BEFORE THE FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

In the Matter of:
Telemarketing Review - Comment FTC File No. R411001

COMMENTS AND RECOMMENDATIONS OF THE ATTORNEYS GENERAL OF ALABAMA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, NORTHERN MARIANA ISLANDS, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, PUERTO RICO, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, VIRGIN ISLANDS, VIRGINIA, WASHINGTON, WEST VIRGINIA, WISCONSIN, WYOMING, THE CORPORATION COUNSEL OF THE DISTRICT OF COLUMBIA, AND THE HAWAII OFFICE OF CONSUMER PROTECTION

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Comments and Recommendations of the Attorneys General

I. Introduction

We the undersigned Attorneys General submit these Comments in connection with the Federal Trade Commission's review of its Telemarketing Sales Rule (hereinafter the "Rule"), promulgated under the Telemarketing and Consumer Fraud and Abuse Prevention Act of 1994 ("Telemarketing Act of 1994") and its Notice of Proposed Rule Making issued on January 22, 2002.

The Attorneys General wish to acknowledge the Commission's important work on behalf of consumers in the area of telemarketing since it initially promulgated the Telemarketing Sales Rule in 1995 and its continuing efforts to address the pervasive and complex problems caused by telemarketing abuse and fraud. The Commission's staff deserve special recognition for continuing to design and help coordinate joint enforcement efforts between the Commission and the Attorneys General, including coordinated investigations, enforcement "sweeps," and joint educational efforts.

In May, 2000, the Attorneys General submitted Comments as the Commission began its review of the Rule. In those Comments we emphasized the importance of the Rule to law enforcement in the area of telemarketing, where many practices affect consumers nationwide, and the need for the Rule to adapt to changing technology in this rapidly changing industry. We also addressed several areas in which we encouraged the Commission to make modifications to the Rule. We are pleased that the Commission has chosen to address a number of these areas.

The purpose of these Comments is to address several of the provisions of the proposed Rule, to respond to the specific questions raised by the Commission in its Notice of Proposed Rule Making ("NPRM"), to express support for many of the proposed modifications, and to offer suggestions as to how certain proposed modifications might be improved for the benefit of both consumers and law enforcement. Because of the magnitude and importance of the Commission's proposal for a national Do Not Call registry, our Comments first address §310.4(b) of the Rule. Secondly, we address modifications relating to the use of preacquired account information and several other proposed modifications in §310.4. These Comments will then address proposed changes regarding coverage of charitable fund raisers, additional disclosures, coverage of third parties who provide essential assistance to fraudulent telemarketers, and exemptions to the Rule's coverage.

As enforcement partners of the Commission, the Attorneys General support the efforts of the Commission to improve upon the protections the Rule provides for consumers. We urge the Commission to continue to keep the interests of consumers paramount as it considers these and other Comments, and we look forward to further cooperative efforts to protect our citizens from fraud and to preserve their right to privacy in their homes in accordance with the purpose of the Telemarketing Act of 1994.

II. <u>Proposal of a No Call Registry (§310.4(b)(iii)(B)</u>:

> The Court has traditionally respected the right of a householder to bar, by order or notice, solicitors, hawkers, and peddlers from his property. . . . To hold less would tend to license a form of trespass and would hardly make more sense than to say that a radio or television viewer may not twist the dial to cut off an offensive or boring communication and thus bar its entering his home. . . . The ancient concept that "a man's home is his castle" into which "not even the king may enter" has lost none of its vitality, and none of the recognized exceptions includes any right to communicate offensively with another.

Rowan v. United States Post Office, 397 U.S. 728, 737 (1970) (internal citations omitted).

Unwanted telemarketing calls interrupt the private lives of millions of Americans. The Attorneys General applaud the Commission for correctly describing and attempting to address the public outcry for improved protection against these abusive and pervasive intrusions into citizens' homes by uninvited telemarketers. Since the late 1980's, when several states began studying these problems, state legislatures have responded to the increasing demand for privacy by enacting their own Do Not Call legislation. Most recent legislation creates centralized registries (*e.g.*, a "No Call List") in which citizens may register their home telephone numbers, and, once done, bars telemarketers from placing calls to those registered numbers. Today, 16 states have No Call database systems in place, and an additional five states are presently implementing systems.[1] More state legislatures have been considering such systems during the current session.[2] Public support of these No Call database systems has been overwhelming, and with good reason: they work.[3]

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[1] Alabama, Arkansas, Connecticut, Florida, Georgia, Idaho, Indiana, Kentucky, Maine, Missouri, New Jersey, New York, Oregon, Tennessee, Texas, and Wyoming have No Call database systems in effect; California, Colorado, Louisiana, Pennsylvania, and Wisconsin are presently implementing database systems.

[2] Legislation proposing No Call database systems has been offered during the current legislative sessions in Alaska, Arizona, Iowa, Illinois, Kansas, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, Ohio, Oklahoma, Rhode Island, South Dakota, and Washington.

[3] The Commission observed the initial astounding public response to the opportunity to the registry proposal in its NPRM. Public enthusiasm shows no sign of waning. For example, in the State of Indiana, more than 1,000,000 residential telephone numbers have been submitted to the State's No Call List; in Missouri, 921,701 residential telephone numbers are now enrolled in the State's No Call database, placing approximately 40% of the State's households on that State's No Call List; in Tennessee, 678,756 telephone numbers have been registered, representing an estimated 35% of all households; in New York the number of residential telephone numbers enrolled on that State's No Call List is nearly 2 million. Connecticut's No Call List contains nearly 400,000

In each state that has enacted a No Call database system, and in many states now considering such a measure, some members of the telemarketing industry have attempted to erect barriers and raise obstacles to thwart the enactment of such a system or to reduce its effectiveness. The Commission has correctly identified this issue as one of consumer privacy. The ability to keep uninvited marketers out of one's home is an issue of consumer sovereignty and autonomy -- as fundamental as the ability to ward off door-to-door peddlers with a "No Trespassing Sign."[4] No marketer has an inalienable right under the First Amendment, or any law, to intrude when uninvited -- or when expressly forbidden -- into the kitchens and living rooms of American families.[5]

Under the company-specific notification system currently required by the Telemarketing Sales Rule, every marketer engaged in telemarketing remains able to call any household *unless and until* the telemarketer is directly told by that consumer not to call again. Thus, consumers currently may be interrupted at least once from their private lives by every telemarketing seller in the country. Consumers are placed at the terrific disadvantage of often not knowing the identity of telemarketers and whether they represent the same company, or a similar-sounding company, as the telemarketer to whom they may have given notice the month before. This system has proven inadequate because it leaves the consumer entirely dependent on telemarketers to identify their business meaningfully, to interpret the consumer's request that they not be called again correctly, and then to comply with that request.[6] The creation of No Call databases empowers consumers to choose, *in advance*, whether they wish to receive these contacts in their homes.

The Attorneys General first brought the inadequacies of the company-specific approach to the Commission's attention when it initially proposed incorporating that notification system in the

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telephone numbers, and Georgia's is nearing 300,000. Colorado and Texas have hundreds of thousands of consumers who have enrolled -- and their systems have not yet gone into effect. The Direct Mail Association's own Telephone Preference Service List contains 4.1 million names nationwide.

[4] *National Federation of the Blind v. Pryor*, 258 F.3d. 851, 855 (8th Cir. 2001)("The State has a well-recognized interest in protecting a citizen's ability to cut off unwanted communications entering the home.")(citing *Hill v. Colorado*, 530 U.S. 703, 717 (2000); *Rowan v. United States Post Office*, 397 U.S. 447, 455 (1980); *see also Martin v. City of Struthers*, 319 U.S. 141, 148 (1943); *Frisby v. Schultz*, 487 U.S. 474, 484-85 (1988).

[5] In contrast, advertising through direct mail may be thrown away without even opening, and if the consumer chooses to open them, he/she does it at his/her convenience. It bears noting that Congress expressly enabled consumers, and others on their behalf, to tell some direct mail marketers, in advance, to not mail them sweepstakes offers. *See* 39 U.S.C.A. §3001(l) (Deceptive Mail Prevention and Enforcement Act of 1999).

[6] The current system offers consumers who do not wish to receive calls the "choice" of disconnecting their telephone or "screening" all calls through their own answering machine (which, for most common models, results in hearing the phone ring, one's own answering machine greeting, and then either the telemarketer's message or the ensuing silence when the telemarketer's predictive dialer hangs up). Many voice mail systems offer no such "screening" ability.

Telemarketing Sales Rule in 1995; we have reiterated our concerns in more recent Comments and in other discussions. The Attorneys General strongly concur with the Commission's conclusion in its NPRM that the company-specific do-not-call approach adopted by the 1995 Telemarketing Sales Rule is ineffective.

While the Attorneys General applaud the Commission's advancement of a Do Not Call database system to protect consumer privacy, we have several concerns with the actual proposal made by the Commission. Our most fundamental concern is how the Commission expects its proposal to work in conjunction with the No Call database systems established or being implemented by the states. To the extent that the Commission views its proposal as supplementing the states' efforts, and not supplanting the protections they afford to their residents against unwanted calls from out-of-state and in-state telemarketers, the Attorneys General are hopeful that a registry will be established. We are hopeful that the Commission's registry would further enhance consumers' right to privacy. Our other concerns relate to the details the Commission may still be developing and are based upon the extensive experience the states have had in implementing such laws. We hope that the Commission may benefit from our experiences. Many of the Attorneys General already have provided to the Commission detailed information about their individual states' No Call database systems. We reiterate our desire to work with the Commission to ensure that any system the Commission may adopt in this rule making process will satisfy our mutual interest in ensuring that consumers' privacy interests are paramount and protected.

A. Preliminary Matters

Before addressing many of the specific questions raised by the Commission, the Attorneys General wish to address two overarching issues: (1) ensuring that any system adopted by the Commission is legally sound; and (2) ensuring that consumers understand the scope of protection offered by a national registry and their own role in participating in any system the Commission might adopt.

1. "Interplay" with State Laws

The critical issue for the Attorneys General is how the Commission expects its Rule to impact state laws -- the issue of preemption. The Commission has not expressed its view on this issue but, rather, has posed the following questions on the issue of "interplay" between state and federal No Call database systems:

> *What should be the interplay between the national "do-not-call" registry and centralized state "do-not-call" requirements? Would state requirements still be needed to reach intrastate telemarketing? Would the state requirements be pre-empted in whole or in part? If so, to what degree? Should state requirements be pre-empted only to the extent that the national "do-not-call" registry would provide more protection to consumers? Will the national do-not-call registry have greater reach than state requirements with numerous exceptions?*

While the Commission has stated it has not formed a position on preemption, it is long-standing practice that the Commission and the states seek to coordinate each other's enforcement activities and regulatory initiatives.[7] We see no basis for the Commission's proposed registry to be different. If any preemptive impact of the Commission's registry were either assumed, or left as an open question, it would be in stark contrast to earlier Commission statements regarding the complementary relationship the Telemarketing Sales Rule was intended to have with state laws. It would also contrast with those intentions expressed by Congress in granting the Commission authority to promulgate the Rule in the first place. It is the view of the Attorneys General that *no* provisions of the Telemarketing Sales Rule may be construed to preempt state regulations, excepting only those provisions with which it would be actually impossible to comply while, at the same time, complying with a state's laws. To date, **no** court has ever found such a conflict to exist.

(a) <u>Congress Expressly Intended to Supplement State Laws</u>

Application of the traditional preemption analysis to this proposal should counsel the Commission to make an affirmative, non-preemption statement within its proposed Rule. The intent of Congress is the key to this analysis.[8] Only where Congress has expressed its intent to preempt state regulation is preemption found.[9] An examination of the statute empowering the Commission to promulgate this Rule makes clear that Congress intended no such result.

The Telemarketing Act of 1994 expresses Congress's intent in very direct language. In announcing its purpose for enacting that law, Congress acknowledged that "interstate telemarketing fraud has become a problem of such magnitude that the resources of the Federal Trade Commission are not sufficient to ensure adequate consumer protection from such fraud."[10] Ensuring the continued authority of Attorneys General to bring actions under state law, Congress declared that "[n]othing contained in this section shall prohibit an authorized state official from proceeding in state court on the basis of an alleged violation of any civil or criminal statute of such state."[11] Likewise, in addressing actions by private persons, Congress held that "[n]othing in this section shall restrict any right which any person may have under any statute or common law."[12]

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[7] "Our experience in consumer protection has been that coordination as a general matter is a far more effective approach than preemption, but on this specific approach we're open." Testimony of Eileen Harrington, Associate Director, Division of Marketing Practices, before the Kentucky Senate Judiciary Committee, February 6, 2002.

[8] *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 369 (1986).

[9] *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985).

[10] 15 U.S.C.A. § 6102(2).

[11] 15 U.S.C.A. § 6103(f)(1).

[12] 15 U.S.C.A. §6104(e).

Congress intended that the Telemarketing Sales Rule, promulgated under the authority of the Telemarketing Act of 1994, would enhance the enforcement powers of the Federal Trade Commission and supplement existing state laws on consumer protection.[13] This point could hardly be more clear.[14] Accordingly, nothing in the Telemarketing Act of 1994 -- and thus nothing in the rules adopted to implement it -- may prohibit a state from proceeding in its own courts on the basis of an alleged violation of its own laws.

(b) Non-Preemption is Consistent with History of State Consumer Protection Laws

This anti-preemption language is consistent with the history of the Federal Trade Commission and state consumer protection laws.[15] Issues of consumer protection and individual rights are historically matters of state interest.[16] Only the clear intent of Congress to usurp the states'

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[13] Excerpts from the Congressional Record illustrate an intent only to enhance the States' and the Commission's ongoing efforts to combat fraudulent telemarketing: "[The FBI's efforts to target illegal telemarketers] illustrate the need to attack this serious and growing problem from a variety of fronts, and to pursue coordinated law enforcement efforts when possible. The Department of Justice, the Federal Trade Commission, and the State law enforcement authorities can all bring a unique perspective to the issue....The bill would permit continuation of State law in this area, to the extent that the FTC finds that the State law provides an overall level of protection equal or greater than that provided by the bill." Statement of Senator Bryan, 139 Cong. Rec. S. 8375-76 (June 30, 1993).

[14] The anti-preemption intent of Congress is clear from the Senate Committee Report: "Subsection (e) of this section provides that rules promulgated under this section shall not be construed as preempting State law. The Committee intends that State law regarding telemarketing remain in full force and effect, to be enforced by State officials as provided under those laws, through use of the State courts if appropriate. The intention of the reported bill is to provide an additional cause of action and remedy applicable to telemarketing activities, which is enforceable exclusively in the Federal courts." S. Rep. 103-80.

[15] The states note that courts have uniformly held that nothing in the Federal Trade Commission Act or the regulations promulgated by the Commission preempt state consumer protection laws. *See American Financial Services v. FTC*, 767 F.2d 957 (D.C. Cir.), *cert. denied*, 475 U.S. 1011 (1985); *Double-Eagle Lubricants v. Texas*, 248 F. Supp. 515 (N.D. Tex.), *appeal dismissed*, 384 U.S. 434, *rehearing denied*, 385 U.S. 890 (1965); *Mobil Oil Corp. v. Attorney General, Mass.*, 280 N.E.2d 406, 361 Mass. 401 (1972); *People v. Arthur Murray, Inc.*, 47 Cal. Rptr. 700, 238 Cal. App. 2d 333 (Cal. Ct. App. 1965). The conclusions of these courts support the states' position that the Commission should make an affirmative, non-preemption statement in any do-not-call rule promulgated.

[16] The states have a long history of regulating against unfair business practices and protecting citizens' rights. *Cedar Rapids Cellular Telephone v. Miller*, ___ F.3d ___, 2002 U.S. App. LEXIS 2373 (8th Cir. 2002); *see also*, *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996)("(T)he States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons."); *Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424, 445 (1963)(Brennan, J. concurring)(joining in the Court's decision upholding the application of state law to an advertisement used across state lines, Justice Brennan noted that consumer protection legislation "embodies a traditional state interest of the sort which our decisions have consistently respected."). Likewise, the distinct "right to be left alone" is an interest that may be protected by the State. *Hill v. Colorado*, 530 U.S. 703, 716-17 (2000); *Frisby v. Schultz*, 487 U.S. 474 (1988).

historical role in these areas would support any aspect of preemption.[17] That intent does not exist here. The federal law was enacted to supplement state and federal laws, to broaden the impact and coverage of enforcement actions, to facilitate national results and changes in business practices affecting consumers, and to stop nefarious efforts by fraudulent operators to seek refuge in faraway states.[18]

This firm anti-preemption sentiment was similarly understood by the Commission in 1995 when it adopted the identical strong language from the Telemarketing Act of 1994 in its Telemarketing Sales Rule.[19] Congress and the Commission created a partnership among state and federal law enforcement agencies in the area of consumer protection -- a mutually agreed to and coordinated attack on fraud and abuse in the area of telemarketing. This partnership between state consumer protection laws and the Commission's Rule has played out well as the states, alone, with other states, and with the Commission, have brought numerous, significant cases against violative telemarketing. States suing under the Rule have frequently attached as pendent claims their individual state causes of action.[20]

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[17] *Maryland v. Louisiana*, 451 U.S. 725, 726 (1981); *Florida Lime and Avocado Growers v. St. Paul*, 373 U.S. 132, 146-47 (1963)(noting that before preemption will be found in an area of traditional state powers there must be "an unambiguous congressional mandate to that effect"); *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230 (1947)(stating that when Congress legislates "in a field which the States have traditionally occupied ... we start with the presumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.").

[18] *E.g*., Congress recognized that "[t]he most common mode of telemarketing fraud is the fly-by-night, boiler room, anonymous operator, whose contact with the consumer is limited to the telephone, and whose mobility and anonymity permit the consumer no recourse if the goods are deficient or undelivered. These types of operations make enforcement and prosecution against fraudulent telemarketers difficult, particularly for State law enforcement officials." Statement of Senator Bryan, n.13, *supra*.

[19] The Commission withdrew from its Final Rule and Order, at the urging of the Attorneys General, the United States Postal Service, the National Association of Consumer Agency Administrators, the American Association of Retired Persons and others, language which could draw into question Congress's anti-preemption position and stated: "Congress clearly intended that the Act and the Rule serve to enhance, and not detract from, State law enforcement efforts to address telemarketing fraud." The Commission made its correct understanding of Congressional intent clear, saying, "[b]y including § 310.7(b) that tracks section 4(f)(1) of the Act, 15 U.S.C. 6103(f)(1), the Commission intends to underscore that the Rule does not prohibit any attorney general or other authorized State official from proceeding in State court on the basis of an alleged violation of any civil or criminal statute of such State." Statement of Basis and Purpose and Final Rule, 60 Fed. Reg. 43842, 43862-43863 (August 23, 1995).

[20] *E.g.*, *Illinois v. Telecommunications Resources, Inc.*, C.D. Ill. Case No. 96-3153 (Illinois, Missouri, Tennessee and Virginia sued telemarketers under the Telemarketing Sales Rule, adding pendent state consumer protection claims); *FTC v. 1st Financial Solutions, Inc.*,N.D. Ill. Case No. 01 C 8790 (FTC and Illinois jointly sued telemarketers under Telemarketing Sales Rule; the FTC added a §5 cause of action and Illinois added state consumer protection claims); *Illinois v. King Marketing, Inc.*, N.D. Ill. Case No. 98 C 3701 (state added pendent state consumer protection claims to Telemarketing Sales Rule claims); *Commonwealth v. Kumar d/b/a Systems 3 Marketing*, M.D. Pa. Case No. 1CV98-2023 (Pennsylvania sued telemarketers under Telemarketing Sales Rule, adding pendent state consumer protection claims; FTC later joined as plaintiff).

The apparent reluctance of the Commission to acknowledge, in its NPRM, the non-preemptive effect of the proposed Rule is disturbing. Neither the states, nor the Commission, have unlimited resources. Thus, even the *threat* of preemption can have a chilling effect on state enforcement efforts as law enforcement resources are directed to where they can cause the greatest beneficial consumer impact. Accordingly, the Attorneys General urge the Commission to end its silence and confirm that any Do Not Call registry it adopts cannot prevent any state from adopting its own system which, like the states' other consumer protection laws, reaches all commercial activity within their borders, including those offers for sale that come via the telephone from across state lines.

(c) <u>States' Historical Role in Combating Out of State Abuses and History of Cooperative and Coordinated Law Enforcement Efforts with Federal Counterparts</u>

As No Call database laws have been enacted within the several states, one of the principal arguments raised against these laws has been the assertion that the states lack authority or jurisdiction to prevent out of state telemarketers from calling their residents, and that any state law passed might apply only to in-state calls. This belies the fact that the states have historically enforced their consumer protection laws within, as well as across, state lines to prosecute a person who has employed unfair and deceptive practices against their citizens. The states have used their consumer protection laws to prosecute thousands of out-of-state companies that have contacted their residents over the telephone, through the mails, through television and other mass media, including through the Internet.

States similarly have enforced their own No Call database laws against telemarketers across the country, irrespective of whether the call was "intra-state" or "interstate" in nature. Telemarketers know this, which is why hundreds of firms have purchased existing state No Call Lists and removed these consumers' telephone numbers from their own solicitation lists.[21] Since the enactment of state No Call database systems, many states have taken legal action against telemarketers who violate their laws by calling into their states.[22] No such action has been defeated by the baseless argument that a state cannot protect its citizens from receiving solicitations they have stated they do not want.

(d) <u>Additional Implications of the Interplay of Federal and State Laws</u>

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[21] *E.g.*, 396 out-of-state telemarketers have subscribed to the Missouri No Call List; 413 out-of-state telemarketers have subscribed to the Tennessee No Call List, and 677 out-of-state telemarketers have subscribed to the Oregon No Call List.

[22] Nationwide, more than 180 enforcement actions have been taken against telemarketers, with nearly half of this number involving telemarketing companies calling from across state lines. The State of New York, for example, announced settlements with 13 companies engaged in telemarketing on March 8, 2002, including settlements with Quest Telecommunications, a telecommunications company, and Discover Financial Services (Discover Card).

While the intent of Congress, and the states' historical role in combating fraud is indisputable, there are additional practical considerations that bear mention. Since nearly half of the states have already responded to the consumer demand for the means to stop unwanted telemarketing calls, the Commission should also consider the possible impact its actions might have on existing and developing state database systems:

C More than 7 million consumers have *already* enrolled in states' existing No Call database systems, and millions more will likely do so over the next year as No Call systems go into effect in California and other states that have recently passed implementing legislation. By the time the Commission implements its registry,[23] widespread reliance on the state systems will already be firmly in place. If the Commission's registry purports to usurp the states' authority, or simply confuses the matter, state education efforts to encourage registration could be jeopardized and considerable confusion would result at both state and national levels regarding the status of a consumer's enrollment in a state's system as well as any benefit to be gained by registering with the Commission's registry.

C Hundreds of thousands of consumers have already paid modest administration fees for enrollment in their own states' No Call systems and will continue to do so.[24] Any reduction in the protection afforded by the states' laws by virtue of a preemptive effect (or a claimed preemptive effect) would negatively affect those consumers and risk a breach of the public trust, and, possibly, a request for refunds of those enrollment fees.

C Maintenance of many state No Call systems is partially offset by modest fees paid by prospective telemarketers seeking access to the No Call Lists.[25] If telemarketers no longer have need for a state list, this source of funding will be impacted, jeopardizing the ability of some states to maintain these systems.

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[23] Which is not reasonably expected until early 2003. Testimony of Eileen Harrington, *supra,* n.7.

[24] While many state databases are free, several charge a small fee to defray the cost of their systems, such as a $10.00 initial enrollment and a $5.00 renewal fee. Oregon charges an initial registration fee of $6.50 and an annual renewal fee of $3.00. The length of enrollment also varies: Idaho offers a 3-year enrollment; Louisiana offers a 5-year enrollment, and Missouri offers a 2-year enrollment with automatic renewal.

[25] Fees may be based on the size of the database and the frequency with which the No Call List is updated. Several states permit the purchase of segments of their list, such as that pertaining to a specific area code.

C The states that have established No Call database systems have done so at considerable expense.[26] Any reduction in scope of coverage or effort to limit the reach of these state law protections could negatively impact those states.

The creation of a central registry compatible with existing state systems and adaptable for future state systems, so as *ultimately* to offer consumers an expedient way to stop all unwanted telemarketing calls is, and has always been, a concept supported by the Attorneys General. Additionally, ensuring that any system would be easily accessible by the states for enforcement purposes would be highly desirable.

The relationship between the State Attorneys General and the Commission has historically been one of cooperation.[27] The states frequently work in tandem with the Commission and its staff in enforcement "sweeps" in which numerous lawsuits are filed nationwide to enforce the various state and federal laws.[28] Additionally, the Attorneys General and the Commission often divide their efforts and focus on different matters, thereby covering collectively many more practices than either would be capable of alone.[29] We see no reason why the Commission's and the states' No Call database systems should not carry on this tradition.

Any effort to intrude upon the states' well-established authority by asserting a preemptive effect on state No Call laws would not only be a legally untenable position, but it could jeopardize existing state No Call database systems and have significant adverse implications for the ability of the states to effectively "partner" with the Commission in actively enforcing the proposed Rule, as discussed further below.

The Attorneys General believe that our shared objective of cooperative and coordinated policing of the marketplace would be better served by the Commission taking a *clear and unambiguous* position against any preemptive effect on the states' authority to protect their own citizens from unwanted telemarketing calls, irrespective of the origin of those calls. Accordingly, the

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[26] *E.g*., the State of Tennessee has spent more than $600,000 to create and run a No Call database system that went into effect in June, 2000. The State of Missouri has spent more than $580,000 to create and run its database system that went into effect in July, 2001. The State of Indiana has spent slightly more than $500,000 to create and run its recently implemented system. These costs do not include the costs of enforcement actions taken against violators.

[27] "We have worked very closely with all of the states on the problem of telemarketing fraud. In that area, as is the case in so many important consumer protection areas, the states are often closer to consumers' actual experiences and problems, and learn of difficulties first." Testimony of Eileen Harrington, *supra*, n.7.

[28] *E.g*., "Ditch the Pitch," a recent law enforcement sweep dealing with cold-call telemarketing coordinated by FTC staff and participated in by a number of states in October, 2001.

[29] A recent example would be in the Sweepstakes industry in which the states undertook several national investigations and extensive litigation efforts, resulting in significant industry changes, while the Commission has made very significant headway in the area of Internet scams.

Attorneys General recommend that, if the Commission implements a national registry, the Commission also make a clear statement of its intent that the registry not preempt any No Call database established by the states. We also recommend that the Commission's registry be made available to the states for import into their own database systems so that the states may *both* continue their own enforcement actions under their own database laws as well as assist the Commission in the enforcement role contemplated by the Rule.

2. Consumer Understanding

The success of any No Call registry system, federal or state, depends in large part upon the public's understanding of how the system works, and how consumers may participate. The Commission's public announcement of a national registry must clearly explain any jurisdictional limitations, its provisional nature, and its interplay with the states' No Call database systems. The Attorneys General are concerned that consumers may not understand which types of telemarketing calls will be subject to the Commission's proposed registry, and how consumers may utilize any such registry to their advantage. The Commission's silence on preemption may have far-reaching implications for consumer understanding of its registry. We have already seen various press accounts suggesting that the Commission's registry will offer a "one stop" process for consumers to stop all unwanted telemarketing calls. Such inaccurate information is likely to generate confusion among consumers and may cause some to act to their detriment in not also enrolling in a state No Call database.

(a) Commission's Restricted Jurisdiction

Congress has not authorized the Federal Trade Commission to assert its authority in a number of fields -- fields which are replete with telemarketing activity at the present time. If asked to name the most recent telemarketers by whom they've been solicited, consumers will likely name common carriers (*e.g.*, long distance telephone service providers),[30] credit cards issuers (*i.e.*, banks), and sellers of securities and insurance (which still utilize the practice of cold-calling prospective customers) -- all industries that generally have not been subject to the Commission's jurisdiction.[31] Additionally, the Commission cannot reach "intra-state" telemarketing -- the telemarketing

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[30] More than 17% of the violation reports received by the Missouri Attorney General's No Call Unit have been reports of telemarketing calls from telephone companies, and an additional 10% involve telemarketing calls from financial institutions and insurance companies; similarly, more than a fifth of the No Call complaints received by the State of Oregon involve unwanted telemarketing calls from the telecommunications and financial services industries.

[31] Industries or practices over which the Commission may lack jurisdiction for purposes of the Commission's proposed registry include (1) banks, savings and loans and other savings associations as defined by 12 U.S.C. §1813; (2) federal credit unions as defined by 12 U.S.C. §1752; (3) common carriers subject to the Communications Act of 1934, as amended, 47 U.S.C. §151, *et seq*. (*i.e.*, telephone companies); (4) insurance companies regulated by state law as provided for in the McCarran - Ferguson Act, 15 U.S.C. §1012; (5) securities marketing subject to the Securities and Exchange Act of 1934, 15 U.S.C. §§78(a), *et seq*.; (6) commodity marketing subject to the Commodity Exchange Act, 7 U.S.C. §§1, *et seq*.

operations that typically operate locally within a single state -- such as sellers of automobile repair services, water purification systems, television satellite systems, home improvement services, and solicitors for local or purportedly local charitable organizations.[32] Thus, a very meaningful subset of calls cannot be reached or regulated by the Commission without further Congressional legislation. If consumers seek to prevent these types of telemarketers from invading their privacy, they must still enroll in their own state's database system.[33]

Judging from the consumer comments submitted to the Commission, this point has not been clearly made. While overwhelmingly supportive of the Commission's proposed registry, it would appear there is already some degree of misunderstanding by consumers as to what calls would be "stopped" by the Commission's proposal. The Attorneys General would caution that such confusion could cause some consumers to register in the Commission's system and forgo enrolling in a state's database system, with the result that they would still be subjected to telephone solicitations they may have expected to prevent, causing consumer frustration.

The existence of these "built-in" exceptions to the Commission's proposed registry also underscores the importance of the Commission avoiding any further exemptions to its Rule. As the Commission is aware, several state No Call database systems are subject to various exemptions, and, in many states, legislation aimed at further restricting, or entirely eradicating, those exemptions is now pending. Accordingly, the Attorneys General strongly recommend that the Commission "hold its ground" in resisting additional exceptions to the Rule's coverage. From the consumer's point of view, one uninvited telephone call is much like another and, as the Commission's NPRM observed, consumers have little favorable to say about telemarketing.[34]

(b) <u>Potential for Confusion if Registry Ended</u>

A secondary concern is the high likelihood of consumer confusion if the Commission were to establish a centralized registry and dismantle it after the two-year "trial" period.[35] As the law enforcement officials most responsible for consumer protection within the states, the Attorneys General would be concerned if an FTC registry were only a fleeting exercise -- because, if, after only two years, the effort were abandoned, consumers who had taken advantage of a national registry

[32] Such intra-state transactions include telemarketing for the purpose of setting appointments for sales presentations, such as water purification system demonstrations, windows and siding services, and resort and timeshare tours.

[33] The state No Call database systems vary in the availability of exemptions, although it appears the clear trend within state legislatures is to remove or narrow any exceptions to coverage.

[34] "Consumer commentators unanimously expressed their strong dislike of telemarketing and their desire to be free of telemarketing calls, citing the intrusiveness and inconvenience of those calls." NPRM; 67 Fed. Reg. 4491, 4518 (January 30, 2002).

[35] In §310.4(b)(3) the Commission has reserved the ability to terminate the registry after a cost/benefit analysis following two years.

might be left to fend for themselves. Irrespective of whether a state had its own No Call database system, considerable confusion and frustration would result. Starting and then stopping a registry of national scale will have a detrimental impact on consumers.

Consumer misunderstanding of the extent of protection offered by a central registry, or the unfortunate event of a central registry being established and then dismantled, could also have a serious detrimental impact on the existing and anticipated state No Call database systems. Misinformation as to the privacy protected by the Commission's registry might cause consumers not to enroll in their own state's system. Such misunderstandings could also tempt state legislators reviewing tight state budgets to reduce their own database funding. Significant financial and other resource commitments made by the states implementing their systems would be jeopardized if the state systems were mistakenly viewed as redundant. The Attorneys General would caution the Commission to avoid taking any action that might improvidently jeopardize the development or funding of any states' systems -- particularly when its own registry may not be permanent.

To help avoid ending the protections afforded by a national registry, we would encourage the Commission, in establishing a registry, to ensure it has adequate funding and the requisite resources to afford consumers the genuine protection of privacy promised.[36] Consumer protection goals would surely be thwarted if the Commission does not ensure its own ability to make the necessary financial and personnel commitments necessary for a successful system before embarking on this endeavor. The several states that have already fought for establishment of No Call database systems urge the Commission not to view this endeavor in this area as a worthy experiment, but, rather, to only pursue a No Call registry with confidence that it will succeed.

B. <u>Mechanics: Implementation and Enforcement of Registry</u>

1. <u>Responses to Questions Posed by Commission</u>

The Commission seeks comments on a number of topics which the proposed Rule, as drafted, does not yet address. The current proposal is in its infancy, leaving many open questions, so it is difficult to assess thoroughly and comment upon. Based on our experiences with state No Call database systems, the Attorneys General are concerned by the absence of several essential details. We have learned through our own implementation efforts that a considerable number of important details must be resolved in order to establish a successful program. Accordingly, the Attorneys General encourage the Commission, after it considers how to address these details, to consider offering a subsequent period for public comment.

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[36] The cost of such a national database system was cited as a reason for the Federal Communication Commission's decision *not* to create a national registry pursuant to the Telephone Consumer Protection Act of 1991 (TCPA), 47 U.S.C.A. §227. See, Shannon, *Combating Unsolicited Sales Calls: The "Do-Not-Call" Approach to Solving the Telemarketing Problem*, 27 J. LEGIS. 381 (2001) (citing, *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 F.C.C.R 8785-89 (1992).

In responding to many of the specific questions the Commission now poses, we cannot over-emphasize our position that the *only* acceptable No Call database system is one that works for consumers. Our experience is that implementation of such a system will require significant refinement of the system outlined by the NPRM and commitment of significant financial resources. Many of the states have independently provided extensive amounts of information and insight to the Commission from their own experiences with No Call databases. We do not plan to delve into the minutiae of that information but, rather, offer illustrative information in the following Comments relating to the actual implementation and enforcement of the proposed Telemarketing Sales Rule.

(a) <u>Cost-Benefit Analysis:</u>

What expenses will sellers, and telemarketers acting on behalf of sellers or charitable organizations, incur in order to reconcile their call lists with a national registry on a regular basis? What changes, if any, to the proposed "do-not-call" scheme could reduce these expenses? Can the offsetting benefits to consumers of a national do-not-call scheme be quantified?

The Commission makes several inquiries weighing the relative costs faced by telemarketers complying with its proposed No Call database against benefits to consumers. However, there are benefits to telemarketers too. Members of the industry have suggested that removing names from their call lists "up front" can result in greater efficiencies as calls to presumptively non-interested consumers could be avoided altogether.[37] In evaluating the cost to industry we recommend that any savings realized due to greater efficiencies by avoiding calling such consumers be considered by the Commission.

Additionally, in assessing the benefits to consumers, the benefit of not being interrupted by unwanted telephone calls merits quantifying. If consumers *know* they should not be receiving telemarketing calls, they will be more apt to hang-up on potentially fraudulent calls.[38] While difficult to quantify, the benefit of consumers' homes not being interrupted by unwanted telemarketing solicitors -- stopping conversations with family members, putting on hold another telephone call, disconnecting a dial-up Internet connection, getting up from the family dining table --

[37] The Direct Marketing Association has indicated support for the use of No Call lists noting that efficiencies in telemarketing operations may be realized by avoiding consumers who have already indicated no interest in receiving offers. "*New Law Gives Connecticut Residents Chance to Curb Calls from Telemarketers,*" THE DAY, January 1, 2001. Additionally, it has been suggested by one commentator that if each telemarketer saved a single hour of unproductive calling time the industry might save itself more than $18 Million. Shannon, "*Combating Unsolicited Sales Calls*," at 405, *supra*, n.36.

[38] Experts working with older telemarketing fraud victims point to those victims' unease with hanging up the telephone on any callers. However, knowing from the outset that the call has been placed in violation of the law, by virtue of their enrollment in a No Call system, will help prospective victims terminate fraudulent solicitations.

is more than just the avoidance of "annoyances."[39] There is a *tangible* cost to be considered when a *single* telemarketer may interrupt the privacy of more than 75 households each night.[40] In view of the high enrollment in several recent state No Call database systems,[41] it is not unreasonable to suggest that nearly half the citizens of this country may wish to be spared the interruptions caused by uninvited telemarketers in their home. The benefits to be realized by consumers stem from their having control over their home and their own privacy -- the importance of consumer sovereignty should tip the scales decisively in favor of consumers.

(b) <u>Use of Database by Telemarketers:</u>

b. Is the restriction on selling, purchasing or using the "do-not-call" registry for any purposes except compliance with §§ 310.4(b)(1)(iii) adequate to protect consumers? Will this provision create burdens on industry that are difficult to anticipate or quantify? What restrictions, if any, should be placed on a person's ability to use or sell a "do-not-call" database to other persons who may use it other than for the purposes of complying with the Rule?

c. Would a list or database of telephone numbers of persons who do not wish to receive telemarketing calls have any value, other than for its intended purpose, for sellers and telemarketers?

To safeguard such sensitive information, the Commission should ensure that it obtains appropriate identification information from prospective sellers and telemarketers. The Attorneys General recommend that, as part of the application process, telemarketers, and the sellers they represent, identify all affiliates that would have access to the Commission's registry, including any fictitious names they might be using in their solicitations, and that this information be maintained by the Commission in order to monitor compliance.

The sensitivity of information in any No Call database is obvious.[42] Many telephone numbers contained in the database may not be "published" or "listed" as consumers increasingly take advantage of these privacy measures. Misappropriation of this data should be a separate offense as

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[39] For some consumers the benefit is even more significant because their cost can be considerable, such as in the case of the telemarketing fraud victim, or consumers who suffer fear or anxiety when an unknown caller calls or disabled consumers who suffer physical discomfort simply in answering the telephone. Avoiding the effort and possible difficulty of obtaining a refund or canceling a transaction later should not be ignored.

[40] If a single telemarketer calls from 6:00 pm Eastern Time through 8:00 pm Pacific Time, for a total of five hours covering the four time zones, using a predictive dialer which requires a consumer to answer before the telemarketer's own line is open, with an average call length of four minutes, 75 households may be interrupted.

[41] *See* n.3, *supra*.

[42] The Commission is likely aware that many consumers have purchased various privacy-protecting devices and services, such as Caller Identification services.

misuse could undermine the purposes of any registry and the public's trust in it. The use, transfer or sale of the database for purposes other than compliance with the No Call laws should be a separate violation. Telemarketers and sellers should be liable for use of the registry's information beyond using it to remove consumers' telephone numbers from their calling lists, and for any negligence on the part of their agents in its dissemination or misuse.

(c) <u>Length of Enrollment/Re-assignment of Telephone Numbers</u>:

d. How long should a telephone number remain on the central "do-not-call" registry? Should telephone numbers that have been included on the registry be deleted once they become reassigned to new consumers? Is it feasible for the Commission to accomplish this? If so, how? If not, should there be a "safe harbor" provision for telemarketers who call these reassigned numbers?

The Attorneys General recommend that the Commission adopt the least burdensome method of renewing a telephone number on the registry in order to remain consistent with the objective of a database system -- preventing calls being made to registered numbers. To determine the enrollment period, the Commission could look to current standards employed by the telemarketing industry. The Federal Communication Commission adopted a 10-year effective period under its company-specific Do Not Call notification system,[43] and the Direct Marketing Association's own Telephone Preference System provides for a 5-year effective period.

(d) <u>Access by Consumers to Registration Process:</u>

e. Who should be permitted to request that a telephone number be placed on the "do-not-call" registry? Should permission be limited to the line subscriber or should requests from the line subscriber's spouse be permitted? Should third parties be permitted to collect and forward requests to be put on the "do-not-call" registry? What procedures, if any,would be appropriate or necessary to verify in these situations that the line subscriber intends to be included on the "do-not-call" registry?

f. What security measures are appropriate and necessary to ensure that only those persons who wish to place their telephone numbers on the "do-not-call" registry can do so? What security measures are appropriate and necessary to ensure that access to the registry of numbers is used only for TSR compliance? What are the costs and benefits of these security measures?

The Attorneys General are concerned by a possibly limited method of registration to be offered by the Commission. Spokespersons for the Commission have indicated the Commission is contemplating offering a single, exclusive means of enrollment in its registry by calling from the same telephone number that is to be included on the registry. That telephone call would be fully

[43] *See* 47 C.F.R. §64.1200(e)(2)(vi).

automated and would "trap" the Automatic Number Identification ("ANI") of the consumer's telephone number for inclusion in the No Call List system.

While such automated registration, by calling from the subscriber's telephone line, might well be selected by many consumers as an easy and efficient means of registration, other options are truly necessary. There are highly practical reasons for offering other, alternative, registration methods. An exclusively automated telephonic enrollment system would not allow consumers to register a home number by calling from their personal cell phones. Consumers who still do not have "touch tone" telephones -- and many older Americans do not -- would not be able to register. Thus, such a requirement may result in many of the most vulnerable consumers not being able to register in the Commission's No Call database, leaving them more prone to scam artists engaged in telemarketing. Further, the system proposed by the Commission would not allow consumers to call from their place of employment or locations other than their actual residence.[44]

Additionally, persons who care for adult family members, such as children assisting a parent, may be hard-pressed to travel to their parent's home for the purpose of placing a call from that telephone line to register their parent's telephone number. The Attorneys General have received numerous notes of thanks for instituting No Call systems that allow adult children to enroll telephone numbers on their parents' behalf. Family members often assist older members in their affairs, and this assistance is something any regulatory system should permit.[45]

Spokespersons for the Commission have suggested that the reason for this limited method of enrollment is the Commission's concern with third parties registering mass numbers of consumers into a registry without their knowledge, thereby denying those consumers the ability to receive telemarketing calls.[46] Our offices, however, have never run across such a practice.[47] If this is a real

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[44] *E.g.*, "snowbird" consumers spending the winter in Florida, Southern California, or Texas would have to physically register from both their seasonal home and their regular residence.

[45] It would be ironic for a system especially intended to benefit senior citizens *not* to be flexible enough to accommodate their registration.

[46] "We don't want a system where there could be certain malicious and wholesale registration of numbers. One of our concerns would be that some prankster, you know, with an auto-dialer, could just phone in and register one number after another, after another, after another on a national register." Testimony of Eileen Harrington, n.7, *supra*.

[47] In contrast, we have seen dubious telemarketers offering, for a fee, to *enroll* consumers in any future No Call List systems that might be created, and consumers, in such desperation to end telemarketing calls, paying these fees for this service. Recent cases have involved offers to add, for a fee, the consumer's name to the company-specific, or the DMA's do-not-call lists required under the current Rule. *E.g.*, *Arizona v. Edward Longoria, d/b/a Senior Advisory Council*, Maricopa County Superior Court Case No. CV 2001-016753(company allegedly telemarketed consumers nationwide offering for sale a membership which would include as a benefit the removal of their name from telemarketing call lists); *Missouri v. R. & R. Consultants, Inc., d/b/a Peace & Quiet*, Cole County Circuit Court Case No. 01CV324031 (injunction issued against Canadian telemarketer offering, for a fee, to enroll consumers in company-specific do-not-call Lists).

threat, we suggest the better way to address it would be to make it an offense to register a consumer without their knowledge or without their consent, unless that person were legally responsible for that consumer's affairs.

g. Should consumers be able to verify that their numbers have been placed on the "do-not-call" registry? If so, what form should that verification take?

If consumers are to be held responsible for renewing or modifying their own registration in a database, they should have the means to verify that their registration remains current or that any needed modification has been made in the registry. Such verification might be made available telephonically, although most states handle these requests through their complaint intake systems -- complaint specialists have the ability to access the database and can, during the course of a telephone call with the consumer, verify any information sought by the consumer. Some states have created websites to permit consumer verification of their inclusion. Consumer confidence in the registry system is likely to increase the incidence in their reporting violations. Indeed, the Attorneys General have found that some consumers, once registered on a state No Call database, are more than willing to "turn in" those telemarketers who still call them.

(e) <u>Options in the Scope of a Consumer's Registration:</u>

h. Should the "do-not-call" registry allow consumers to specify the days or time of day that they are willing to accept telemarketing calls? What are the costs and benefits of allowing such selective opt-out/opt-in?

i. Should the "do-not-call" registry be structured so that requests not to receive telemarketing calls to induce the purchase of goods and services are handled separately from requests not to receive calls soliciting charitable contributions?

Ease of consumer access and use dictates that any telephonic enrollment process be simple. Offering many selections or options may make the system difficult to manage for some consumers, especially those who have cognitive difficulty making rapid choices or who are physically challenged by the process of "keying in" their selections.[48] Any options must be explained, which in an automated telephone setting may be difficult to accomplish.[49]

[48] Some citizens have complained about the difficulties presented by automated telephone systems in other contexts, such as when calling various customer service numbers. While many consumers may be adept in the use of such technology, no one would want to exclude from the protections offered by the proposed Rule those citizens who are physically or cognitively unable to utilize a particular system.

[49] The Commission should also consider that in many households, English may not be the primary language spoken. Several of the states, like the Commission, have been translating consumer education materials and staffing complaint intake units with bi-lingual personnel. The need to make the Commission's registry accessible to non-English speaking consumers should also be considered.

The Attorneys General encourage the Commission to consider the ease with which a consumer would be able to later change their selections. Finally, we suggest that the Commission ascertain, before implementing myriad options, the level of actual consumer interest in them. In our experience, consumers have not requested many of the options we have heard discussed or suggested over the years by members of the industry -- consumers enroll in No Call databases for the simple purpose of avoiding as many unwanted calls as possible. We would discourage unduly complicating the registration process.

(f) <u>Cost of Access to and Enrollment in Database:</u>

j. Some states with centralized statewide "do-not-call" list programs charge telemarketers for access to the list to enable them to "scrub" their lists. In addition, some of these states charge consumers a fee for including their names and/or phone numbers on the statewide "do-not-call" list. Have these approaches to covering the cost of the state "do-not-call" list programs been effective? What have been the problems, if any, with these two approaches?

More than half the existing No Call database systems created by the states impose modest fees on prospective telemarketers for access to the No Call List, and several states require lower fees from consumers to offset the cost of enrollment. The Commission has inquired as to the states' experiences regarding whether these fees have significantly impacted the funding requirements of these database systems. While a number of states hosting No Call database systems have placed responsibility for maintaining those systems in other agencies, several of the Attorneys General do oversee their states' database systems. Several states have already provided to the Commission detailed information about how they created their databases and the costs they have incurred in the creation and ongoing maintenance of the system.

As an example, the State of Missouri received a legislative appropriation for the anticipated costs of establishing its No Call database. However, it has been able to recoup a portion of the ongoing maintenance costs by requiring a modest fee for copies of the quarterly No Call List it produces.[50] Telemarketers are required to pay $25.00 for each area code segment of the list.[51] During the first year of implementation, slightly more than $100,000 was collected from telemarketers seeking copies of the Missouri No Call List, while ongoing maintenance cost is nearly $200,000 annually, not including personnel. The State of Missouri charges residents nothing to

[50] Because all allocations must be made through the Missouri State Legislature there is not, strictly speaking, a direct "set-off" from recovered fees; recovered fees are deposited into a separate fund and are available for future appropriations.

[51] This enables smaller, local telemarketing operations to acquire the list for far less than a state-wide (or interstate) telemarketer.

enroll, which may have contributed to the high enrollment rate.[52] Missouri's experience has been that modest fees charged for access to the No Call List can off-set, but are not likely to fully cover, the ongoing costs of database systems.

The State of Oregon charges an annual fee of $120.00 for database access to telemarketers.[53] In addition, consumers are required to pay a registration fee of $6.50 and an annual renewal fee of $3.00.[54] Oregon has retained a list administrator who is responsible for maintaining the Oregon No Call List based on these subscription fees and registration fees. Oregon's experience is that the combined fees cover the cost of third party maintenance of its database. In both Missouri and Oregon the costs of enforcement have largely been recouped as both are able to receive awards for their investigative and litigation costs.[55] None of the states has reported experiencing any "problems" in terms of industry members being unable to pay the modest list access fees imposed.

The Missouri and Oregon experiences also suggest that greater consumer participation may be achieved if there is no fee charged to consumers for enrollment. Several of the recent state database systems implemented have abandoned the imposition of consumer registration fees, and have experienced widespread growth as consumers have eagerly registered.[56] To the extent that a state may currently require a small registration fee we are concerned that any additional fee will serve only to dissuade registration in the Commission's registry. The Attorneys General recommend that the Commission continue with its current plans not to charge consumers for the privacy protection it seeks to ensure through the creation of its registry.

2. <u>Additional Considerations</u>

Based on the experiences of the Attorneys General, several critical details appear to be missing from the Commission's NPRM that we wish to address in these Comments. The Commission's proposal and comment do not discuss what happens *after* the Commission's registry is created. Creating a No Call database is only the *beginning* of the process of ensuring that consumers do not receive unwanted telemarketing calls. Our experience has been that for an effective system, education of consumers and industry, and enforcement are absolutely essential. To create an effective registry, it is critical that the Commission secure the necessary funding to

[52] As of late February, 2002, 921,701 residential telephone numbers were included in the Missouri No Call database, free of charge. Missouri's population is approximately 5.5 million.

[53] Currently more than 1,000 telemarketers subscribe to the Oregon No Call List.

[54] As of late February, 2002, there were 66,917 residential telephone numbers included in the Oregon No Call database.

[55] Oregon and Missouri, combined, have initiated more than 140 enforcement actions for violations of their No Call Lists.

[56] *E.g.*, Indiana, Tennessee, and New York; s*ee* n.3, *supra*.

create a reliable and useful system for law enforcement use and to ensure adequate allowance is made for the Commission's own enforcement efforts.

(a) Compatibility with State Systems:

The Attorneys General are interested in the potential compatibility of the Commission's registry with their own states' No Call Lists and hope the Commission establishes a system in which the transfer of information between state systems and the Commission's registry is feasible. Several of the state systems were erected in contemplation of the Commission's sister agency, the Federal Communications Commission ("FCC"), one day amending the rules it promulgated pursuant to the Telephone Consumer Protection Act to adopt a centralized Do Not Call registry. These states' laws generally require that the states *import* any registrations from an FCC system to the state systems.[57] Additionally, we are interested in ensuring that the states will have access to both the Commission's registry, as well as to any database utilized for collection of violation reports, so that we may facilitate consumer registration and pursue enforcement actions against violators.

The Attorneys General recommend that the Commission consider a registry that permits the states to both submit registrations from their own databases (subject to state laws) and to obtain from the Commission's registry any registrations submitted by their own residents for import into their own databases. For example, the Commission might offer, during the initial registration process, to forward a consumer's registration to any database operated by that registrant's own state. We also recommend that the Commission adopt a registry program that enables law enforcement to verify particular consumer registrations and to access violation reports in order to facilitate state enforcement efforts.

The Attorneys General encourage the Commission to build a database that permits the transfer of registrations to and from the state databases. Few would dispute the desirability of a seamless technology that would facilitate the sharing of information from a centralized registry with any state's registry so that consumers might avoid needing to register separately with the state.[58] We invite the Commission to work closely with our offices in this endeavor. While some states might need to modify their own regulations to accomplish such a transfer, we would like to work with the Commission towards this goal. The Commission should adopt a system that is technologically flexible enough both to facilitate the transfer of this information and to provide for the states' use of this data for enforcement purposes.

(b) Education of Consumers:

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[57] Several states with No Call database laws are required to import database information relating to their residents from a national database into their own database, although several of those statutes peak only to an FCC-established national database.

[58] As noted elsewhere, even if the Commission's registry were thought to have preemptive effect on state interstate enforcement of their own No Call database laws, the state retains exclusive authority over -- and offers exclusive protection against -- intra-state telephone solicitations.

The Attorneys General recommend that the Commission consider a comprehensive consumer education program which both informs the general public about its registry, as well as provides very specific instruction to registrants as to how to report a violation. This is an area addressed in several states by mailing "enrollment confirmation" packets to consumers. For example, the Missouri Attorney General mails an informational packet to each Missourian enrolling in the Missouri No Call database which provides explanatory information as to the consumer's rights under Missouri's No Call Law, instructions for how to report a violation, and a sample violation report form. Each of Missouri's 921,720 residential subscribers has been sent this material. Oregon also offers comprehensive consumer education packets to consumers inquiring about its No Call database system. Both Missouri and Oregon also offer educational information, and the ability to enroll, on their websites.[59] The Attorneys General encourage the Commission to factor in the costs of similar education for consumers utilizing its registry.[60]

(c) __Collection of Violation Reports__:

The Attorneys General are somewhat concerned by the absence of Commission commentary on how violation reports from consumers will actually be maintained for enforcement purposes. In addition to high registration rates in their database systems, the states have also received *extremely* high numbers of violation reports from consumers who have reported receiving calls from telemarketers. For example, the State of Idaho, one of the least populous in the nation, received more than 1,500 complaints of violations in a single year; the State of Missouri received more than 17,000 reports of violations during the first eight months of implementation of its No Call List.

Making the process of reporting violations *easy* for consumers is of paramount importance to the Commission's No Call registry meeting its goal. The Attorneys General recommend providing consumers the ability to make on-line, telephonic, and written reports of these violations. It is uncertain how the Commission intends violation reports to be maintained and segregated for monitoring potential enforcement targets.[61]

To facilitate collection of these reports, several states have established separate databases designed for this purpose. For example, the State of Missouri has established a separate No Call Unit that produces the Missouri No Call List and logs all violation reports registered by Missourians in a specialized database designed to capture the most pertinent information for such reports, in addition to maintaining files of written reports and registration materials. The date and time of the call, and every bit of information a consumer may have received that could help identify the caller

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[59] The Commission's own website provides consumers with hyperlinks to 13 state No Call database websites which offer Internet enrollment, <http://www.ftc.gov/bcp/conline/pubs/alerts/dncalt.htm>.

[60] The Commission has long been sensitive to the need for educational materials to be available in multiple languages, which would also factor into educational costs.

[61] Staff for the Commission have suggested that the Consumer Sentinel complaint system might be utilized as the database for violation reports.

is essential to building a useable database for enforcement purposes. Maintaining a record of the identities of telemarketers who have access to the database and their various affiliate names and calling locations may help in this violation tracking process. In all cases it is important to be able to identify when a particular consumer's registration in a database became effective for purposes of confirming a violation has occurred.

Finally, it is unclear whether the Commission has projected the additional costs that might be created by receipt of a significant number of violation reports -- which the experience of the States would suggest is inevitable. The experience of the states that have implemented these systems has been that a modest increase in personnel, in addition to equipment expenses, has been necessary to adequately meet the needs of citizens trying to enroll in their databases and to process reported violations.

(d) Implementation and Maintenance Costs:

When the FCC considered implementing a national do-not-call list in 1992, it was presented with estimates by industry ranging from $20 million to $80 million for implementation, in addition to an annual operational cost of around $20 million.[62] While technological improvements may have reduced these costs, they would still be significant. The source of funds for this venture has not been clarified by the Commission -- the only information to date is that the Commission has requested $5 million in its current budget for database costs. The Attorneys General are concerned that this amount will not be adequate to create the database, much less to cover the costs of maintenance and enforcement, even assuming significant state assistance in that endeavor.

States implementing No Call database systems have incurred significant expenditures in establishing computerized databases, the corresponding personnel and other equipment and location expenses, and in consumer education efforts. Missouri's database system, for example, cost in excess of $580,000 for implementation and the first year's operations, including additional staffing for its No Call Hotline. Tennessee had similar experiences, incurring approximately $600,000 in implementation and maintenance costs over a two-year period. Additionally, Indiana's No Call database, which just went into effect this year, has cost slightly more than $500,000.

It bears pointing out that none of these estimates of implementation and maintenance costs include actual enforcement costs. The Attorneys General, and other state agencies, have often dedicated additional personnel to the many enforcement actions undertaken across the country.

(e) Enforcement Philosophy:

It has been the experience of the Attorneys General that the number of reported violations of a state's No Call database law often represent only the *tip* of the proverbial iceberg. Many consumers do not file violation reports when they have been called, despite being on a No Call List.

[62] Report and Order, Federal Communications Commission, FCC 92-443 (October 16, 1992), at 6.

Some of them do not report a violation because they were unable to obtain sufficient identifying information from the telemarketer.[63] Consequently, the number of reported violations is likely to significantly under-represent the number of actual violations which have occurred.

Those states that have earned a reputation for No Call laws that accomplish their goal have done so largely because they have proactively enforced the laws passed by their legislatures. The State of Oregon, for example, has implemented several "enforcement sweeps," as have the States of Missouri and New York.[64] An aggressive approach of contacting the reported violators and either suing or requiring swift and public settlements has helped educate both the more recalcitrant end of the industry as well as consumers, thus enhancing the effectiveness of the system. Our experience has been that the number of telemarketers making arrangements to obtain copies of the No Call Lists increases significantly after such public actions, strongly suggesting greater awareness of enforcement actions prompts greater compliance.

Accordingly, the Attorneys General recommend that the Commission contemplate a highly aggressive initial enforcement effort to reinforce its education efforts among both consumers and within the industry. This could require extra staffing or a temporary shifting of resources within the Commission, just as it has among the several states. By the same token, the Attorneys General encourage the Commission to not set too high a "threshold" for initiating an enforcement action as consumers do not have their *own* cause of action against the telemarketer by virtue of their being included in the Commission's registry.[65] The ultimate effectiveness of its registry may be largely determined by the enforcement resources committed to it.

(f) <u>Consequences for Violations</u>:

Another concern of the Attorneys General is the aspect of punishment -- particularly that which the states might obtain in actions they bring to enforce the Commission's registry rules. The Telemarketing Act of 1994 authorized the states to pursue enforcement of the Telemarketing Sales

[63] In some cases a telemarketer has been identifiable only by a return telephone number provided to the consumer because the name by which he/she identified herself -- or which the consumer remembered -- was not sufficiently specific. It is important to encourage all violations to be reported, even where a report can be only partially complete.

[64] As discussed below, whether states can recover the costs of that litigation under their state laws may impact the number of enforcement actions a state can afford to take. Several states have recouped their enforcement costs through settlements and awards of attorneys fees in their enforcement actions.

[65] The private cause of action available to consumers remains as originally set forth in the Telemarketing Act of 1994, in addition to the company-specific cause of action provided by the Telephone Consumer Protection Act of 1991. Accordingly, millions of consumers will rely on the Commission for protection of their privacy interests. In contrast, some of the states' No Call database laws have created additional private causes of action for consumers who have enrolled in the states' database.

Rule for the purpose of seeking injunctive relief and damages.[66] "Damages" are commonly treated as being based on actual consumer losses. However, the violation of one's privacy -- the interruption of the consumer's private time at home -- often may not result in any purchase or donation on which to base a damages claim.

A likelihood of meaningful consequences for violations offers an incentive for telemarketers to adhere to these important laws. The absence of such a threat could substantially reduce their effectiveness. In its anticipated enforcement actions related to the Commission's registry, the Commission may pursue civil penalties of up to $11,000 per violation.[67] Similarly, most of the state's No Call laws provide for the imposition of civil penalties. In the State of Missouri, for example, a violator may be fined up to $5,000 per call placed to a consumer included in the Missouri No Call List. In Arkansas and Colorado, penalties may reach as high as $10,000 per violation in certain circumstances, and in Oregon they may reach $25,000 per violation. In many cases a state's recovery of fines or penalties goes either to local education or to that state's general revenue, so there is an indirect recovery by the community harmed.

However, the Telemarketing Act of 1994 does not authorize the states to seek any fines or penalties for violations of the Telemarketing Sales Rule. That has not impeded the states from pursuing telemarketing fraud under the current rule -- to compensate for the absence of penalties in state-initiated actions, the states have typically added pendent state claims based on their own consumer protection laws. These state law causes of action often enable the states to recover their own investigative and litigation costs, including reasonable attorneys fees, so ultimately the public's money used for enforcement is recovered. In a registry-related enforcement action, those states that maintain their own registries might still be able to plead additional violations of their *own* No Call laws, which would enhance the effectiveness of their enforcement efforts significantly. However, those states that do not yet have No Call databases might not have any pendent state law claims.[68] Their pursuit of enforcement of the Commission's registry Rule might offer only injunctive relief -- without a threat of civil penalties or repayment of the costs of the prosecution -- and may not offer significant deterrence to potential violators.

(g) <u>Enforcement Resources</u>:

The Commission has not indicated what additional resources it would commit to the registry and the complaint database, the investigation of violations, and the commencement of enforcement efforts against violators. How the Commission and the states might pursue complementary litigation

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[66] 15 U.S.C.A. §6103(a) authorizes a state "to obtain damages, restitution, or other compensation on behalf of residents of such state, or to obtain such further and other relief as the court may deem appropriate."

[67] The Commission is authorized to seek civil penalties of up to $11,000 per violation or a disgorgement order. 15 U.S.C. §6105(b).

[68] To the extent the Commission's registry were claimed to preempt states' No Call database laws, many more possible pendent state claims could be lost.

against violators of any national registry provisions will depend largely on the availability of necessary information about the violations *and* the resources to commence such actions.

Consideration of government's enforcement costs, both those of the Commission and of the states, is not addressed by the proposed Rule or in the questions raised by the Commission.[69] Recovery of all costs of investigation and prosecution, including reasonable attorneys fees, is common among the states' No Call database laws, just as it is in their consumer protection laws. The Telemarketing Sales Rule, however, has never offered these particular forms of recovery. As the Commission knows from its many joint enforcement actions taken with the states, states have successfully recovered monies paid by their own taxpayers in enforcing this federal law by attaching to those federal enforcement actions pendent state claims.[70] Since the Commission appears to be relying heavily on the State Attorneys General to help enforce a national No Call database, it should recognize that an absence of enforcement funding, and a possible inability to recover costs following successful prosecution, will be practical considerations as states evaluate their possible causes of action, the interests of their own taxpaying residents, and the most effective allocation of their litigation resources.

Because of the disparity in available remedies and deterrent effect discussed above, the Attorneys General would encourage the Commission to carefully evaluate its own enforcement costs. Obviously the states have taken numerous enforcement actions under the Telemarketing Sales Rule, and would fully expect to continue sharing these enforcement responsibilities under the revised Rule. But in the unique area of enforcement of the Commission's registry, the states might be less effective where consumer damages are low or difficult to quantify and pendent state law claims are unavailable. This potential reality should be factored into the Commission's evaluation of its own litigation resources.

(h) <u>Exit Strategy</u>:

The final concern relative to the Commission's proposal to create a No Call registry is how such a system will be dismantled *if* the Commission later determines it should significantly change the system or abandon it altogether. Any termination of the registry would have to be done in a responsible way that would not leave consumers stranded with no protection from unwanted telemarketer calls.[71] For example, it would be important that consumers be notified of any termination of the registry and, to the extent they might not have registered in a state No Call

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[69] While many of the states' database systems have been in effect for only a year or less, several states have incurred significant enforcement-related costs.

[70] *E.g.,* in *Telecommunications Resources, Inc., supra,* n.20, the States of Missouri, Illinois, Tennessee and Virginia included pendent state claims. The ability of the states to recoup litigation expenses and other monies can contribute significantly to the funding of their database systems and their ability to enforce those laws.

[71] The consequences could be more serious if states fail to establish their own database systems in reliance on the Commission's system.

database, be provided information regarding that option.[72] We encourage the Commission to give careful consideration to any possible impact its rule making will have on existing and future state systems, especially while any effort it makes to create a registry is subject to being terminated.

C. <u>Conclusion:</u>

That consumers strongly desire sovereignty over their homes against unwanted telemarketing intrusions is abundantly clear. Based on the responses in states that have adopted No Call database systems, the Attorneys General encourage the Commission to anticipate a significant response to a national database, particularly from citizens of states that have not yet implemented their own databases. The many considerations we have raised are not intended to throw cold water on the establishment of a registry by the Commission. We support the Commission's efforts to provide meaningful consumer protection in this area and seek only to underscore the magnitude of this undertaking in an effort to prepare the Commission for what lies ahead.

The State Attorneys General and the Federal Trade Commission enjoy a long history of cooperative efforts as we have combined forces and resources to protect consumer interests. We welcome the opportunity to continue to work with the Commission in pursuing the establishment of a No Call database that will serve consumers and not undercut the states' integral role in protecting their privacy. By clearly stating that the proposed Rule is not intended to preempt any state laws, the Commission will underscore its commitment to our enforcement partnership established under the Telemarketing Act of 1994. We look forward to the continuation of that strong relationship for the benefit of all consumers.

III. <u>Preacquired Account Telemarketing</u>

The Commission should be commended for addressing in a straightforward manner the pernicious problem of preacquired account telemarketing. The proposed Rule would greatly benefit American consumers. This portion of our Comments will focus on areas in which the Attorneys General believe the Rule could be clarified and slightly expanded to further alleviate the problems associated with preacquired account telemarketing.

A. <u>Inherent Problem Of Unfairness And Deception</u>

Since the Attorneys General filed their May 2000 Comments on the Rule, we have continued to experience a high volume of consumer complaints about unauthorized credit card charges.

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[72] We noted at n.59, *supra*, that hyperlinks to some state No Call database websites are currently posted at the Commission's website.

Enforcement actions also have continued since that time.[73] Our investigations have revealed that the primary source of these unauthorized charges lies with telemarketers who have preacquired consumer billing information.

1. **<u>Fundamental Problem</u>**

Preacquired account telemarketing is inherently unfair and susceptible to causing deception and abuse, especially with elderly and vulnerable consumers. As described in our May 2000 Comments, preacquired account telemarketing turns on its head the normal procedures for obtaining consumer consent. Other than a cash purchase, providing a signature or an account number is a readily recognizable means for a consumer to signal assent to a deal. Preacquired account telemarketing removes these short-hand methods of consumer control when he or she has agreed to a purchase. The preacquired account telemarketer not only establishes the method by which the consumer will provide consent, but also decides whether the consumer actually consented. The NPRM summarizes well the unfairness in this form of telemarketing.

The consequence of this fundamentally unfair selling method is clear. Fleet Mortgage Corporation, for instance, entered into contracts in which it agreed to charge its customer-homeowners for membership programs and insurance policies sold using preacquired account information. If the telemarketer told Fleet that the homeowner had consented to the deal, Fleet added the payment to the homeowner's mortgage account. Angry homeowners who discovered the hidden charges on their mortgage account called Fleet in large numbers.[74] A survey, taken by Fleet of its customer service representatives, is attached as Exhibit "A." Approximately one-fifth of all calls

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[73] Attorneys General have taken action against sellers of membership programs through preacquired account telemarketing, including the following: Memberworks, Inc. (Assurances of Discontinuance with the States of Nebraska and New York; Consent Judgments with the States of California and Minnesota); BrandDirect Marketing Corp. (Assurances of Discontinuance with the States of Connecticut and Washington); Cendant Membership Services (Consent Judgment with State of Wisconsin); Signature Financial Marketing (Assurance of Discontinuance with State of New York); Damark International, Inc. (Assurances of Discontinuance with States of Minnesota and New York).

States have also taken actions against companies using preacquired information as part of an upsell of membership programs or magazines. *Illinois v. Blitz Media, Inc.* (Sangamon County, Case No. 2001-CH-592); *New York v. Ticketmaster and Time, Inc.*(Assurance of Discontinuance). Twenty-nine states, led by Missouri and Florida, and the Commission took action against Ira Smolev, Triad Discount Buying Service Inc. and related entities for engaging in deceptive practices related to the upselling of membership programs.

Minnesota and 39 other states reached an agreement with U.S. Bancorp related to its sharing of consumer financial information with membership program sellers engaged in telemarketing. *Minnesota v. U.S. Bancorp., Inc.*, Case No. 99-872 (Consent Judgment, D. Minn.). In 2001, the State of Minnesota sued Fleet Mortgage Corp. for alleged violation of the TSR and state consumer protection law. *See Minnesota v. Fleet Mortgage Corporation*, 158 F. Supp. 2d 962 (D. Minn. 2001).

[74] The mortgage statements issued by Fleet hid the charges under the rubric "opt. prod." at the very bottom of the bill in small print, such that it was extremely difficult to discover the charge or discern the purpose of the charge. For consumers on auto-draft from their checking or other bank account, Fleet gave no written notice of the charge.

by Fleet customers were about these preacquired account "sales." Customers overwhelmingly told Fleet that they did not sign up for the product, and wanted to know how it was added to their mortgage accounts without their approval, consent, or signature.

In Fleet's survey, its phone service employees were asked to describe the "single biggest customer complaint" they received and, it appears, they shared the resentment of these consumers. Below are verbatim excerpts of the survey responses provided by Fleet employees:

> Unethical for Fleet to add opt ins [optional insurance] without my permission/How did this get on my acct.
>
> I know opt is big for profit however there should be a written confirmation to verbal offers and written notification of expiration of trial period.
>
> The fact that people are mad about an increase in their monthly pymnt because of opt ins
>
> HO knows they are being slammed w/ ins they never authorized. HO thinks unethical & bad business by us…. I agree with the customer.
>
> I hope that FMG makes enough revenue from opt ins to justify all the calls on our 800 line from customers trying to cancel.
>
> What right do we have to add this to their escrow?
>
> Fleet should not allow this to happen….We need to get their permission to draft their account instead of just doing it.
>
> Please change the way that ins is added to account.
>
> Customer should know when we are adding things to their accounts.
>
> They feel this is fraud. It's a scam. They never wanted the ins.

2. Vulnerable Consumers

The frail elderly, consumers who speak English as a second language, and other vulnerable groups are especially at risk with preacquired account telemarketers. Sellers are continually using preacquired account telemarketing to sell elderly consumers membership clubs, magazines, and other products for which they have no possible use. In our May 2000 Rule Comments we included transcripts of telemarketers using preacquired billing information to charge the following: the credit card of an 85-year old man with Alzheimer's; the credit card of a 90-year old woman who asked to "quit this" and said "sounds like a scam to me;" and the bank checking account of an impaired 90-

year old man who did not believe he consented to the charge. Attached as Exhibit "B" to these Comments is a letter from a Legal Aid attorney listing a variety of useless and expensive membership clubs charged to the credit card of a retired church janitor in his 80's. These are just a few of the substantial number of consumer complaints our offices have received.

3. Problems Multiplied by Opt-out Free Trial Offer

A constant companion of the preacquired account telemarketer is the opt-out free trial offer.[75] The inherent unfairness of preacquired account telemarketing is compounded by its use in combination with this selling method that the Commission has previously found susceptible to abuse.[76] As described in our May 2000 Comments, consumers are led to believe that they are agreeing to accept materials in the mail, preview a program along with a free gift, or the like. As one telemarketer explicitly stated in its scripts: "we're sending you the information through the mail, so you don't have to make a decision over the phone." Only at the tail end of a lengthy call does the telemarketer obliquely disclose that the consumer's preacquired account will be charged. By this time, many consumers have already concluded that they understood the deal to require their consent only after they review the mailed materials. By combining the potential for deception of an opt-out free trial offer with the inherent deception possibilities with preacquired account telemarketing, these telemarketers gain extraordinary bargaining leverage that makes deceptive conduct almost inevitable.

4. Inadequacy of Verification Taping

Preacquired account telemarketers usually assert one defense to their unfair advantage -- that they obtain a tape recording of the consumer consenting to the transaction. Our experience, however, is that this is far from adequate to establish consumer consent. First, these telemarketers almost universally tape record only the last portion of the telephone call. This is a particular problem because, as noted above, the preacquired account selling usually occurs in conjunction with an opt-out free trial offer. Many consumers already have formed the impression during the lengthy unrecorded portion of the call that this is a decision of no great consequence. Second, verification taping is especially inadequate because the telemarketer circumvents short-hand forms of consumer assent and controls the decision of whether the consumer consented. Preacquired account telemarketing verification taping typically is preceded by statements suggesting that the taping is "to prevent clerical error" and critical information is revealed in ways that many consumers will not grasp at the end of a conversation. Third, the prior problem is compounded by the disproportionate share of vulnerable consumers agreeing to preacquired account free trial offers. On the verification

[75] The Attorneys General use the term "opt-out" in these Comments to refer to the practice of a seller placing a charge on a consumer's account unless the consumer takes an affirmative action within a set time to cancel the charge. The Attorneys General use this term to distinguish the practice from the narrowly defined "negative option" sales method as that term is used in the Commission's Negative Option Rule, 16 C.F.R. § 425.

[76] *See generally Annotation, "Advertising 'Free Trial' of Merchandise As Deceptive Act or Practice or Unfair Method of Competition Violative of § 5(a)(1) of Federal Trade Commission Act*," 26 A.L.R. Fed. 795 (1996).

transcripts we attached to our May 2000 Comments, for example, vulnerable consumers technically responded to verification scripts, but the absence of genuine consent is obvious. Finally, as noted in our May 2000 Comments, investigations conducted by State Attorneys General show that a random sampling of verification tapes revealed an inability of such telemarketers to produce a substantial percentage of the tapes and little concern by telemarketers for following their own scripts and procedures.

B. Types Of Preacquired Account Telemarketing

Preacquired account telemarketing can be classified into three general types: (1) calls initiated by telemarketers who sell merchandise using billing information previously acquired from a third party; (2) sellers charging merchandise by using billing information acquired from the customer by another telemarketer; and (3) sellers charging for their own merchandise by using billing information obtained in a prior or contemporaneous transaction.

1. Third Party Data

The first type of selling involves the acquisition of billing information from a third party, often financial institutions, for use in calls initiated by the seller. This can be described as "third party data" preacquired account telemarketing. The typical scenario is a financial institution sharing billing information with a telemarketer who sells membership programs, magazines or small insurance policies, often accident, credit or life insurance. The telemarketer initiates a call to the consumer and attempts to make a sale using the billing information preacquired from the financial institution. Credit card issuers are common participants in preacquired account telemarketing. The mortgage accounts of homeowners, however, also have been subjected to third party data preacquired account telemarketing. Telephone service accounts, insurance accounts, and other types of consumer accounts also have been subjected to this form of telemarketing charge.[77]

2. Upsell

The second type of preacquired account selling is an "upsell" following purchase of another company's merchandise. The actions against Triad and related entities by numerous Attorneys General and the Commission is an example of this form of preacquired account telemarketing. These are usually inbound calls during which the company receiving the call completes the purpose for which the consumer initiated the call and then entices the consumer to consider another seller's products. The upsell can follow either a sales call or a call related to customer service, such as a call about an account payment or product repair. The proposed Rule's expansion of the definition of "outbound telephone call" in §310.2(t) effectively captures the two variants of upsell: the transfer

[77] For example, Minnesota, Illinois, and Arizona reached settlement with Network 1000, Inc. and its principals. Network 1000 entered into arrangements with a telephone service provider to charge alleged website development services on phone service accounts based on outbound telephone solicitations.

of the call to a second seller and the sale by the recipient as agent of the second seller.[78] Some examples of the upsell of membership programs, magazines and the like are a television solicitation to buy an inexpensive lighting product that includes upsell of a costly membership program,[79] consumers sold a membership program when attempting to purchase United States flags following the September 11, 2001, tragedy,[80] or tickets to entertainment events.[81]

3. Seller Retention

Finally, preacquired account telemarketing also occurs when a company sells its own merchandise using billing information acquired from the consumer either in a prior interaction or for another purpose during the same call. This can be described as "seller retention" preacquired account telemarketing. There are three general categories of such calls: (1) in a single transaction the seller or telemarketer acquires the billing information as part of the sale or servicing of one product and uses it in charging the sale of a different product by the same seller; (2) the seller or telemarketer retains billing information from the consumer in a sale and uses it in a separate, later sale by the same seller of the same type of products, usually as part of a call initiated by the consumer; and (3) the seller or telemarketer retains billing information from the consumer in a sale and uses it in a separate, later call for a wholly different type of product, usually in an outbound call initiated by or on behalf of the same seller.

C. Proposed Rule Revisions

Proposed §310.4(a)(5) offers a creative and efficient means for addressing the problems of preacquired account telemarketing. The expansion of the definition of "outbound telephone call" coupled with the prohibition on receiving or distributing billing information could effectively control the problem of preacquired account charges for most telemarketing calls subject to the Rule. It would accomplish this goal with minimal impact on legitimate commerce because any seller or telemarketer can escape the reach of this prohibition simply by acquiring the billing information from the consumer for the purpose of completing the contemplated transaction.

Our recommendations regarding the proposed Rule are as follows: (1) suggesting revision to the language of the proposed Rule to dispel ambiguities concerning which transactions are

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[78] In n.45 of its NPRM, the Commission labels this as "external" versus "internal" upsell. 67 Fed. Reg. at 4496.

[79] The action taken by the Commission and numerous states against Triad and related entities, *see* n.73 *supra*, included allegations that these companies use a television advertisement for an inexpensive lighting program that would be followed by an upsell of a more costly membership product.

[80] Attached as Exhibit "C" is a summary of a story run on ABC Television concerning upsell of membership programs by a merchant of U.S. flags.

[81] *See New York v. Ticketmaster and Time, Inc.*, n.73 *supra*.

intended to be covered; (2) clarifying that the exception provision of §310.4(a)(5) neither swallows the Rule nor excludes upsells; (3) clarifying the breadth and meaning of the definition of billing information; (4) expanding the definition of "outbound telephone call" to include upsells following customer service calls; and (5) proposing an addition to the Rule to cover preacquired account charges for opt-out free trial offers in the seller retention situation. The following subsections of our comments address each of these concerns.

1. **<u>Proposed Revision to §310.4(a)(5)</u>**

Section 310.4(a)(5) clearly is intended to prohibit preacquired account telemarketing in the third party data situation and with upselling. We strongly support the concept of regulating preacquired account telemarketing by prohibiting the data sharing that makes it possible, and we commend the Commission's obviously thoughtful analysis that led to this approach. Our primary concern is the need to clarify the language of the Rule implementing the concept.

Proposed §310.4(a)(5) works by two independent prohibitions: (1) receiving billing information not obtained from the consumer "for use in telemarketing;" and (2) disclosing billing information "for use in telemarketing." By focusing on the receipt of billing information for use in telemarketing, the Rule might be construed to allow conduct that it clearly means to prohibit, at least as to this half of the prohibition. For example, a company that already has an inventory of consumer credit card numbers or other billing information could argue that it is not "receiving" such information after the effective date of the Rule and thus could continue to use preacquired account telemarketing with these consumers for years to come.

Even as to prospective sharing of billing information, the effect of the Rule could turn on the interpretation of the phrase "for use in telemarketing." One issue could become whether the seller or telemarketer received or disclosed billing information "for use in telemarketing" rather than for some other purpose. Would it be a violation of the Rule if a seller receives billing information in connection with a direct mailing but later uses it for preacquired account telemarketing? The current construction of the section almost encourages an argument over the intent of the seller, which is traditionally not an element of proof required in consumer protection law. Similarly, a seller or telemarketer could assert that disclosing billing information is not part of the telemarketing solicitation process and thus is not "for use in telemarketing," but rather only for use in processing billing. The obvious retort and the seeming intent of the Commission is that "for use in telemarketing" should be broadly construed to include the billing aspect of the transaction.

We propose resolving these problems by changing the prohibition against receiving billing information into a prohibition against using or disclosing preacquired billing information in connection with telemarketing. Specifically, we suggest the following language for the prohibition in §310.4(a)(5): "Using in connection with telemarketing billing information received by the seller or telemarketer from any person other than the consumer or donor, or disclosing any consumer's or donor's billing information to any person in connection with telemarketing." By tying the prohibition on use to the current or past receipt of billing information from a source other than the consumer, we believe the Rule would more clearly achieve the objective of prohibiting preacquired account telemarketing in the third party data situation and with upselling.

2. Clarifying the Exception Provision Regarding Prohibition on Preacquired Account Telemarketing with Upsells

The Commission has found that the practice of upselling goods and services has become more common,[82] bringing this issue to the forefront of abusive telemarketing practices. The Attorneys General commend the inclusion of upselling within the scope of the Rule, but we recommend clarification of the provision in §310.4(a)(5) exempting the sharing of consumers' billing information to process payment for goods or services when a consumer has previously disclosed his or her billing information.

This exception provision can be divided into three elements:

(1) the transfer of a consumer's or donor's billing information to process a payment for goods or services or a charitable contribution;

(2) pursuant to a transaction in which the consumer or donor has disclosed his or her billing information; and

(3) (the consumer or donor) has authorized the use of such billing information to process such payment for goods or services or charitable contribution.

Taken as a whole, the exception provision seems limited to the use of billing information when the consumer provides billing information to seller X during that transaction for the purpose of purchasing merchandise from seller X. This exception is appropriate and necessary.

As written, however, the exception leaves grounds to argue for mischief. First, by using the term "billing information," the exception could essentially swallow the Rule. As discussed more fully below, billing information could include as little as the consumer's name, address or phone number, if that is the only information the billing entity requires from the seller in order to charge the consumer's account.[83] Sellers could argue that by providing their name and address, the consumer has provided his or her billing information for purposes of the exception provision. If that is the case, consumers are right back to where they started before the adoption of the Rule, fighting over whether or not the consumer authorized the use of that billing information. The Attorneys

[82] 67 Fed. Reg. at 4512-4514.

[83] *See* part 3 below for a further discussion on the definition of "billing information." This is exactly what occurred in the States' Network 1000 cases, *see* n.77 *supra*, in which small businesses and nonprofits were charged on their phone bills for webpage development as a result of telemarketing.

General recommend replacing the term "billing information" with "account number" throughout the exception clause. This will allow the transfer of information needed to complete a legitimate transaction, without eviscerating the purpose of the proposed Rule.[84] The asymmetry between a broader definition of billing information in the prohibition provision and narrower language in the exception makes sense: the harm of preacquired account telemarketing flows from account issuers selling wide access to account charging information while the exception is based on the consumer disclosing information that he or she readily understands as offering access to his or her account, the latter constituting a narrower range of data.

In addition, the exception, as currently proposed, leaves open the argument for upsellers that the transfer of billing information between sellers, after the telemarketing transaction ends, meets each of the latter two elements of the exception. The consumer disclosed the billing information to the initial seller, and both the initial seller and the secondary seller will argue that the consumer authorized use of the billing information to process the payment. The issue here is whether the consumer disclosed his or her billing information "pursuant to a transaction" with the second seller. Treating the upsell call as one transaction would allow the exception to defeat the rule. The Commission's comment on the expansion of the "outbound telephone call" definition makes clear that this is not the intended result, but a further comment clarifying the Rule as to this section would preclude such arguments.

3. <u>Definition of Billing Information-- §310.2(c)</u>

Proposed §310.4(a)(5) prohibits preacquired account charges by focusing on the sharing of information by and with telemarketers and sellers, rather than on the form of consent by the consumer after the telemarketer or seller has preacquired information allowing it to bill a consumer's account. The effectiveness of this approach substantially rests on the definition of "billing information." The proposed rule broadly and adequately defines billing information to include any data that provides account access. The Commission's discussions in the NPRM also confirm the intended broad scope of this definition.[85] Nonetheless, the Attorneys General urge clarifications in the Commission's comments regarding this definition.

First, the Commission's comment in the NPRM lists primarily account numbers and traditional verifying information (date of birth or mother's maiden name) as examples of access data. As described below, the Gramm Leach Bliley Act ("GLBA") has resulted in the common use of reference numbers and encrypted numbers to identify consumer accounts in preacquired account telemarketing. These types of account access devices definitely should be included in the list of examples. Failure to include encrypted numbers within the scope of the Rule's definition of "billing

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[84] Alternatively, we suggest new Rule language or a comment limiting the term "billing information" for the purpose of the exception clause to information that a consumer would reasonably expect would provide access to his or her account.

[85] *See* NPRM, 67 Fed. Reg. at 4512-4514.

information" would render the Rule useless as a device to combat the ills of preacquired account telemarketing.

The Commission's comment also states that limits on what can be used as access data depend on the relationship of the account issuer to the seller. For example, a mortgage service company could contract with a magazine seller to allow a homeowner's name and address as sufficient identification to charge the homeowner's mortgage account. In this case, a name and address is a form of billing information because of the mortgage servicer's agreement to this form of preacquired account charges.

For the same reason, the exception is fodder for creative lawyering to preserve the preacquired account telemarketing system in the third party data context. An account issuer and a telemarketer could agree to split the sharing of information by dividing the receipt of contact information (name and phone number) from the information that allows account access (*e.g.*, address and birth date). The telemarketer could argue that it receives no information that allows access to the consumer's account, that it acquires the billing information during the call (even though the consumer would never recognize address and birth date as information allowing an account charge), and that it discloses that information solely to process a charge authorized by the consumer. We encourage the Commission to add a comment to the effect that the sharing of billing information must be viewed in the context of the account charging, information sharing, and telemarketing scheme of the parties, not as isolated transactions.

Furthermore, while the definition plainly contemplates including a very broad range of accounts, the listing of specific types of accounts in the definition could open the door to needless wrangling about whether non-listed account types fall within the intended scope of the definition. There is no reason, for example, for including utility and mortgage loan accounts, but not insurance or medical accounts, since the Rule clearly makes no such distinction. Additionally, the listing of examples of accounts following "such as" clearly is intended to refer to the types of accounts rather than the forms of access data. Comments to the Rule clarifying that the cited account types are a non-exclusive illustrative list of exemplar consumer accounts would clarify the Rule and limit the need to engage in this type of argument[86]

4. Clarifying or Revising the Definition of "Outbound Telephone Call" to Include Upsells Following Customer Service Calls

Revising or clarifying the definition of "outbound telephone call" is necessary to capture the preacquired account telemarketing calls that occur through upsells after customer service calls. The proposed §310.2(t)(3) includes within the scope of the Rule the solicitations for one seller and then for a second seller in the same call. This definition, however, does not capture a common telemarketing situation that imposes all the same risks to the consumer. Companies that have

[86] A similar statement was inserted regarding the Commission's Rule Comments listing examples of conduct that violate §310.3(b). 60 Fed. Reg. 43842, 43852 (August 23, 1995).

consumer billing information from prior transactions or who are the account issuers are using upsells during routine customer service calls. For example, the consumer calls her mortgage servicing company to inquire about receipt of a mortgage payment. After completing this transaction, the mortgage servicer proceeds to sell her an opt-out free trial offer membership program or magazine. Similarly, the seller who retains a credit card number from a prior transaction can complete an upsell following a product service or billing question call. The same ills apply here as in the situation in which the upsell occurs along with a second sale. In some ways it is more unfair because of the possible disconnect in time between the transaction in which the consumer provided the billing information and the upsell.

Whether this conduct falls within the current proposed definition of §310.2(t)(3) depends on the meaning of the undefined term "solicitation." We suggest revising §310.2(t)(3) by adding "or servicing" after the word "soliciting." Alternatively, we encourage additional Commission comment clarifying that servicing an account in the multiple seller context brings the upsell part of the call within the scope of the Rule.

5. <u>Prohibiting Opt-out Free Trial Offers with Seller Retention of Billing Information</u>

The proposed Rule clearly prohibits preacquired account selling when the telemarketer or seller obtains the billing information from a third party. There are several circumstances in which sellers retain consumer billing information and use it in a second or later transaction with the same consumer. In some cases, this is beneficial, such as when the consumer makes an informed decision to leave billing information on file with the seller. In other cases, consumers would be shocked to know that the seller retained his or her billing information. For instance, a consumer who makes a credit card purchase of a printer from a catalog seller or uses her credit card to pay for a hotel room would not expect the seller to retain her credit card number for use a year later in an outbound telephone solicitation for a magazine. This problem also exists for calls in which the seller uses an allegedly free or cheap product to lure in consumer calls and then sells an expensive item through the opt-out free trial offer, such as occurred in the states' and Commission's actions against Triad entities or the recent Illinois suit against Blitz Media.[87]

The Attorneys General suggest expanding the proposed Rule to cover this particularly egregious type of seller misuse of previously acquired billing information. As noted above, this type of preacquired account telemarketing is especially troublesome when combined with an opt-out free trial offer. The inherent potential for deception is multiplied when used in this combination, resulting in the substantial number of consumer complaints received by the Attorneys General. Accordingly, we urge the Commission to enact a narrow additional provision in §310.4 prohibiting the use of preacquired billing information, even if previously obtained by the same seller or telemarketer from the consumer, in opt-out free trial offer solicitations.

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[87] *See* n.73, *supra*.

Specifically, we propose the following addition to §310.4(a):

> (6) causing a charge to a consumer or donor for goods or services as a result of a telemarketing solicitation for an opt-out free trial offer using billing information received by the telemarketer or seller from any person other than the consumer or donor, or received by the telemarketer or seller for any purpose other than permitting a charge for such opt-out free trial offer.

The Attorneys General also propose a corresponding definition of "opt-out free trial offer" as an additional provision of §310.2: "an offer to provide goods or services to a consumer for a trial period during which the seller agrees to delay initiating a charge to a consumer or donor's account and agrees to allow the consumer or donor to cancel the purchase during the trial period."[88] Because calls using seller retention data to make opt-out free trial offers often would be inbound calls, the Attorneys General also suggest that the exemption provisions be amended to exempt this narrow category of calls.

The problems associated with seller retention preacquired account telemarketing are vexing because of the difficulty of developing a rule that sorts acceptable from unfair or deceptive use of billing information previously provided to the telemarketer by the consumer, but used by the telemarketer for another purpose. In the restricted case of opt-out free trial offers, however, there is a tremendous amount of evidence that the combination of these selling practices regularly deceives or confuses consumers. The Attorneys General propose that only in an opt-out free trial offer the telemarketer or seller be required to obtain the consumer's billing information rather than being able to use billing information previously acquired from the consumer for a different purpose.

D. Relationship to Gramm Leach Bliley Act

The Commission's NPRM also asked for comments about the relationship between the proposed Rule and the Gramm Leach Bliley Act ("GLBA").[89] The Attorneys General contend that the restrictions on data sharing in GLBA have had little effect on preacquired account telemarketing and that abuses continue to occur.

Subtitle A of Title V of GLBA limits the ability of financial institutions to disclose a consumer's nonpublic personal information to nonaffiliated third parties. Financial institutions are also required to provide notices to their customers about their information collection and information

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[88] The opt-out free trial offer sales method is distinct from a sale with a money-back refund period. In a free trial offer, the seller often represents that the consumer is "not making a purchasing decision," or the like. This often misleading representation is based on the notion that a charge will not be processed to the consumer's account during the trial period. A money-back refund offer, on the other hand, follows the actual sale of merchandise to the consumer.

[89] 15 U.S.C. §6801, *et seq*.

sharing practices and give customers the opportunity to "opt-out" of having their information shared with nonaffiliated third parties. The burden is therefore on consumers to look for the privacy notices, read and attempt to understand them, and then take affirmative action to halt the sharing of their nonpublic personal information with nonaffiliated third-parties, such as telemarketers.[90]

The GLBA, in §502(d), does prohibit a financial institution from disclosing, "other than to a consumer reporting agency, an account number or similar form of access number or access code for a credit card account, deposit account, or transaction account of a consumer to any nonaffiliated third party for use in telemarketing, direct mail marketing, or other marketing through electronic mail to the consumer." Thus, §502(d) prohibits the practice by financial institutions of providing the credit card numbers of its customers to nonaffiliated third-party vendors and their telemarketers. These third-party vendors had previously solicited the financial institutions' customers via outbound telemarketing calls to market the services of the third party vendors. For example, these vendors called consumers, used the financial institution's name in the sales pitch, and attempted to sell free-trial memberships in the vendors' travel club memberships or medical discount plans. The consumers were never asked to recite their credit card numbers because the vendors already had the numbers on hand with the capability to send through a charge. As a result, many consumers found charges for products and services on their credit card bills that they believed they never had authorized.

After §502(d) of GLBA was enacted, however, the federal banking agencies promulgated rules that permitted financial institutions to continue sharing with third party vendors those account numbers, so long as they were in encrypted form.[91]

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[90] The ineffectiveness of this approach has been thoroughly documented. *See* Mark Hochhauser, Ph.D., *Lost in Fine Print II: Readability of Financial Privacy Notices*, Privacy Rights Clearinghouse, May 2001, available at http://www.privacyrights.org/ar/GLB-Reading.htm.

[91] The banking agencies (the Department of the Treasury, the Office of Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the Office of Thrift Supervision) offered the following rationale for this action:

Encrypted numbers. Many commenters urged the Agencies to exercise their exemptive authority to permit the transmission of account numbers in encrypted form. Several commenters noted that encrypted account numbers and other internal identifiers of an account are frequently used to ensure that a consumer's instructions are properly executed, and that the inability to continue using these internal identifiers would increase the likelihood of errors in processing a consumer's instructions. These commenters also point out that if internal identifiers may not be used, a consumer would need to provide an account number in order to ensure proper handling of a request, which would expose the consumer to a greater risk than would the use of an internal tracking system that preserves the confidentiality of a number that may be used to access the account.

The Agencies believe an encrypted account number without the key is something different from the number itself and thus falls outside the prohibition in section 502(d). In essence, it operates as an identifier attached to an account for internal tracking purposes only. The statute, by contrast, focuses on numbers that provide access to an account. Without the key to decrypt an account number, an encrypted number does not permit someone to access an account.

In light of the statutory focus on access numbers, and given the demonstrated need to be able to identify which account a financial institution should debit or credit in connection with a transaction, the Agencies have

As a result of the Rule change, the practices of financial institutions and their third party vendors have remained the same. Financial institutions may share encrypted or randomly generated reference numbers for their customers with third party vendors. Vendors, therefore, can still send through charges to consumers' accounts without consumers giving their credit card numbers. The encrypted numbers are simply decrypted by the financial institutions' affiliates or billing services and the charges are then put through. This allows the same preacquired account telemarketing process to continue -- legally and unimpeded.

Unscrupulous telemarketers can still put through a charge to a consumer's account even when a consumer says "no" to the sale, or simply believes he or she is trying out a free trial offer. Such telemarketers can still use sales presentations that do not clearly disclose to consumers that they are making purchasing decisions by accepting those trial offers or agreeing to look over materials the telemarketer offers to send. Attorneys General continue to receive complaints from consumers concerning charges for services and products that consumers did not intend or agree to purchase on their credit card, bank account, and mortgage statements.

The Commission's proposed Rule focuses on telemarketers and their practices, addressing the fundamental imbalance in the selling relationship between telemarketers and consumers. The essential characteristic of preacquired account telemarketing is the ability of the telemarketer to charge the consumer's account without traditional forms of consent -- *i.e.*, paying cash, providing a signature, or providing a credit card or bank account number. The key is how the agreement between a company controlling access to a consumer's account and the telemarketer who preacquires the ability to charge a consumer's account affects the bargaining power between that telemarketer and the consumer. GLBA and implementing regulations do not address this relationship. The Commission's proposed Rule, on the other hand, strikes directly at the consumer harm caused by preacquired account telemarketing.

Decades of consumer education have made many consumers aware that disclosing their account number may result in unexpected charges. The corollary to this is that many consumers believe that as long as they do not disclose their account number, no charge can be made on the account. Preacquired account telemarketing exploits this belief. As recognized in the Commission's proposed changes to the express verification provisions of the Rule, section 310.3(a)(3), providing an account number is an important shorthand means for a consumer to communicate assent to a deal. Preacquired account telemarketing strips the consumer of this control over the transaction and exploits the belief that being careful about disclosing an account number provides protection. Permitting preacquired account telemarketers to charge a consumer's account without the protection

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included a clarification in § __.12(c)(1) [*sic*] of the final rule stating that an account number, or similar form of access number or access code, does not include a number or code in an encrypted number form, as long as the financial institution does not provide the recipient with the means to decrypt the number. The Agencies believe that consumers will be adequately protected by disclosures of encrypted account numbers that do not enable the recipient to access the consumer's account.

Agency Comments to 12 C.F.R. Part 40, 216, 332, and 573; 65 Fed. Reg. 35162, 35182 (June 1, 2000).

and control that results from the consumer controlling access to the account is hardly a step forward in protecting consumer privacy.

E. Conclusion: Inadequacy of Disclosure Remedies with Preacquired Account Telemarketing

The Commission has proposed a necessary step to address a serious issue in telemarketing abuse. We commend the Commission for not only recognizing the severe problem of preacquired account telemarketing, but proposing an approach that, with slight modification, should effectively control the problem.

The unfairness and deception resulting from this special type of telemarketing are consequences of the fundamental shift in control that occurs when the seller acquires the ability to charge the consumer's account before the solicitation occurs. As a result, this is not an issue that can be cured by mandated disclosure. The inherent inequity of bargaining power is the root of the problem; that inequity can be resolved only by preventing telemarketing with preacquired account information. If adopted in substantially similar final form, the Commission's proposed Rule in this area will be an important step forward for protecting American consumers, especially the elderly and those most vulnerable to abusive telemarketing.

IV. Other "Abusive" Practices (§310.4)

The Commission has proposed additional amendments to the Telemarketing Sales Rule addressing other "abusive" practices regarding which the Attorneys General wish to voice their support.

A. Efforts by Telemarketers/Sellers to Avoid Consumer Assertions of Do-Not-Call Notifications (§310.4(b)(ii))

The Commission has asked for comments relating to the following query:

The proposed Rule would prohibit a seller, or a telemarketer acting on behalf of a seller or charitable organization, from denying or interfering with the consumer's right to be placed on a "do-not-call" list or registry. Is this proposed provision adequate to address the problem of telemarketers hanging up on consumers or otherwise erecting obstacles when the consumer attempts to assert his or her "do-not-call" rights? What alternatives exist that might provide greater protections?

The Attorneys General agree that any efforts by telemarketers to avoid or disregard a consumer's notice of their desire to receive no further calls should be addressed in the Commission's Rule and are pleased with the approach proposed. Obviously any efforts by telemarketers to obfuscate their identity or avoid a consumer's efforts to advise telemarketers that the consumer does not want future telemarketing solicitations undercuts the Commission's current do-not-call rule, and must not be tolerated. In drafting regulations, it is important to keep in mind that the consumer receiving telemarketing calls is the perpetual "underdog," relying nearly exclusively on the forthright disclosure by the telemarketer of his/her identity and purpose for the call.

The Attorneys General have received numerous complaints regarding re-solicitation of consumers who attempted to give such notice. There is often confusion among consumers as to the actual identity of telemarketers and sellers since numerous companies (often independent franchisees) use the same or very similar names. The consumer is left to wonder whether a telemarketer has properly interpreted and recorded a request to not be called. Expressly stating that it would be a violation of the Telemarketing Sales Rule for a telemarketer to deny or interfere with a consumer's right to be added to a company-specific do-not-call list -- to be included in any other No Call registry -- clarifies the seriousness of such efforts. Clearly prohibiting all efforts to interfere with consumers' effort to invoke their rights, and making such efforts punishable violations independent of a subsequent re-solicitation, will raise confidence in any system and help achieve the goal of consumer protection.

B. Circumvention of Caller Identification Services (§310.4(a)(6A))

The Commission has proposed adding to the list of proscribed abusive practices the blocking, circumventing, or altering of transmissions of caller identification information in §310.4(a)(5). Caller identification information ("Caller ID") is a popular tool that many consumers use to screen their calls. They are often frustrated, however, when the phone rings and the display reads "unavailable." State legislatures have responded to the frustration by passing laws to prohibit telemarketing companies from blocking the display of the company's name and address.[92] Additionally, a bill recently introduced in Congress would also prohibit interference with caller ID displays.[93]

The Attorneys General recommend that the Commission follow this trend by making the proposed modification to §310.4(a)(5). This change would be meaningful because companies that avoid the transmission of such information invite the inference of fraud. Additionally, telecommunications technology has now made it feasible for virtually all telemarketers to transmit their identification information to consumers. Given this new capability, we hope the Commission will also encourage telemarketers to utilize the equipment necessary to provide this important information.

The Commission requests specific information about the technological capabilities in the telemarketing industry. One question posed was "whether there are trends in telecommunications that might now permit the transmission of full Caller ID information when the caller is using a trunk line or PBX system." Based on information we have gathered from major telephone service providers, the ability to permit the transmission of full Caller ID information when the caller is using a trunk line or PBX system is available today. We have been advised that *all* trunk lines (the connections between the telemarketers' offices and the PBX systems) should be capable of supporting Caller ID.

Even though these systems are available, Caller ID will work only if both the transmitting and receiving telephone companies have the equipment that is compatible with Caller ID. Where the name and number come from, and whether they are transmitted, depends upon the equipment at the telemarketer's telephone company. Although it appears that all of the large telephone companies have the equipment in place, there remain some small local companies that may not. We have been told, however, that all telephone companies are likely to have the equipment within three years.

The Commission asks whether the use of predictive dialers may be circumventing the transmission of Caller ID data. We have been advised that predictive dialers can circumvent Caller ID in the same way that telemarketers using a manual dialing system can circumvent the system -- their impact being many times the number of consumers receiving unidentified calls.

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[92] *See* generally, ARIZ. REV. STAT. §44-1278 (B)(1); 815 ILCS 413/15(c)(2000 State Bar Edition); MO. REV. STAT. §407.1104; N.C. GEN. STAT. §75-30.1 (f); N.H. REV. STAT. ANN. §359-E:5-9; OKLA. STAT. TIT. 15, §775A.4 (a)(8).

[93] S. 1881, the "Telemarketing Intrusive Practices Act."

Industry claims that the use of predictive dialers can dramatically increase "efficiency" of telemarketing operations by increasing actual contact between the telemarketer and consumers as much as 400%. Obviously, the more time a telemarketer spends actually talking to consumers, the more sales are likely to be made. Thus, telemarketing productivity may be measured by "hit rate," meaning the number of live conversations had within an hour. One member of the industry, Marketel Systems, Inc., offers the following illustration of these efficiencies on its website at www.Predictive-Dialers-Results.Com:

	8 Seat Manual Dialer	**4 Seat Predictive Dialer**
Minutes Talking to Prospects:	3,840	5,640
Hours of Operation:	30	30
Hours of Salary/Week:	240	120
Total Payroll/Week @ $8.00/hour:	$1,920	$960
Avg. Talk Time:	16 min/hr	47 min/hr
Possible Contact Minutes:	14,000 (240hrs/wk)	7,200 (120 hrs/wk)
Results:	3,840 out of possible 14,400 Contact min/wk with Payroll=$1,920/wk	5,640 out of possible 7,200 Contact min/wk with Payroll=$960/wk

Marketel Systems suggests that additional efficiencies in training may also be realized by the use of a predictive dialer and estimates that a telemarketer's use of a predictive dialer may result in additional gross profits of $187.50 per person hour simply by making that telemarketer more productive. Since members of the telemarketing industry may realize potentially huge cost savings from their use of such dialers, one could argue they should be required to absorb the cost, if any, of using a Caller ID compatible trunk line.[94]

However, irrespective of the equipment acquired by the telemarketer, businesses can still find ways to avoid transmitting Caller ID information, such as by blocking the transmission at their own office. We, therefore, support the prohibition of *any* affirmative effort to avoid transmission of Caller ID information, and hope that the Commission will strongly encourage efforts in the telemarketing industry to implement the new technologies so this important information can be transmitted to consumers who desire it.

[94] Of course, the actual transmission of Caller ID data does not "cost" the telemarketer anything -- the only economic issue facing telemarketers is the equipment they select to purchase, and whether they choose to generate Caller ID data.

C. Mandatory "Prompt" Disclosures (§310.4(d))

The Attorneys General appreciate the Commission's suggested modifications to the mandatory prompt disclosures required of all telemarketers by §310.4(d). The insertion of the requirement that the disclosure of the seller's identity and purpose be "truthful" would seem unnecessary, but, amazingly, reflects past abuse in this area. Numerous consumers have reported bewilderment at being told a call is a "courtesy call" or made for some altruistic purpose, when, in fact, the call is made for the purpose of pitching some product or service. Naturally, sellers have an interest in establishing customer rapport and good will. However, in their desire to do so, there is the realized risk of downplaying or obscuring the business purpose of their call. The limited disclosures required by §310.4(d) serve the more important purpose of alerting the consumer to the nature of the telephone call.

The Commission has proposed to modify the disclosures required in sweepstakes promotions by including the disclosure that any purchase or payment will not increase a person's chances of winning. Like the injection of "truthfulness," this modification may also seem unnecessary. However, it is necessary, and it reflects the significant developments in the regulation of sweepstakes promotions by the states since the initial Rule was promulgated. During the last few years, several companies offering promotional sweepstakes have been called to task for suggesting that purchasing items might influence a consumer's chance of winning -- even though their offers often included statements to the effect that a purchase was not "necessary." Accordingly, consumers across the country believed that, while it might be possible to win without purchasing, buying would help. The recent judgments entered against Publishers Clearing House, among others, illustrate recognition that clearly explaining that a purchase will not help one's chance of winning (and not suggesting the contrary) is essential to ensuring consumers make purchases based on the merits of the products offered. The Attorneys General support the Commission's inclusion of this additional disclosure.

Finally, the Attorneys General concur with the Commission's interpretation of §310.4(d)'s requirement of prompt disclosures as being violated when a consumer receives a telephone call that has been "abandoned" by a predictive dialer system.[95] The result of an "abandoned call" is that the consumer picks up the telephone to hear it disconnect on the other end -- presumably because no telemarketer was available to handle the call. As children we called such abandoned calls "pranks." By setting some "acceptable" abandonment rate the Commission would be blessing the interruptions that have contributed to the unprecedented consumer outrage leading to the current No Call database laws. We assume that persons engaged in telemarketing do not desire to alienate consumers. We suggest that the consumer's time is just a valuable as that of a telemarketer. Accordingly, we believe that a 0% rate of abandoned calls is the appopropriate standard and should be the target and expectation of every company using a predictive dialer. No level of abandoned calls should be sanctioned as a "defense" by the Commission.

[95] The Commission observed industry's awareness that consumers are annoyed by these hang-ups. NPRM, 67 Fed. Reg. at 4523.

V. Ensuring Consumer Consent to Certain Transactions: "Express Verifiable Authorization" (§310.3(a)(3))

The Attorneys General strongly recommend adoption of the modification proposed to §310.3(a)(3) describing the requisite authorization required in order for a telemarketer to collect payment through certain methods. In our original Comments submitted in response to the initial Telemarketing Sales Rule proposal in 1995, we encouraged the Commission to implement a verification procedure that would require written authorization from a consumer before any charge was submitted or any funds were withdrawn from their checking account. The Commission, responding to industry suggestions that oral verification and post-transaction written confirmations be permitted, adopted the present alternative requirements found in §310.3(a)(3). Consequently, consumers have continued to complain of funds being removed from their bank accounts without their authorization because disclosures leading to oral authorization were inadequate or the mailed notices went unnoticed.

The issues surrounding the determination of whether a consumer has actually consented to purchase merchandise or make a charitable contribution are not unlike those discussed in Part III of these Comments addressing the use of preacquired account information. From a consumer's perspective, until they have provided all of the information needed to process a payment and have agreed to the specific terms of any payment, a transaction has not been completed. These authorization issues are greatly magnified when the telemarketer may already possess billing information. However, even in traditional transactions, where a telemarketer must obtain all billing information from the consumer, the issue of authorization remains a recurring problem. In most telemarketing transactions the telemarketer is the party who determines whether and when a sale has been made. Our objective is to ensure that the consumer is a knowing participant and has knowingly provided billing information for the intended transaction. We are aware of cases where this has not occurred. Our offices continue to receive consumer complaints reporting telemarketers using guises to obtain consumers' bank account numbers or who fail to meaningfully disclose the means by which the consumer will be charged for the purchase or donation.[96]

The proposed modifications to §310.3(a)(3) are well-tailored to expand the protections intended by the current provision to the newer payment methods now being used, knowingly and unknowingly, by consumers. We continue to receive complaints from consumers expressing bewilderment over receipt of charges through their bank accounts or other accounts. This is particularly true among older consumers, but is hardly limited to any age group. While younger consumers are increasingly utilizing debit cards and other payment methods, they are often unaware of the reduced protection against unauthorized charges these methods offer. Accordingly, the Commission's proposal to extend the requirement for express verifiable authorization to cover these

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[96] Just last Fall the Commission and the State of Illinois obtained a preliminary injunction against a company alleged to have obtained billing information for "verification purposes" or by other means of trickery. FTC v. Membership Services, Inc., C.D. Cal. Case No. 01CV1868 JM (2001).

less-protected payment methods, and to also require disclosure of the actual account that will be billed, would be beneficial for consumers.

The Attorneys General also support the deletion of §310.3(a)(3)(iii) which provided the alternative method of obtaining a consumer's authorization for payment by mailing a "post-sale" confirmation of the transaction. It has been our experience that the use of written confirmations of a transaction has been ineffective as they tend to go unnoticed or unrecognized by consumers, thereby failing in their function of "authorizing" a payment. A consumer who does not believe they entered into a transaction would be less likely to even open mail from a company whose offer he or she had recently "declined."

VI. Charitable Solicitors (§310.3(d), §310.4(e) and §310.4(f))

A. Introduction

Legal oversight of charitable solicitations is well established as a function of the states. As early as 1954, New York enacted a comprehensive law to regulate charitable solicitations. Thirty-six states now have laws governing charitable solicitation by the many various forms these solicitations take -- mail, telephone, print, electronic media, and door-to-door. Twenty states require registration with their Attorney General; sixteen states require registration with another governmental agency such as the Secretary of State. The Attorneys General welcome the Commission's proposed inclusion of charitable solicitations in the proposed amendment to the Telemarketing Sales Rule. In this section we offer comments in light of the extensive experience of the Attorneys General in regulating charitable solicitations and the recent collaborations between the states and the Federal Trade Commission.

A review of recent federal/state cooperation highlights the importance of the partnership between the Attorneys General and the Commission in combating deceptive charitable solicitations. In April 1997, the Attorneys General and other state charity officials joined with the FTC in "Operation False Alarm." This joint law enforcement and public education campaign targeted the deceptive fundraising activities of certain for-profit fundraisers who misrepresented ties with police departments, firefighters, and other public safety organizations. Together, federal and state officials initiated 57 law enforcement or regulatory actions against companies engaged in these deceptive fundraising practices. Another federal/state campaign, "Operation Missed Giving," took place in November 1998, directed at deceptive fundraising activities alleged to be on behalf of police departments, firefighters, veterans groups, children's health organizations, and other community organizations. Together, federal and state officials initiated 39 law enforcement or regulatory actions in that campaign.

As reflected in §310.7(b), the clear intent of the proposed amendments to the Rule is not to preempt the states from enforcing their own state charitable solicitations laws. Effective Rule provisions on deceptive fundraising will complement ongoing state law enforcement efforts. In this regard, the Attorneys General offer the following recommendations on how to strengthen the Rule to further appropriate legislative, law enforcement and public policy goals.

B. Scope of Regulations

The Commission has proposed to expand the scope of the Rule to include telemarketing calls involving charitable solicitations, based on §1011(b)(1) of the USA PATRIOT Act, Pub. L. 107-56 (Oct. 25, 2001). However, the Commission has also taken the position that only *for-profit* entities that solicit charitable contributions will be subject to the Rule, and that the Telemarketing Sales Rule will not apply to charitable organizations themselves. The basis for this distinction, according to the Commission, is the text and legislative history of the USA PATRIOT Act, which is said not to affect the preexisting limitation on the FTC's jurisdiction to for-profit entities and their members.[97]

However, the Attorneys General believe that neither the text nor the legislative history of the USA PATRIOT Act supports this nonprofit/for-profit dichotomy. The Act itself is devoid of any language suggesting such a distinction. This is true, first, with respect to the Act's amendment to the definition of "telemarketing" in the Telemarketing Act, 15 U.S.C. § 6106(4), where the underscored language -- neutral as to the profit motive of the solicitor -- was inserted:

> The term "telemarketing" means a plan, program, or campaign which is conducted to induce purchases of goods or services <u>or a charitable contribution, donation, or gift of money or any other thing of value</u> . . . .

Nor does any nonprofit/for-profit distinction appear in §1011(b)(1), which simply states that the Rule's definition of deceptive telemarketing acts or practices "shall include fraudulent charitable solicitations." Similarly, the nonprofit/for-profit dichotomy is absent from §1011(b)(2), which adds "a requirement that *any person* engaged in telemarketing for the solicitation of charitable contributions, donations, or gifts of money or any other thing of value, shall [make certain disclosures on the call]." (Emphasis added.) Significantly, the word "person" is defined broadly by the Rule as including "any individual, group, unincorporated association, limited or general partnership, corporation, or other business entity," with no reference to for-profit or nonprofit status.

The intent of Congress to apply the Telemarketing Sales Rule to *all* telephonic charitable solicitations, regardless of the for-profit/nonprofit status of the solicitor, is also reflected in the draft legislation that became §1011, and in the real-world context in which this provision came into being. Section 1011 was originally part of S. 1484, "Crimes Against Charitable Americans Act of 2001," introduced by Senator McConnell of Kentucky in October 2001. In remarks on the floor of the Senate, Senator McConnell explained that the reason for the bill was the surge in fraudulent charitable solicitations in the wake of September 11:

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[97] *See* 15 U.S.C. §44.

> Almost daily we hear of American citizens receiving solicitations from phony charities. News reports from more than a dozen States, from New York to Florida to California, reveal that Americans are being asked to contribute to what turn out to be bogus victim funds, phony firefighter funds and questionable charitable organizations. The fraudulent solicitation of charitable contributions is a problem all across our Nation. [147 Cong. Rec. S10065 (Oct. 2, 2001)]

Undoubtedly, some of the fraud described by Senator McConnell was perpetrated by for-profit organizations or people associated with them. By the same token, some of these "questionable charitable organizations" were nonprofit groups whose fault was using contributions in a manner inconsistent with representations that they themselves had made to prospective donors. The best-known post-September 11 instance of this misdirection involved the American Red Cross. The Red Cross faced widespread criticism and an investigation by a state Attorney General for its proposal to keep tens of millions of dollars specifically donated for 9-11 relief in reserve for future disasters, rather than distribute the money to victims of the terrorist attack as originally announced to donors.[98]

Deception by a for-profit entity was not the issue in the Red Cross case; however, it was that controversy that symbolized the abuses that Senator McConnell's bill, and §1011, were designed to address. Thus, the available evidence suggests that §1011 was intended to apply to *all* fraudulent fundraising calls, not just to those made by for-profit entities. It would be inconsistent with that intent for telemarketing by charities themselves to be excluded from the scope of the Rule, as the Commission has proposed.

Lastly, including charities among potentially liable parties under the Telemarketing Sales Rule is the right thing to do. It is consistent with the underlying purpose of the Rule, which is to "offer consumers necessary protection from telemarketing deception and abuse." 15 U.S.C. §6101(5). Most charities do not engage in deceptive conduct. However, some do. To deny relief to consumers under the Rule for acts by the one, but not the other, affords consumers incomplete protection from the full range of charities fraud to which the USA PATRIOT Act was directed.

C. Definition of "Charitable Contribution"

The proposed definition of "charitable contribution" in §310.2(f) is apparently -- and appropriately -- intended to be expansive, encompassing "*any* donation or gift of money or any other thing of value." (Emphasis added.) Because the only exceptions to the definition are contributions to political and religious organizations,[99] any donation to any other group should logically constitute a "charitable contribution."

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[98] *See, e.g.*, Susan Saulny, *Red Cross Announces Plans for Rest of Disaster Fund*, N.Y. TIMES, Feb. 1, 2002, <http://www.nytimes.com/2002/02/01/ nyregion/01CROS.html> (Feb. 8, 2002).

[99] *See* §310.2(f)(1) and (2).

However, it would be helpful for the Commission to clarify, in a comment, two aspects of this definition. The first would be to state that the word "charitable" does not limit the character of the recipient of the contribution. In many states, public safety organizations -- such as departments, unions and other associations of police, firefighters, sheriffs and similar personnel -- are considered "charitable" for regulatory purposes.[100] In addition, where a *for-profit* entity holds itself out as a charity, contributions solicited on behalf of the entity should fall within the Rule. In sum, the Commission should make it clear that public safety organizations are "charitable" within the meaning of the Rule, and, more generally, that the use of the term "charitable" is not meant to limit recipients of contributions to any particular subset of organizations.

The second requested clarification concerns "percent of purchase" situations, where contributions are sought in the form of the purchase of goods or services, where a portion of the price will, according to the solicitor, be dedicated to a charitable cause. These dual-purpose scenarios should clearly be covered by the Rule -- either as sales of goods or services, or as charitable contributions, or as both -- but this point should be expressly stated, so that such hybrid transactions do not fall between any regulatory cracks.

D. <u>Mandated Disclosures</u>

Section 310.4(e) requires two oral disclosures in charitable solicitations: the identity of the charitable organization on whose behalf the request is being made, and the fact that the purpose of the call is to solicit a charitable contribution. The Attorneys General also recommend that if the telemarketer is being *paid* to solicit, three additional disclosures be required: (1) the name of the caller; (2) the name of the telemarketing company; and (3) the fact that the caller is being paid to solicit.

Currently, at least 20 states have statutes requiring a professional telemarketer to disclose the fundraiser's identity and the fact that the telemarketer is being paid to solicit.[101] These disclosures help avoid deception in charitable fundraising calls. Prospective donors need to know who is soliciting their contribution, to ensure that they are not misled as to the identity of the caller. a common problem that the states have seen involves paid fundraisers who misrepresent that they are affiliated with, or members of, the charity or public safety organization in whose name they are calling. Likewise, only if prospective donors are informed that the fundraiser is being paid to solicit are they likely to seek out -- by asking the caller or contacting a state agency -- key information on how much of their contribution will go to the fundraiser and how much to the charity.

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[100] *See, e.g.*, N.Y. EXECUTIVE LAW §171-a(1) & (11) (McKinney 1993) ("charitable organization" includes any "organization, association, union or conference of . . . law enforcement officers, including, without limitation, peace officers and police officers . . ., sheriffs, deputy sheriffs, detectives, investigators or constables"); TENN. CODE ANN. §48-101-501(1) (1995) ("charitable organization" includes any group which is or holds itself out to be "for the benefit of law enforcement personnel, firefighters, or other persons who protect the public safety").

[101] *See, e.g.*, N.Y. EXECUTIVE LAW §174-b(2-a) (McKinney 1993); MASS. GEN LAWS ANN. ch. 68, §23(a) (2001); CAL. BUS. & PROF. CODE §17510.85 (West 2002); TENN. CODE ANN. §48-101-513(j)(1) 1995).

In a number of states, fundraisers are also required to disclose where donors can obtain information about the respective percentages of the donor's contribution that will go to the fundraiser and to the charity, or to disclose such information to prospective donors on request.[102] The Commission should clarify in a comment that the disclosures required by the Rule represent the federal "floor" only, and that telemarketers are not relieved from legal obligations to provide additional disclosures that are required by specific state laws and regulations. Such an approach is consistent with our federal system of law enforcement and with the cooperative working relationship between the FTC and the Attorneys General.

E. <u>Misrepresentations</u>

Section 310.3(d) lists categories of material information, misrepresentation of which is deemed to be fraudulent, deceptive and a violation of the Rule. The Attorneys General urge one modest but important addition to this section, and one clarifying comment.

First, the Attorneys General propose that a new subsection (8) be added, to read, "The address or location of the charitable organization, and where the organization conducts its activities." The purpose of this subsection is to ensure specifically that fundraisers do not misrepresent that the charities on whose behalf they are soliciting are "local," or that their activities are local. The local character of a charity or its programs is highly material to prospective donors, who can often be expected to prefer to support organizations that will benefit their own community. To take advantage of that sentiment, fundraisers will sometimes use a local commercial mail receiving agency or post office box as their return address, to make it seem as if the charity is based close to the donors -- a misrepresentation that is no less deceptive than others listed in §310.3(d).[103]

The Commission should also clarify that subsection (7) (prohibiting any misrepresentation of "[a] seller's or telemarketer's affiliation with, or endorsement or sponsorship by, any person or government entity"), covers misrepresentations of affiliations with a *charity*. Such misrepresentations are not uncommon, involving, for instance, telemarketers who falsely portray themselves as police officers soliciting for a police department, union or other public safety organization. Accordingly, it should be made clear that the reference to "any person" in subsection (7) encompasses "any charity."

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[102] *See, e.g.,* VT. STAT. ANN. tit. 9, §2475(e) (2001); COLO. REV. STAT. §6-16-105.3(f) (2002); FLA. STAT. ANN. §496.412(d) (West 2002); TENN. CODE ANN. §48-101-513(n)(1995).

[103] *See, e.g., Vermont v. Civic Development Group, L.L.C.*, No. 863-98CnC (Chittenden Super. Ct. Jan. 22, 2001) (Consent Decree and Stipulation) (prohibiting unqualified use of in-state street addresses by out-of-state charities); Vermont Consumer Fraud Rule 119.08(b) (prohibiting use of in-state address in any solicitation unless either charity maintains and staffs an office at that address, or there is a prominent disclosure of both charity's actual address and fact that local address is a mail drop); N.M. ADMIN. CODE tit.12, ch. 2, part 8 (proposed) (to similar effect).

VII. Additional Disclosures

The Attorneys General further wish to express their support for the modifications proposed in §310.3(a)(1)(iv), §310.3(1)(vi) and §310.3(2)(viii) addressing additional disclosures to be used in sweepstakes promotions by telemarketers and in the offer for sale of any credit protection which is already be available under federal law.

A. Sweepstakes Offers (§310.3(a)(1)(iv))

The Commission has proposed adding to the disclosures required of telemarketers offering prize promotions by requiring them to disclose that any purchase or donation will not help a consumer's chance of winning the prize offered. As with the proposal to change §310.4(2), the Attorneys General appreciate the proposed modification of §310.3(a)(1)(iv) which recognizes the considerable changes in sweepstakes marketing practices as a result of sweeping litigation and settlements with several national companies engaged in sweepstakes promotions. However, the Attorneys General would suggest these required disclosures go still further -- as those national settlements and state laws would require -- in several ways:

First, any telemarketer using a prize promotion should disclose the actual or estimated odds -- not simply "how" the odds might be calculated. Telling a prospective customer that "odds are based on the number of entries received" is utterly meaningless as the purpose for any odds disclosure is to describe the likelihood of winning in a contest of chance. The Attorneys General recommend that the "odds disclosure" required by this provision mandate either the actual or a good faith estimate of the odds.

Second, the offer of an item as a "prize" represents that the item is of value and that there is a chance it will not be received. The Rule's definition of "Prize," §310.2(v), is not consistent with state laws, regulations and the several national settlements now governing the largest purveyors of promotional sweepstakes. The Attorneys General recommend that "Prize" be defined to be an item of value and that it not be an item that substantially all entrants in the promotion will receive. Specific language might be borrowed from a recent multi-state settlement:

> **"Prize"** means cash or an item or service of monetary value that is offered or awarded to a winner in a Sweepstakes. The term does not include one or more similarly valued items or cash amounts of nominal value that are distributed to all or substantially all participants in a Sweepstakes.

Third, the means by which a consumer might enter a sweepstakes without making a purchase must not be any more difficult than if a purchase were made. The recent settlements between the states and Publishers Clearing House require that the same entry method and device be used. The Attorneys General have long been concerned that distinctions made in entry methods imply disparate treatment of those entries -- a conclusion supported by thousands of consumer complaints and several years of studying the use of sweepstakes in direct mail. The same effect can be had in sweepstakes offered by telemarketers: If a consumer is told his agreement to purchase an item over the telephone will result in an entry into a sweepstakes, but is then told, if he does not purchase, he must call a different number or write a letter for alternative entry instructions, it is difficult to believe the non-purchase entry rate will be significant. Such practices, like their direct mail counterparts, are employed to encourage purchase and to discourage non-purchase entries. Because of the deceptive impact and the unfair influence they have on consumers' decisions to purchase or donate, the Attorneys General recommend the Commission require that the same entry method into a sweepstakes offered through telemarketing be available to purchasers and donors as well as non-purchasers and non-donors.

B. Credit Card Protection (§310.3(a)(1)(vi) & (a)(2)(viii))

The Attorneys General support the enhancements to the Rule offered by §§310.3(a)(1)(vi) and 310(a)(2)(viii) which require disclosure, in any offer of credit protection services, of the limit on a credit card holder's liability for unauthorized use and which prohibit misrepresenting that particular services or goods are needed to protect against that liability. Despite the long-standing liability limit of $50.00 for a credit card holder's liability for unauthorized use, dubious offers continue offering protections against such liability, some even representing that certain credit protection services are either required or strongly recommended by credit card issuers.[104] The Commission has correctly identified credit protection offers as meriting additional disclosures to ensure that consumers can evaluate the offer in light of any protections they currently have under federal law.

VIII. Third Party Liability(Assisting & Facilitating under §310.3(b))

The Attorneys General continue to recommend that the standard for third party liability currently set forth in §310.3(b) be modified to increase the likelihood of successful prosecutions of those who provide crucial assistance to fraudulent telemarketers. We request the Commission to reconsider its determination that the standard for third party liability remain the same.

[104] The experience of the Attorneys General has been similar to that described in the Commission's NPRM: we have brought numerous cases against unscrupulous telemarketers of credit card protection plans who have misrepresented that, without the protection they offer, a consumer's liability for unauthorized purchases is unlimited, and that they are affiliated with a consumer's credit card issuer. (NPRM, 67 Fed. Reg. at 4503.) Accordingly, thousands of consumers have purchased "protection" that afforded them little value beyond the existing protections of federal law. A recent example of dubious credit protection being so offered is the current litigation between the Commission and the State of Illinois against Membership Services, Inc., which was alleged to have made such representations in telemarketing its credit protection services. *See* n.96 *supra*.

Currently, the FTC and State Attorneys General, in order to prosecute third parties under the Telemarketing Sales Rule, must establish that the third party "knows or consciously avoids knowing," that they are assisting or facilitating deceptive telemarketing.[105] This is a higher standard than that required under the majority of state consumer protection laws and the FTC Act.[106]

The Attorneys General recommend that §310.3(b) be modified to adopt a "knew or should have known" standard which would obviate proving the third party's mental state, a burden which can rarely be met. Moreover, it would reduce the likelihood that a third party could avoid liability by asserting that he or she did not know of the fraud, and did not consciously avoid such knowledge. As the Rule currently stands, both federal and state authorities are unduly hampered in trying to reduce telemarketing fraud.

Fraudulent telemarketers, many of whom have migrated outside the United States, cannot function alone; they necessarily rely upon third parties to carry out their fraudulent schemes. Whether it be selling lists of victims who have been identified as particularly vulnerable, laundering credit cards, or operating fulfillment houses in the United States, third parties provide invaluable assistance to fraudulent telemarketers beyond our borders, yet, frequently escape prosecution. Since the majority of fraudulent telemarketers who operate outside of the United States have no assets here, being able to prosecute the third parties assisting or facilitating fraud, who do have assets in the United States, is crucial to effective enforcement.

A third party should be liable if the FTC and/or the Attorneys General present evidence establishing the third party should have known that they were assisting or facilitating deceptive telemarketing. As an example, assume that a fulfillment house sends out only inexpensive prizes, which it has purchased on behalf of the telemarketer, and as part of its contract with the telemarketer, it also receives customer correspondence, including complaints on behalf of the telemarketer which it is required to open. If the fulfillment house receives scores of complaints suggesting that the telemarketer is defrauding consumers, and the telemarketer fails to respond to these complaints, and the fulfillment house continues sending the inexpensive prizes which are generating those complaints, the fulfillment house should be subject to prosecution under the Rule. The actual mental state of the fulfillment house, such as whether it deliberately avoided investigating the many consistent complaints it had seen, should be irrelevant for a civil prosecution if there are facts which should have put it on notice that it was facilitating a deceptive enterprise.[107]

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[105] §310.3(b); *see also*, 15 U.S.C. §6102(a)(2).

[106] *See, e.g.*, *Citicorp Credit Services, Inc.*, FTC Docket NO. C-3413, CCH Trade Reg. Rep. par. 23,280.

[107] Under state laws, such an inquiry is reserved for the determination of whether civil penalties should be assessed, not whether a party should be enjoined or should be ordered to rescind consumer contracts or pay damages. *E.g.,* MO. REV. STAT. §407.100 (2000) (the bona fide effort to avoid the unlawful practice is a defense to the imposition of penalties).

Changing the standard of liability would increase the likelihood of successful prosecutions, without putting an undue burden on legitimate businesses, since the FTC and State Attorneys General would have to establish sufficient facts that the third parties should have been on notice that they were assisting or facilitating deceptive telemarketing. Given the growth of telemarketing fraud, and the limited success made in stopping cross-border activity, we believe addressing third party liability is an important aspect of changing the Rule to reflect the realities of governmental efforts to reduce telemarketing fraud.

IX. Exemptions to Rule (§310.6)

The Commission has proposed narrowing several exemptions it created to the current Telemarketing Sales Rule in 1995. As opponents of those original exemptions, we support the changes suggested. By the same token, we continue to believe that exemptions offer fertile ground for deceptive and unfair telemarketing practices.

A. Face-to-Face Transactions

Section 310.6(c) exempts from the Telemarketing Sales Rule (with certain exceptions) telephone calls in which a sale or charitable solicitation is not completed, and payment or authorization of payment is not required, until after a face-to-face sales presentation has occurred. The Attorneys General are concerned that misrepresentations made during the initial call may induce consumers, particularly elderly or other vulnerable consumers, to make an appointment for a face-to-face meeting at which they are confronted with high-pressure sales tactics. The risk of abuse in such face-to-face meetings is reflected in the Commission's Rule Concerning Cooling-Off Period for Sales Made at Homes or at Certain Other Locations.[108] To the extent that a telemarketing call is deceptive, or omits material information, it should not be insulated from the Rule. Subsequent disclosures do not cure a telemarketer's deception.[109] The Attorneys General recommend that §310.6(c) be narrowed to exempt only high-dollar transactions (e.g., over $25,000) such as would be involved in the sale of real estate.

B. Inbound Calls Not Resulting from a Solicitation

Section 310.6(d) exempts from the Rule any inbound telephone call that is not the result of "any solicitation" by a seller, charitable organization, or telemarketer. As noted in their discussion of preacquired account telemarketing and of the definition of an "outbound telephone call," the

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[108] 16 C.F.R. part 429.

[109] *E.g., Resort Car Rental Systems, Inc. v. FTC,* 518 F.2d 962 (9th Cir.), *cert. denied sub nom. Mackenzie v. United States,* 423 U.S. 827 (1975); *Exposition Press, Inc. v. FTC*, 295 F. 2d 869 (2d Cir. 1961), *cert denied*, 370 U.S. 917 (1962).

Attorneys General wish to clarify that this exemption does *not* apply to any inbound call in which the consumer is transferred to another telemarketer, to another seller or charitable organization (using the same telemarketer),[110] or where preacquired account information is retained by a seller or telemarketer and then used to charge a consumer in connection with an opt-out free trial offer.

C. General Media

In both our 1995 and 2000 Comments, the Attorneys General urged that inbound telephone calls resulting from "general media" advertisements not be exempted from the Rule. The Attorneys General continue to believe that applying the Rule to such calls would help protect consumers from fraudulent schemes that utilize a combination of broadcast or print ads and inbound calls to fraudulent telemarketers. Nonetheless, in its most recent comments on §310.6(e), the general media exemption, the Commission has restated its support for the concept of such an exemption. The Attorneys General are consequently focusing this section of our Comments on an appropriate tailoring of §310.6(e).

The Attorneys General first wish to commend the Commission for recognizing and responding to law enforcement representatives' concern about the dangers for consumers of inbound telephone calls that turn into multi-purpose solicitations. We discussed in Section III of these Comments the various marketing schemes that have taken advantage of preacquired account information obtained in a multipurpose solicitation. In the past year, both the FTC and the Attorneys General have investigated, and initiated enforcement actions against, a growing number of membership/buying club companies that operate using an "upsell" technique after the initial inbound call is placed by consumers in response to an advertisement for a completely different product. Thus, the advertisement appearing in the "general media" offered no information to consumers about the "upsell" telemarketer's intended offer.[111]

The Attorneys General support the Commission's position that under §§310.2(t)(2) and (3), the second portion of the call becomes an outbound call and therefore would be governed by the Rule. Indeed, the Commission's comments to the proposed amended Rule state in part:

> Under the proposed definition, when a call, *whether originally initiated by a consumer/donor or by a telemarketer*, is transferred to a separate telemarketer or seller for the purpose of inducing a purchase or charitable contribution, the

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[110] *See* §310.2(t) (definition of "outbound telephone call").

[111] An example of this technique is where a membership club or discount buying plan advertises a product, such as "click lights," on television. Consumers dial a toll-free number in response to the advertisement to order the product. However, after the consumer has provided his or her credit card number, the telemarketer either transfers the call to another telemarketer, or solicits the consumer to purchase a membership in the club or other product on behalf of another vendor, often on a "free" trial basis.

> transferred call shall be considered an "outbound telephone call" under the Rule. [Emphasis added.]

The Commission is correct that consumers who make inbound calls in response to television advertisements, which then become multipurpose calls, should receive the same disclosures under the Rule as are required for outbound calls.

To ensure this happens, the Attorneys General recommend that the language in §310.6(e) be clarified. Despite what appears to be a plain reading of §§310.2(t)(2) and (3), the general media exemption in §310.6(e) could be misinterpreted as exempting the multi-purpose types of calls referred to in §§310.2(t)(2) and (3). Specifically, inbound calls wherein a consumer responds to a television advertisement seem at first blush to be exempt under §310.6(e). However, under §§310.2(t)(2) and (3), the inbound call becomes an outbound call by definition if there is a second telemarketer or vendor soliciting a second good or service. Therefore the Attorneys General recommend that the Rule expressly exclude from §310.6(e) outbound calls as defined in sections §§310.2(t)(2) and (3).

Third, since the Rule excepts from the exemption in §310.6(e) high-abuse transactions (credit repair, recovery services, advance fee loans, prize promotions, investment opportunities and many business opportunities[112]), it should likewise except other transactions that involve a high risk of abuse. Specifically, there should be an exception from this exemption for discount buying clubs and for transactions involving opt-out free trial offers.[113]

D. <u>Certain Direct Mail Solicitations</u>

Section 310.6(f) exempts from the Rule inbound telephone calls that result from a direct mail (or e-mail or fax) solicitation that clearly, conspicuously and truthfully discloses all material information required by §310.3(a)(1). The Attorneys General have three concerns about this provision.

The first concern is that there is important information not listed among the mandatory disclosures in §310.3(a)(1) that may nonetheless be deceptively presented in a telemarketing call. Specifically, a telemarketer can now misrepresent -- without triggering application of the Rule in a post-mailing inbound call -- (1) the *nature* of the goods or services offered, and (2) *facts relating to a charitable contribution*. The first scenario includes any case in which the capabilities of a health,

[112] The Attorneys General commend the Commission for including business opportunities, an area of concern for the states, among the types of telemarketing that are excepted from exemption under §§ 310.6(e) and (f). *See, e.g., Texas v. Advanced Systems, Inc.*, No. 98-08174 (Harris Cty. Dist. Ct.) (Agreed Final Judgment & Permanent Injunction signed on Feb. 26, 1998) (newspaper advertising of vending machine business opportunity followed by inbound calls); *Texas v. Ruth Steiber d/b/a Doctor's Advantage*, No. 2000-07363 (Harris Cty. Dist. Ct.) (Final Judgment & Permanent Injunction signed Oct. 9, 2001) (newspaper advertising of medical billing business opportunity followed by inbound calls).

[113] *See* Part III of these Comments, *supra*.

home care or other consumer product are misrepresented by the telemarketer. The second scenario encompasses inbound charitable fundraising calls in which the telemarketer misrepresents his or her identity (*e.g.*, falsely claiming to be a police officer fundraising on behalf of a public safety group), or the percentage of contributions that will go to the charity, or the purpose for which the contributions will be used. The Attorneys General strongly recommend that, at a minimum, these categories of information, and any others deemed to be important to consumers and donors, be expressly referenced in §310.6(f).

Second, the Commission should clarify in a comment that a pre-call mailing is not "truthful" if it is inconsistent in some material way with what is stated on the call. For instance, assume that a mailing states that the price of a product is $50, and in fact consumers can buy the product for that price only if they press the telemarketer to drop to a lower price tier; however, the telemarketing script sets out a higher, "initial" price, with which the telemarketer is instructed to lead off. Does the mailing "truthfully" disclose the price? The telemarketer might argue that it does, because the $50 price is available to an aggressive consumer. However, the Commission should make clear that such a mailing is *not* truthful, and that the subsequent call is not exempt from the Rule whenever material representations in the mailing and during the call are different.

Third, as in the case of the general media exemption, the Rule excepts from the exemption in § 310.6(f) such high-abuse transactions as credit repair, recovery services, advance fee loans, prize promotions, investment opportunities and many business opportunities. In the same way, there should be an exception from this exemption for commonly-abused calls involving discount buying clubs and opt-out free trial offers.

E. <u>Business-to-Business</u>

Section 310.6(g) currently exempts from the Rule telemarketing to businesses, excepting only calls to induce the retail purchase of nondurable office or cleaning supplies. The Attorneys General note that the Commission seeks to amend the Rule to add to the list of exceptions calls involving the sale of Internet or Web services, and those soliciting charitable contributions.

The Attorneys General applaud this narrowing of the business-to-business exemption. In the Comments we filed with the Commission in June 2000, the Attorneys General noted that the outbound telemarketing of website design, hosting, and maintenance services to small businesses was an area in which the states had seen an increasing number of complaints,[114] and in which enforcement action was warranted.[115] Fraudulent charitable solicitations directed at businesses --

[114] For example, as of May 2000, approximately 100 complaints had been filed by small businesses in the State of Illinois alleging that unauthorized charges for website hosting, design, and maintenance services had been placed on their telephone bills as the result of a sales pitches by multiple outbound telemarketers. By December 2000, nearly 50 such complaints had been filed alleging similar conduct by a *single* company soliciting the purchase of website services.

[115] The State of Illinois alone filed seven enforcement actions in state court between April 1999 and December 2000, alleging telemarketing fraud in the sale of website services. *See People v. Smart Internet Services Ltd. and Byron*

including those undertaken in the name of public safety organizations, *see* discussion of Charitable Solicitors, above -- are similarly an area of concern for the states.

There is one other product which the Attorneys General would urge the Commission to add to the list of those excepted from the business-to-business exemption. This is the sale of business directories and listings in such directories, which has been the focus of increased telemarketing fraud in recent years. In the past 12 months alone, well over 700 complaints have been lodged on the FTC's Consumer Sentinel database under the category of *Office: Ad Space/Directory Listings*, and enforcement action has been initiated at the state level.[116] Such a high complaint volume is more than adequate reason for the Commission to extend the application of the Rule to the telemarketing and sale of business directories and related listings.

The rapid rise of telemarketing fraud involving the sale of Internet and Web services and directories reflects both the rapidity with which high-abuse products change and the difficulty of predicting such trends. Given this reality, and the fact that small businesses make appealing targets to fraudulent telemarketers, the Attorneys General also urge the Commission to commit explicitly to an annual review of the business-to-business exemption to determine if other types of telemarketing directed to businesses should be covered by the Rule in future years.[117]

X. <u>Conclusion</u>

The Attorneys General continue to view telemarketing fraud as a serious problem affecting many consumers, and an invasion of privacy when consumers desire not to be contacted in their homes. Unwanted telemarketing calls are a continuing intrusion into the privacy of those consumers

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P. Williams, No. 2000-CH-00604 (Sangamon Cty. Cir. Ct.) (Complaint filed Dec. 28, 2000); *People v. Profile National Business Directory, Inc.,* No. 99-CH-0191 (Sangamon Cty. Cir. Ct.) (Complaint filed Apr. 22, 1999); *People v. Network 1000, Inc.,* No. 99-CH-0194 (Sangamon Cty. Cir. Ct.) (Default Judgment filed Oct. 12, 2001); *People. v. Peter Westbrook, SNS Shared Network Services and US Buying Group, Inc.,* No. 99-CH-0193 (Sangamon Cty. Cir. Ct.) (Complaint filed Apr. 22, 1999); *People v. Service One Communications, Inc.* No. 99-CH-0190 (Sangamon Cty. Cir. Ct.) (Final Judgment and Consent Decree filed Dec. 14, 2000); *People v. Technet, Inc., and Rownok Anwar,* No. 99-CH-0192 (Final Judgment and Consent Decree filed Apr. 11, 2000); and *People v. Webviper, Inc.,* No. 99-CH-0195 (Complaint filed Apr. 22, 1999).

[116] *See, e.g., Vermont v. W.W.S. World Wide Source Publishing, Inc.,* No. S1348-01 CnC (Chittenden Super. Ct.) (alleging fraudulent telemarketing by Montreal-based seller of listing in business-to-business directory).

[117] Both our offices and the Commission have seen the types of products and services telemarketed to businesses change over time -- once deceptive offers typically consisted of copy machine supplies but now have expanded to include Internet-related services and other items. The recent settlement by NOS Communications, Inc. with the State of Florida exemplifies the potential for these products and services to change. *In re NOS Communications, Inc.,* (Settlement with the Florida Attorney General dated February 22, 2002)(requiring payment of $2.5 million to settle allegations of misleading pricing claims by telemarketers of long distance telephone service to businesses.)

who do not wish to receive such calls. We urge the Commission to view consumers' desire for privacy in their homes as paramount as it pursues the establishment of a national No Call registry and works with our offices to ensure a legally sound and consumer-friendly database system.

We also encourage the Commission to proscribe the additional practices that it has identified as new hallmarks of fraudulent telemarketers and sellers. Assuring consumers of the protection of their own financial information in the hands of others, by restricting the sharing of billing information among sellers, is an extremely important measure. With fraudulent telemarketers still active domestically and internationally, vigilant enforcement continues is as necessary as ever. Augmenting enforcement tools, proscribing the worst abuses, and safeguarding consumers' privacy, further our mutual consumer protection interests.

Respectfully Submitted,

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[1]Of the states listed, Hawaii is not represented by its Attorney General. Hawaii is represented by its Office of Consumer Protection, an agency which is not a part of the state Attorney General's Office, but which is statutorily authorized to represent the State of Hawaii in consumer protection actions. For the sake of simplicity, the entire group will be referred to as the "Attorneys General," and such designation as it pertains to Hawaii, refers to the Executive Director of the State of Hawaii Office of Consumer Protection.