farm Mutual Insurance Co., 463 U.S. 29, 43 (1983), holds that a rule must be predicated on substantial evidence in the record taken as a whole, i.e., factual and evidentiary support. Thus, Commission regulations will be struck down as arbitrary and capricious unless there is a rational connection between the facts found and the regulation adopted. Id.

For example, in Katherine Gibbs School v. FTC, 612 F.2d 658, 664 (2d Cir. 1979), the District of Columbia Court of Appeals struck down FTC regulations which required operators of trade schools to provide strict pro rata refunds to students who withdraw before completing courses. The Commission imposed this requirement in spite of the fact that it had not found that existing refund policies were either unfair or deceptive. Instead, the Commission imposed the requirement because it wanted to make it financially unattractive for trade schools to accept students who were unlikely to finish courses. The court found the requirement to be invalid because it could find "no rational connection between the Commission's universally applicable refund requirements and the prevention of specifically described unfair and deceptive enrollment practices." Id. Similarly, the Commission's proposal to create a national Do-Not-Call registry fails to provide any facts as evidence of a rational connection between the proposed regulation and any unfair, deceptive or abusive practices. In fact, the Commission has presented no

evidence other than some general anecdotal evidence provided by a small handful of citizens that suggests the current company specific Do-Not-Call regulations are flawed.

Commission regulations also must be based on "substantial evidence in the record taken as a whole." Id. (quoting H.R. Rep. No. 93-1107, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S. Code Cong. & Admin. News at 7702, 7729). This high standard was imposed by Congress as a procedural safeguard because of the "potentially pervasive and deep effect" of Commission regulations. FTC Credit Practices Rule, Statement of Basis and Purpose and Regulatory Analysis, 49 Fed. Reg. 7740, 7742 (March 1, 1984) (quoting American Optometric Ass'n v. FTC, 626 F.2d 896, 905 (D.C. Cir. 1980)).

Regulations that are based on faulty or inadequate data cannot withstand judicial scrutiny. American Optometric Ass'n, 626 F.2d at 911-13 (rule based on only "scant evidence" declared invalid); Almay, Inc. v. Califano, 569 F.2d 674, 682-83 (D.C. Cir. 1977) (FDA regulation based on flawed consumer survey stricken); Lloyd Noland Hosp. & Clinic v. Heckler, 762 F.2d 1561, 1568 (11th Cir. 19850 (regulation based on study with sample size too small to justify assumptions was stricken). In this proposed rulemaking, the FTC has provided no data to justify its actions. Even if the Commission had provided data, it is likely that such data would not support the Commission's proposed actions. In fact a careful review of the data available to the public suggests just the opposite. That is, that there is no need for a national Do-Not-Call registry. Do-Not-Call complaints do not even show up on the Commission's list of top consumer complaints. Further, since the Rule went into effect in 1996, telemarketing complaints have dropped considerably according to the Commission. Such data would seem to suggest that there is no rational reason for revising the Rule at all.

Moreover, particularly with respect to the Rule's provisions that are not mandated or authorized by the Act, the FTC Act requires that the acts or practices that are subject to the rulemaking be "prevalent." Prevalence will be found if the Commission has issued cease and desist orders regarding such acts or practices, or if any other information available to the Commission indicates a widespread pattern of unfair or deceptive acts or practices. 15 U.S.C. § 53(b)(3). Thus, the Commission must examine the particular practices it seeks to regulate; it cannot justify all provisions on the grounds that fraud, in general, is prevalent. Again, the lack of significant data showing Do-Not-Call complaints as a prevalent problem will render the proposed rule revision constitutionally invalid. The complete lack of enforcement actions brought by the Commission in recent years underscores the problems the Commission will have in defending this proposal. Again, what little data the Commission did provide in the NPRM does not support the proposed Rule. The Commission's numbers suggesting that telemarketers make 9 billion phone calls annually provides ample evidence that the Commission has no data to support its contention that unwanted sales calls are a widespread problem. Given the 100 million households in this country, if the industry is making 9 billion calls every year, the average household in America would receive approximately 1.7 calls per week. Even assuming that every call was unwanted (an assumption that cannot be made given the number of satisfactory transactions completed through telemarketing each year), it is hard to see how 1.7 calls per week establishes a prevalent problem.

IV. *SPECIFIC PROVISIONS OF THE PROPOSED RULE*

A.) The Commission Should Not Amend The Definition Of "Outbound Telephone Call".

Section 310.2(n) of the proposed Rule defines telemarketing as "a telephone call initiated by a telemarketer to induce the purchase of goods or services. In the proposed revisions to the Rule, the Commission has expanded the Act's limited definition of telemarketing to include certain inbound calls and additional solicitations. Specifically, the Commission has broadened the definition of telemarketing to include "(i) when in the course of a single call, a consumer or donor is transferred from one telemarketer soliciting one purchase or charitable contribution to a different telemarketer soliciting a different purchase or contribution, such as in the case of up-selling; or (ii) when a single telemarketer solicits purchases or contributions on behalf of two separate sellers or charitable organizations (or some combination of the two)." This proposed language goes beyond the statutory definition of telemarketing.

By expanding the scope of activities beyond what the Act expressly provides, the Commission has ignored Congress's mandate of tailoring the scope of activities under the Rule to target deceptive and abusive telemarketing conduct without also unduly regulating legitimate activities. To the extent that the Rule precludes legitimate telemarketers' activities along with deceptive and abusive conduct, the scope of the Rule must be narrowed.

The Rule should strictly regulate only deceptive and abusive practices. These practices are readily distinguishable from legitimate activities. For example, an outbound call in which the consumer is solicited for a particular product or service and is then transferred to another unrelated telemarketer under the guise of verification or

confirmation, cannot be painted with the same broad brush as an outbound call where the original telemarketer, upon completing the original sales presentation, asks the consumer if they would be interested in hearing about an additional good or service from a different seller and identifies that seller by name. Consumer injury is not likely to occur when consumers knowingly and willingly agree to be transferred to another seller.

Likewise, using the same scenario except the original call is generated by an inbound call to the telemarketer, consumer injury is unlikely to occur when the consumers have voluntarily called an 800 number expecting to be solicited and are solicited.

Up-sells and cross-sells in and of themselves are not deceptive or abusive. The problems associated with such practices are the fraudulent use of such business practices. Such practices are already prohibited by the Act and the FTC Act. Thus the proposed revision to Section 310.2(n) (proposed 310.2(r)) seeks to regulate an entirely legitimate business practice simply because a small percentage of marketers abuse the practice and a small number of consumers may be confused. The Commission should refrain from redefining "Outbound Telephone Call" and rather, should revise the Rule to provide an additional disclosure and consent requirement for transferring customers from one seller to the next.

B.) Special Regulation Of Preacquired Account Information Is Unwarranted

The Act, Congress does not single out telemarketing using preacquired account information as a particularly deceptive or abusive telemarketing practice. In fact, the Act does not mention preacquired information at all. As noted above, when reviewing the legislative history of the Act, it is clear that the focus of Congress was on boilerroom activities. Marketing goods and services using preacquired account information is not a

practice restricted to boilerrooms. There is nothing inherently fraudulent, abusive or deceitful in using preacquired account information to provide a shorter, easier transaction for consumers. In fact, it is a practice used by much of the legitimate business world in both telemarketing and non-telemarketing transactions. For instance, many airline reservation programs are now conducted over the Internet. Most of these airlines offer consumers the ease of keeping their payment information stored in a secure area to make the purchase of tickets easier and quicker. Sometimes these airlines will share information with their partner airlines to ease billing for customers. Accordingly, any regulations adopted by the Commission should appropriately target only the fraudulent and abusive conduct of the boilerrooms , while preserving the ability of legitimate telemarketers to employ this legal and ethical business practice.

That being said, the ATA recognizes that there have been abusive telemarketing schemes perpetrated using preacquired account information, and the incidence of these schemes may be unacceptably high. However, the record presented by the Commission in this NPRM indicates that these are primarily the unfortunate creation of a group of boilerroom telemarketers who represent an increasingly small percentage of the overall telemarketing universe, and are, therefore, not representative of the manner in which legitimate telemarketers conduct their business. As such, while the Commission is rightly concerned about how to protect consumers from such reprehensible practices, the proposed revisions to the Rule must be careful not to prohibit or unduly restrict lawful telemarketing practices conducted by legitimate telemarketers. Prohibiting the use of preacquired account information in legitimate telemarketing transactions would do just that. It would unduly restrict legitimate business practices. In contrast, a revision to the

Rule prohibiting the fraudulent use of preacquired account information would provide the Commission with an appropriate means to halt such deceptive and abusive practices. To achieve such a goal, the ATA supports the guidelines adopted by the Electronic Retailing Association ("ERA") regarding the use of preacquired account information. These guidelines provide consumers a clear understanding of what information is already held by the telemarketer and if used properly, should eliminate consumer confusion in the marketplace.

C.) Additional Cumbersome Regulation Creating A National Do-Not-Call Registry Exceeds The Commission's Authority And Is Unnecessary Under The Existing Structure of Federal, State And Industry Regulation.

1. The Proposed Registry Is Unconstitutional

The Commission's proposed amendment to section 310.4(b)(1)(iii)(B) of the Rule, would create a National Do-Not-Call registry for consumers who do not wish to receive telemarketing calls. The registry, as proposed, "would enable consumers to contact one centralized registry to effectuate their desire not to receive telemarketing calls.

As noted earlier in these comments, the creation of the proposed DNC registry would violate the limited statutory mandate granted the Commission by Congress through the Act. In addition to those constitutional deficiencies noted earlier, the proposed Do-Not-Call registry also infringes on Congress' specific grant of authority to the Federal Communications Commission ("FCC") to establish such a registry. It is a long-standing government principal that one agency may not assume the duties or responsibilities of another without a specific grant of authority from Congress. H.R. Rep. No. 79-1980 (1946), reprinted in U.S. Gov't Administrative Procedure Act: Legislative History, S.

Doc. No. 79-248, at 233, 274 –75 (1946) ("[N]o agency may undertake directly or indirectly to exercise the functions of some other agency. The section confines each agency to the jurisdiction delegated to it by law. . . . ."). As the Commission is most certainly aware, the Telephone Consumer Protection Act ("TCPA") expressly authorizes the FCC to prescribe regulations requiring the establishment and operation of a "single national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations." 47 U.S.C. § 227(c)(3). While the Commission has tried to justify the creation of this registry by asserting that the registry would, "directly advances the [TSA]'s goal to protect consumers' privacy, " it is clear that such a registry exceeds the limited grant of authority given the Commission by Congress. Nowhere in the Act do you find the words "Do-Not-Call", "registry", "database" or "list". And yet, as noted above, not just the concept, but language stating nearly the exact same words exist in the TCPA. Since the Act went into effect nearly five years after the TCPA, it is clear that if Congress had intended the Commission to have the authority to establish such a registry, then Congress would have used the same language contained in the TCPA's grant of authority to the FCC. Since those words do not exist in the Act, it is clear that the FCC is the only federal agency granted the authority to create a national Do-Not-Call registry. As such, the Commission's proposed amendment cannot withstand constitutional scrutiny.

2. Given Industry's Own Efforts To Address The Issue Of Unwanted Calls And The Current Federal And State Regulatory Environment The Proposed Registry Is Unnecessary

The telemarketing industry certainly recognizes the problems resulting from unwanted calls to consumers. It is an issue not only addressing consumer privacy as the Commission asserts, but sound business practices as well. As the Commission is certainly aware, the telemarketing industry is a unique industry. The primary expenses of the business are determined by the time spent on the telephone. A company is often measured by an amount of dollars generated per telephone or per chair. The single greatest predictor of failure in the industry is low per chair production. And the single greatest contributor to low per chair production is spending time on the telephone with people who don't want to talk to you. Thus the industry goes to great lengths to target only those consumers who are likely purchasers of their products. The successful telemarketer is the business that talks to the fewest uninterested parties. Consequently, it is in the industry's best interests to keep a detailed "Do-Not-Call" list. Not only does it make sense for a company's bottom line, but it also increases morale and production among the sales force if they are not talking to hundreds of people who say "No" at the beginning of the call. Thus, the industry has taken voluntary steps to achieve the dual purposes of protecting consumer privacy while maintaining effective and responsible business practices. The Direct Marketing Association's Telephone Preference Service (TPS) is one of the most visible examples of American industry (any industry, not just the telemarketing industry) taking steps on their own to remedy a perceived problem. The TPS accomplishes all of the goals set forth by the Commission in its proposal to create a national Do-Not-Call registry. It provides a one-stop, free and easy method for consumers to avoid receiving unwanted telemarketing calls. The TPS is exactly what the Commission intends to create by its proposed amendment to section 310.4(b)(1)(iii)(B) of

the Rule. Rather than reinvent the wheel, costing taxpayers millions of dollars in creating a redundant national Do-Not-Call registry, the Commission should look for a way to work with industry to make the TPS "the national Do-Not-Call list."

Additionally, the current company specific "Do-Not-Call" requirements of the TCPA and the Rule are the best way to empower consumers to make their own decisions regarding which calls they will accept and which calls are considered "unwanted". For consumers who do not want to receive calls, all they have to do is tell the telemarketer up front. However, for those consumers who want to receive calls or really only want to receive certain types of calls, the existing federal rules allow them the freedom to determine which calls they will accept and prohibits those calls they won't.

This is an area that, a consumers who is aware of his/her rights, is the best equipped to keep unwanted telemarketers out of their home. No government agency or program can or will be as effective as an informed consumer with specific recourse against companies that violate the law.

Additionally both the TCPA and the Rule allow state attorney general's office to go after a caller from outside the state who has been ignoring the do-not-call requests of consumers in their state. This cross-border enforcement strategy creates a national blanket of protection for consumers. No longer can these unethical businesses escape prosecution by simply picking up their operations and moving them to another state. It is this borderless regulation that supplies the real teeth to the Rule. These teeth make additional regulation and restrictions, like those proposed by the Commission redundant, unnecessary, and overly burdensome.

These existing national measures, coupled with the explosive growth in state sponsored Do-Not-Call lists, eliminates the need for a Commission sponsored registry. The Commission is surely aware that there are currently 21 states (AL, AK, AR, CA, CO, CT, FL, GA, ID, IN, KY, LA, ME, MO, NY, OR, PA, TN, TX, WI and WY) that have established their own state specific Do-Not-Call registries. Unlike the proposed Commission registry, it is currently the position of the states that have such registries, that the state registries can be enforced against both intrastate and interstate marketers. While the ATA vehemently disagrees with that position, the simple fact is that several states have attempted to bring enforcement actions against interstate marketers, thereby providing the citizens of these states with equal if not greater protection than the Commission registry could. How can the Commission justify spending the time and money necessary to create such a list, when it will not add any protection or provide any additional benefit to a group of citizens that represent more than half this country's population?

The current Administration occupying the White House and the current majority in the House of Representatives was elected in part on a message of devolution. This message, which believes in trusting the states to do what is right for their citizens, is based on the sound principle that those closest to the people are best equipped to determine how to solve their most pressing problems. Clearly, the citizens in these 21 states have voiced their concerns to their elected officials and those officials have responded in a way that is deemed best for that particular state. That is why there is no uniform state Do-Not-Call law. Each of these 21 states has looked at its citizens, its business climate and its limited resources and enacted legislation that makes sense at

home. For example, many states have determined that calls by licensed insurance agents and real estate agents are not really the same as telemarketing calls and have exempted them from their state restrictions. Likewise, some states have attempted to carve out restrictions for small businesses that make local calls. These are clear examples of states looking at their particular business environment and the concerns of their citizens and adopting a balanced approach to the problem. The states clearly offer consumers the most efficient means to block unwanted calls. There is no way the Commission can be as flexible as each state, and thus there is no way the Commission can be as effective. That fact alone should cause the Commission to abandon its plans for a national registry.

3. The Cost Of Establishing And Maintaining The Proposed Do Not Call Registry Far Exceeds Any Potential Benefits.

As noted earlier in these comments, the costs associated with many of the proposed amendments to the Rule dictate a different approach by the Commission when promulgating its final version of the Rule. Nowhere is that more evident than the proposed Do-Not-Call registry. When considering the creation of a similar database back in 1991, (pursuant to the TCPA), the FCC estimated that it would cost a federal agency in the neighborhood of $20 million - $80 million to get such a program up and running, with annual costs of $20 million to maintain the database and administer the program. While the ATA is aware that the Commission believes it can establish its list for significantly less than the figures estimated by the FCC, the ATA respectfully submits that the Commission is taking a wholly unrealistic approach to such a belief. The Commission's opinion appears to be based on the mistaken idea that the list can be established and maintained without significant human involvement. The Commission appears to base its

cost estimates on a proposal using an entirely automated system to log consumers who want their name placed on the database. Given the information available at this time, it appears unlikely that the Commission can establish such a system. The Commission itself has noted the problems associated with the ANI capture system, in an enforcement action brought by the Commission in 1998 against International Telemedia Associates, (a billing aggregator for Online Consulting Group, a dating service). FTC v. International Telemedia Associates, 1 98-CV-1935. In this action, the Commission alleged that International Telemedia Associates had engaged in unfair and deceptive trade practices because it captured ANI information from consumers who called a toll free number and used that ANI information to bill the subscriber to that line. In a press release from the Commission discussing the nature of the complaint, the Commission noted:

> "ANI technology identifies the *telephone number* from which the call originates, but cannot identify the *caller*, and cannot determine whether a caller is the line subscriber for the line from which the call originates. Because of the shortcomings of ANI as a basis for billing, in numerous instances, ITA caused line subscribers to be charged on their phone bills for Online services ordered and received by someone else using their telephone without authorization. **Legally, this is as indefensible as it would be for any other retailer to bill a line subscriber for goods or services delivered to some other caller's house simply because the caller used the line subscriber's telephone to place the order**." (emphasis added).

The limitations and legal infirmities of using ANI information to bill consumers for goods or services exists to the same degree in using that information as the sole means for registering individuals for the list. It will be impossible for the Commission to ensure that the party calling the Commission to register for the Do-Not-Call database is in fact the line subscriber. Likewise, the legal legitimacy of such a list would be called into question at every claim of a violation. In short, the Commission's own position may

undermine the legitimacy of the registry. Clearly the Commission will have to provide consumers with an additional option for registering with the Do-Not-Call database. These additional options will all result in a significant increase in the costs required to create and maintain the registry.

Even giving the Commission the benefit of the doubt, that somehow, some way, a national registry that would be available to all Americans can be created using an entirely automated system, there are still many factors in the proposal that cannot be automated. For example, the Commission's proposal to allow consumer's to pick and choose which companies they will accept calls from and which companies must cease from calling cannot be an automated system. Just using the ATA's membership database as a barometer shows the inherent flaws in the Commission's proposal. With more than 2,500 businessmen and women holding membership in the ATA, consumers obviously have an incredible number of options available to them if the want to choose certain telemarketers who can call them. If the Commission is serious about establishing the all automated system, each one of the thousands of telemarketing companies would have to have a separate database entry and a corresponding touch-tone number to log a consumer's request. It is impossible to think of the system that provides real choice to consumers and yet does not require additional human interaction with the consumer to determine which companies they would like to hear from. Again, once you start adding people to the proposal, it is likely that the costs associated with the program will skyrocket.

In addition to the substantial costs associated with creating and maintaining the list, the costs associated with investigation and enforcement will be in the 10's of millions as well. A recent Washington Post article, (see "FTC Anti-Telemarketer List Would Face

Heavy Demand", Washington Post, March 19, 2002, Pg. A-7) discussing the proposed list, quoted Missouri Attorney General Jeremiah "Jay" Nixon stating that his office had appointed 38 attorneys to investigate Do-Not-Call complaints. This in a state with approximately 2 million total households and approximately 920,000 households on the state list. If these numbers hold for the national list, there would be in the neighborhood of 60 million households on the national Do-Not-Call registry. Using the Missouri numbers and the corresponding percentages at the national level, that would result in the Commission appointing approximately 2400 attorneys to handle this mountain of paperwork. At an average salary of $50,000 per year for an attorney, it would cost the Commission more than $120 million dollars just in lawyer's salaries. We are all well aware that the President of the United States has made job creation a primary focal point of his domestic agenda, but it is a safe bet that he has not been talking about lawyer jobs during all those speeches. Once again, the ATA respectfully submits that the Commission is taking an unrealistic approach to these matters if it believes that it can establish and maintain this national registry for less than the $20 million per year that FCC concluded was necessary. Times have changed since 1991, but they haven't changed that much.

4. **The Commission Must Make Substantial Revisions To The Proposed Do-Not-Call Registry**.

Even if the Commission were to have the statutory authority to establish such a national registry, there are several substantive matters that must be addressed prior to creating the list. If the Commission adopts the proposed amendment to create a national DNC registry, the ATA urges the Commission to consider the following key provisions:

- The Commission registry must preempt the existing state registries. The cumulative burden associated with purchasing 50 state do-not-call registries, the Commission registry and maintaining an in-house registry would place an enormous financial and administrative strain on companies. The administrative nightmare of trying to integrate all of these DNC registries into one calling database and then determine which calls can be made and which are prohibited (for example, is the call an intrastate call with a DNC list that exempts established business relationships) will ultimately lead to consumer confusion and more industry violations that are the result of human error.
- The Commission must charge consumers a nominal annual fee (no more than $1) for inclusion on the list. This nominal fee will maintain the integrity of the registry by ensuring that only those consumers who want to be placed on the list will in fact be included in the registry. Additionally, the annual renewal will maintain the integrity with regard to the transient nature of our society. Given the frequency with which Americans relocate these days, the Commission cannot support including a name on a list for any extended period of time. An annual renewal period strikes an appropriate balance.
- The registry must provide for an exemption for calls made to consumers with whom the company has an established business relationship. A consumer who has purchased or inquired about a purchase from a particular business, has obviously indicated some interest in the particular products or services offered by that business and such calls should not be lumped with cold calls to consumers.

V.) *REQUESTS FOR COMMENT*

A.) Calls Made To Consumers Without A Live Operator Are Not A Violation Of The Rule

In addition to the proposed amendments to the Rule, the Commission has requested information on several other aspects of the telemarketing industry. Of particular interest to the ATA is the Commission's request for comments regarding the use of predictive dialers and the alleged problems with calls made to consumers where no operator is available to connect to the call. In the NPRM, the Commission has announced a newfound position that "Telemarketers who abandon calls are violating §310.4(d) of the Telemarketing Sales Rule." While this outlook is certainly new to the industry, it appears that the Commission is imposing its new position on the basis that any call which is

disconnected prior to a live operator fails to make the necessary disclosures required by §310.4(d) of the Rule and is thus in violation. In addition to the obvious concerns this raises within the ATA, the Association also believes that this new position is not supported by the language of the Act or the Rule.

First, the disclosure requirements of Section 310.4(d) of the Rule apply only to outbound telephone calls, which are defined as telephone calls initiated by a telemarketer "to induce the purchase of goods or services." At no time during a call that is ultimately abandoned by the telemarketer, does the caller ever attempt to induce the purchase of goods or services. It is only in those situations where a live operator actually connects with the consumer and has an opportunity to engage the consumer in conversation that an effort to "induce the purchase of goods or services" takes place. Thus with an abandoned call, there is no outbound telephone call and thus the call never comes under the auspices of the Rule.

Moreover, while the Commission states that this is simply a clarification of a position that has been in place over the life of the Rule, it is clear that this is in fact a new approach by the Commission. The Commission has repeatedly acknowledged the use of predictive dialers over the past six years. Additionally, on its own website, the Commission touts the many enforcement actions that have been brought against telemarketers under the Rule. It is no secret that many of these enforcement actions have been brought against companies that have been using predictive dialers and in most if not all instances, those companies have been abandoning calls at some rate. If it was the Commission's long standing position that an abandoned call did, in fact, constitute a violation of the Rule, why has the Commission not raised such a violation in any of the

many enforcement actions brought under the Rule. This approach to abandoned calls violates the Commission's own procedures for issuing rules. If the Commission is intent on addressing the issue of abandonment rates for predictive dialers, the issue should be presented in the NPRM and open for comment.

B.) A Zero Abandonment Rate Should Not Be Imposed On The Use of Predictive Dialers

In the NPRM, the Commission cited concerns about the use of predictive dialers causing consumer frustration and inconvenience and, further, that when a predictive dialer disconnects a call without an operator coming on the line there is no way for the consumer to determine from whom the call originated and thus to whom he or she should direct a Do Not Call request. As the Commission itself notes, predictive dialers are not a new phenomenon, but rather have been used by telemarketers for over a decade. These devices create significant efficiencies for telemarketers in terms of operator productivity by automatically dialing the consumer's telephone number (rather than having a live operator dial the number manually) at a rate designed to minimize operator down time and maximize the number of consumers that a particular operator can speak with during a specific time period.

As noted above, it is well documented, (and acknowledged by the Commission), that autodialing technology provides great benefit to both the users of such technology and the public that receives calls made by such technology. In addition to the benefits provided private business, government agencies have also achieved notable results through the use of a dialer. A recent (December 1999) study by the State of Oregon

(attached as Exhibit B) provides a detailed description of the number of states that use predictive dialer technology to increase the efficiency of many essential government functions. The study paints a clear picture of the benefits predictive dialers provide to both users and consumers alike. In particular, the study notes:

- How autodialing technology has allowed various state revenue departments to increase the efficiency in which they collect delinquent tax dollars. The use of dialers has allowed state governments to achieve an important state goal, i.e. accomplishing more with fewer resources available;
- How autodialing technology contributed to a 49% increase in collection of defaulted student loans by the Oregon State Scholarship Commission;
- A Connecticut observation that recommends having "twice as many phone lines as agents", a situation that will ultimately lead to calls in which no agent is available for the called party;
- A Florida observation that notes the increased efficiencies and benefits for consumers in that it allows more timely follow-up on accounts;
- An endorsement from Kansas which notes the tremendous advantage in management control that is gained through the dialer. It allows the user to tailor calling campaigns, track work schedules and generate real time reports and information to allow the most efficient use of the users resources. It also provides users with real-time information to track how "workflow is impacting your customers" which allows users to make necessary adjustments to provide better and more effective customer service, which translates into happier consumers;

Nearly every commentator (state) surveyed by the State of Oregon noted the increased efficiency in handling customer service matters. These increased efficiencies certainly provide a benefit to the organization/agency/business that is using the dialer, but it also provides benefits to the consumers in the form of better customer service and less time involved on the telephone. These workplace efficiencies are quantifiable data that cannot be ignored by the Commission. Nor can the Commission use anecdotal evidence and the hyperbole offered by some groups to overcome the empirical data that this study provides.

If the benefits of predictive dialer technology are sufficient for government use, there is nothing inherently different or more disturbing about their use by private industry. The perceived harm has nothing to do with the user of the device nor with the message that is being communicated to the general public.

That being said, the ATA acknowledges that there are concerns raised when companies abuse the dialer. It is and always has been the ATA's position that telemarketers should utilize the lowest possible abandonment rate to achieve their calling campaign's objectives. Recognizing that every calling campaign and every business is different, the ATA does not advocate nor does it support a minimum abandonment rate. As such, the ATA is opposed to any regulation or legislation, which would mandate a zero abandonment rate.

A mandatory zero abandonment rate would add significant costs to telemarketers. In addition to the costs that a telemarketer must absorb through the loss of efficiencies that predictive dialers provide, businesses would also be forced to spend substantial sums to upgrade their technology to achieve a zero abandonment rate. That is based on the supposition that companies could achieve such a rate. An informal survey of our members and the manufacturers of predictive dialing equipment has found that not all predictive dialer equipment has the technological capability of achieving a zero abandonment rate. This would obviously force industry to expend significant resources to upgrade their technology, both hardware and software. This type of expenditure would force many small businesses, already operating on razor thin margins, to shut their doors. Again, enacting regulations with such a dramatic effect on small businesses is not

consistent with either the economic policies of this country or the congressional mandate of the Act.

As noted above, the ATA acknowledges that there are problems with companies that use the dialing technology irresponsibly. However, simply mandating a zero abandonment rate is unlikely to stop the abusive practices of a few bad actors. Given the difficulty in determining exactly who placed an abandoned call, it is unlikely that the truly abusive practitioners will make any efforts to comply with the Rule. Once again leaving consumers and legitimate businesses to bear the burden of the regulation.

Additionally, simply mandating an acceptable, non-zero abandonment rate is not sufficient either without additional discussion. Of primary importance is defining what the Commission considers an abandoned call. No matter what setting a company may use for its dialer, even if it is a zero percent abandonment rate, there will always be some slight lag time between the time the call is connected to the consumer and the time the live agent connects with the call. That is the nature of the dialer. While this time period is very small, it is conceivable that consumers, not hearing a voice immediately upon picking up the telephone, may disconnect the call themselves by hanging up. Such a situation cannot be considered an "abandoned" call.

Another key factor for the Commission to consider will be the time frame in which calls will be reviewed for compliance. Abandonment rates are not a static number. The rates obtained using the dialer will vary significantly based on a number of factors, (including the time of day the call is placed, number of operators available, number of telephone lines employed by the call center and other factors). As such, any measurement of abandonment rates cannot be viewed as a snapshot in time. Rather the review must be over a broad period of time so that the entire nature of the calling campaign may be viewed as a whole.

Conclusion

While these comments highlight significant concerns of the ATA and the constitutional, economic and procedural problems with the proposed Rule, the ATA does believe that the proposed Rule can be amended to reach a satisfactory balance. The ATA, its Board of Directors and many of its individual members have a long standing commitment of cooperation with the Commission, and the ATA looks forward to continuing this relationship and working with the Commission to remedy these problems.

Respectfully Submitted:

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