Before the Federal Trade Commission
Washington, D.C. 20580

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

To: The Commission

COMMENTS OF THE ELECTRONIC PRIVACY INFORMATION CENTER, THE CENTER FOR DIGITAL DEMOCRACY, JUNKBUSTERS CORP, INTERNATIONAL UNION UAW, PRIVACY RIGHTS CLEARINGHOUSE, CONSUMERS UNION, EVAN HENDRICKS OF PRIVACY TIMES, PRIVACYACTIVISM, CONSUMER ACTION, CONSUMER PROJECT ON TECHNOLOGY, ROBERT ELLIS SMITH OF PRIVACY JOURNAL, CONSUMER FEDERATION OF AMERICA, COMPUTER SCIENTISTS FOR SOCIAL RESPONSIBILITY, AND PRIVATE CITIZEN, INC.

April 10, 2002

Pursuant to the notice [1] published by the Federal Trade Commission on January 30, 2002 regarding the notice of proposed rulemaking (NPR) on the Telemarketing Sales Rule, the Electronic Privacy Information Center, the Center for Digital Democracy, Junkbusters Corp., International Union UAW, Privacy Rights Clearinghouse, Consumers Union, Evan Hendricks of *Privacy Times,* Privacyactivism, Consumer Action, Consumer Project on Technology, Robert Ellis Smith of *Privacy Journal,* Consumer Federation of America, Computer Scientists for Social Responsibility, and Private Citizen, Inc. submit the following comments.

The commentators appreciate this opportunity to contribute to the proposed rulemaking on the Telemarketing Sales Rule (TSR), because outbound telemarketing is regularly identified as an obnoxious and unwanted intrusion into the privacy of the home. [2] Individuals are at a disadvantage in preventing telemarketing because of the technology, practices, and flow of personal information employed by the telemarketing industry. [3] Even those who regularly opt-out under the current system cannot eliminate telemarketing calls. In fact, organizations such as Privacy Rights Clearinghouse have advised individuals that eliminating telemarketing calls is difficult; even diligent individuals can obtain only a reduction in calls. [4]

Telemarketing is one of the negative consequences of a lack of information privacy law in America. Without limitations on the collection and use of personal information, telemarketing and list brokerage companies can mine databases and share personal information, often without even providing notice to the individual affected. Data miners strip personal information from product warranty cards, public records, sweepstakes entry forms, and many other sources. This results in the creation of detailed consumer databases that include health information, religious affiliation, book reading preferences, financial information, and product ownership. Information brokers, such as Experian, American List Counsel, and many Direct Marketing Association (DMA) members, then sell these detailed lists for direct mail and telemarketing. [5]

Thus, our comments will focus on the privacy issues surrounding personal information transfer and practical suggestions for providing individuals with substantive approaches to ending telemarketing calls.

The Commission has a fundamental responsibility under the Telemarketing and Consumer Fraud Abuse Act (the "Telemarketing Act") and the Federal Trade Commission Act (the "FTCA") to protect individuals from invasions into the privacy of their homes. Congress empowered the FTC to provide individuals with protections against telemarketing because sales calls can be made across state lines, and without direct contact with the individual. [6] Consequently, individuals need strong protections and substantive rights to address telemarketing. The FTC's responsibility can be met through the adoption of policies that follow the comments set forth below.

I. General Comments

Section IX of the NPR solicits specific comments on changes to the TSR. EPIC strongly urges the commission to consider the following issues that relate to protecting individuals privacy but have not been raised by the NPR.

A. The FTC has authority to regulate telemarketing and create a do-not-call list pursuant to the Telemarketing Act and the FTCA.

The Telemarketing Act and the FTCA afford the Commission broad authority to regulate trade practices and telemarketing.

The Telemarketing Act, Section 6102(a)(3)(A) specifically instructs the Commission to include in the telemarketing rules "a requirement that telemarketers may not undertake a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy." [7] The overwhelming response to the proposed rule, and the consistent ineffectiveness of the current do-not-call scheme, show that individuals do find unsolicited telemarketing calls an abuse of their privacy and demonstrates that these calls have led to fraud and coercion. The proposed rule appropriately addresses the reasonable consumer's privacy and is a responsive and permissible construction of the statutory authority granted in the Telemarketing Act. The proposed do-not-call registry directly addresses the Act's privacy goals and is an appropriately responsive solution solving matters of privacy that arise in the context of unsolicited telemarketing.

According to the Telemarketing Act, and its statement regarding privacy and abusive practices in relation to telemarketing, the proposed do-not-call registry is a proper exercise of the FTC's authority to carry out the desires of Congress. *Chevron v. Natural Resources Defense Council*, [8] not only permits an agency to address the direct intent of Congress, it grants significant deference to an agency rule that resolves any ambiguity in the legislation. [9] Any ambiguity in the language of the act is resolved in favor of an agency's reasonable interpretation and rule construction. [10] Here, the Telemarketing Act specifically calls for provisions addressing invasive telemarketing calls. Appropriately, the FTC proposal addresses Congress' privacy concerns by creating a rule tailored to the address invasions of privacy concerning the reasonable consumer.

B. An opt-in approach to telemarketing would more effectively protect individuals' rights and ensure that only those who wish to be called receive solicitations.

Individuals' rights and privacy would be more effectively protected by an opt-in framework rather than the opt-out do-not-call (DNC) list proposed by the FTC. An opt-in approach would require telemarketers to obtain express consent before initiating sales calls to individuals.

An opt-in framework would better protect individuals' rights, and is consistent with most United States privacy laws. For instance, the Family Educational Rights and Privacy Act, Cable Communications Policy Act, Electronic Communications Privacy Act, the Video Privacy Protection Act, the Driver's Privacy Protection Act, and the Children's Online Privacy Protection Act all empower the individual by specifying that affirmative consent is needed before information is shared. [11]

Further, public opinion clearly supports an opt-in system for information collection and sharing. A study conducted by the American Society of Newspaper Editors (ASNE) and the First Amendment Center (FAC) in April 2001 illustrated strong support for privacy and specifically for opt-in systems. [12] In that study, the respondents indicated that personal privacy was an issue as important as crime, access to health care, and the future of the Social Security system.

In other information collection contexts, individuals regularly indicate that opt-in is preferable to opt-out. The ASNE/FAC study shows that 76% of individuals support opt-in as a standard for sharing of driver's license information. A study conducted by Forrester Research found that 90% of Internet users want the right to control how their personal information is used after it is collected. [13] A study conducted by the Pew Internet and American Life Project found that 86% of Internet users favor opt-in privacy policies. [14] And, a Businessweek/Harris poll in 2000 found that 86% favored opt-in over opt-out. The same poll showed that if given a choice, 90% of Internet users would either always or sometimes opt-out of information collection. [15]

It is important to note that the public statements of telemarketing industry groups support an opt-in framework for information sharing. For instance, Steven Brubaker of the American Teleservices Association has argued that telemarketers should not call individuals who are uninterested:

"And the single greatest contributor to low per chair production is spending time on the telephone with people who don't want to talk to you. Thus the industry goes to great lengths to identify only those consumers who are likely purchasers of their products. The successful telemarketer is the business that talks to the fewest uninterested parties. Consequently, it is in the industry's best interests to keep a detailed "Do-Not-Call" list. Not only does it make sense for a company's bottom line, but it increases morale and production among the sales force if they are not talking to hundreds of people who say "No" at the beginning of the call. [16]

Mr. Brubaker makes a cogent argument for an opt-in system. Through an opt-in system, telemarketers will only contact those interested in receiving sales calls. Telemarketers will not be burdened by calling those who do not wish to receive calls, and individuals will not be burdened by having to opt-out from every telemarketer who calls on a given day.

Economically, opt-in systems may be more lucrative for telemarketers as well. Mike DeCastro of Imagination claims that acquiring a customer through opt-out lists cost six times more than using opt-in lists. [17]

Opt-out systems shift costs onto the recipients of telemarketing. Individuals attempt to avoid calls by purchasing anti-telemarketing technology and anti-telemarketing services. However, these expenditures can reduce but not eliminate telemarketing. Accordingly, the telemarketing industry will continue to call persons who do not want to receive calls under an opt-out system.

Opt-out can only be effective when individuals have adequate notice of sales calls practices and the flow of their personal information. However, the public does not have access to information

on how the telemarketing industry works, especially in regard to the use of predictive dialers and the avoidance of sending caller identification information. Additionally, individuals do not have notice of the flows of personal information traded by list brokers. Individuals may unwittingly enroll themselves on dozens of lists based on their participation in sweepstakes, a listing in the phone book, or in registering a product through a warranty card.

Opt-in is more effective than opt-out because it encourages companies to explain the benefits of information sharing, and to eliminate barriers to exercising choice. Experience with opt-out has shown that companies tend to obfuscate the process of exercising choice, or that exemptions are created to make opt-out impossible. For instance, the Gramm-Leach-Bliley Act required opt-out notices to be sent to customers of banks, brokerage houses, and insurance companies. [18] These notices were confusing and in fact unreadable to many Americans. [19] Opting out often required the consumer to send a separate letter to the company. Even if a consumer did opt out under the law, a company that wished to share consumer data could simply create a joint marketing agreement with another company to fall within an exemption to the prohibition on information sharing. [20]

C. Federal telemarketing protections should allow states to complement measures to restrict sales calls.

The TSR should allow states to craft stronger protections against telemarketing. Historically, state authorities have been on the forefront of privacy protection, and their leadership can continue to address privacy abuses by telemarketers.

America's prior experience with privacy legislation clearly favors federal laws that allow states to develop complementary protections. The Electronic Communications Privacy Act, the Right to Financial Privacy Act, the Cable Communications Privacy Act, the Video Privacy Protection Act, the Employee Polygraph Protection Act, the Telephone Consumer Protection Act, the Driver's Privacy Protection Act, and the Gramm-Leach-Bliley Act all allow states to craft protections that exceed federal law. [21]

In the areas of civil rights law, open meetings and open records acts, and consumer protection generally, the states have crafted tailored laws that best address particularized needs of individuals. In recent years, states have enacted more comprehensive laws against the secondary use of financial information, [22] health information, [23] and prevention of identity theft than the federal government. [24] It is clear that state protections are vital to individuals' privacy.

State protections tend to extend longer statutes of limitations to individuals, as well as private rights of action, and receive aggressive enforcement from Attorneys General. Additionally, individuals armed with a private right of action can evade barriers to enforcement posed by federal agencies that may be captured by industry.

In the area of telemarketing, state law has been essential to protecting individuals' rights. State DNC lists have been proven to be effective in reducing unwanted telemarketing for several reasons. First, state telemarketing laws regulate a wider array of companies that engage in telemarketing, such as common carriers. Under the FTC's current statutory authority, common carriers, federal financial institutions, and insurance companies will be exempt from the restrictions in the TSR. Second, the Attorneys General have vigorously enforced state telemarketing DNC laws. State Attorneys General can take action quickly to enforce laws and defend the rights of citizens. [25] Third, state DNC lists have been made easily accessible to individuals for enrollment. Many states provide mail, telephone, and Internet enrollment.

Last, as Justice Brandeis once noted, states may engage in experiments in law to develop more effective protections over time: "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." [26]

D. Industry-generated studies on the economics of telemarketing are suspect because they employ questionable methods, use broad definitions of sales call activities, and tend to ignore costs that are transferred to the call recipient.

Studies performed on telemarketing by industry groups such as the Direct Marketing Association (DMA) rarely include explanations of study methods or datasets. For instance, shortly after the FTC announced the proposal for creation of a DNC list, a DMA official was quoted as saying: "The FTC must be careful and deliberate in weighing the merits of this proposal because more than 6 million jobs and $668 billion in sales in the United States are at stake." [27] The DMA has not adequately proved how it calculated these figures. These figures appear on the DMA website without any explanation of methods. [28]

Further, even the term "telephone marketing" is defined in a vague fashion: "Telephone Marketing includes all out-bound direct response advertising communications conducted over the telephone using conventional, WATS, private line, or other telecommunications services. This includes all outsourced and in-house telephone marketing designed to immediately sell a product or service, identify a lead, or generate store traffic." [29] A $668 billion figure calculated from this definition appears to include both inbound and outbound telemarketing. Additionally, the figure appears to include business-to-business telemarketing as well as business-to-consumer sales calling. However, the DNC list and other proposals such as requiring the transmission of caller ID would not affect inbound telemarketing. The regulations set forth and complaints made by individuals primarily apply only to business-to-consumer outbound telemarketing.

The FTC should not accept the DMA figures without determining what percentage of sales would pertain to business-to-consumer outbound telemarketing only. Additionally, these figures should not be accepted until the methods used to obtain them are adequately explained to the public.

The industry groups' studies on telemarketing also tend to ignore costs that are passed onto the consumer. Some of these costs include time that is lost in answering sales calls, frustration with frequent calls and "dead air" calls, and purchases of anti-telemarketing devices and services. Caller ID, for instance, is one service that is marketed by telephone companies as a measure to combat unwanted telemarketing. Caller ID costs consumers $7.50 a month, and it does not fully address telemarketing because many sales callers purchase phone service that does not transmit Caller ID information. Accordingly, consumers are urged to add another service to Caller ID called "Privacy Director," which is specifically advertised as being effective against telemarketers that do not transmit Caller ID information. Privacy Director from Bellsouth costs $5.95. [30] These monthly charges represent significant costs that are passed to consumers. Private Citizen Inc. estimates that consumers spend $1.4 billion a year in caller ID services to avoid telemarketing. The industry studies rarely consider these costs when calculating the benefits of the telemarketing industry. [31]

II. Comments Solicited in the Proposed Rule

Much of the existing Telemarketing Sales Rule, and the proposed changes in the NPR, address

consumer protection issues [32] that are outside the scope of these comments. However, the Rule also recognizes and protects the privacy interests of individuals subjected to telemarketing. [33] In the proposed amendments to the Rule, the Commission has made significant changes in an effort to protect individuals' privacy more comprehensively and effectively. [34] The discussion below addresses the privacy implications of:

> *A. §310.4(a)(5): Preacquired Account Telemarketing. The use of preacquired account information should be prohibited as possession of account information by telemarketers disadvantages consumers and leads to fraud.*

The proposed prohibition on preacquired account telemarketing is beneficial for consumers, and remedies what is presently an unfair information practice.

The proposed rule would ban the transfer of a consumer's or donor's billing information for use in telemarketing: §310.4(a)(5) ("Preacquired Account Telemarketing"). The rule would prohibit both the disclosing and the receiving of billing information, which is defined as "any data that provides access to a consumer's or donor's account" including credit card, checking, savings, or investment accounts, utility bills, mortgage loans or debit cards. [35] The Commission states that it considers receiving or disclosing a customer's billing information for the purposes of telemarketing an abusive practice within the meaning of the Telemarketing Act, [36] and therefore includes it in the list of abusive acts or practices in §310.4(a).

> *1. Will this proposed change adequately address the problems resulting from preacquired account telemarketing? Will this action adequately protect consumers from being billed for unauthorized changes? If not, what changes to the Rule would provide better protection to consumers? What additional provisions, if any, should be included to protect customers from unauthorized billing?*

The Commission asks whether the proposed definition of "billing information" is broad enough to capture any information that can be used to bill a consumer for goods or services or a charitable contribution, and whether it is too broad. [37] By defining "billing information" according to its potential use by telemarketers to "provide access to an individual's account," the proposed rule successfully covers the present and future range of methods by which telemarketers could engage in this abusive practice.

As outlined in the Commission's Notice of Proposed Rulemaking, [38] the introduction of this prohibition will have substantial benefits for consumer rights, and reduce the instances of fraudulent or deceptive charges being made to telemarketing consumers or donors. The disclosure of sensitive financial information, in circumstances where the consumer is not aware that the party with whom they are speaking has that information, places consumers at a distinct disadvantage in obtaining fair transactions. The proposed rule redresses the imbalance by ensuring that customers cannot be tricked into purchases unless they knowingly give the telemarketer their financial information.

In addition, the proposed changes significantly increase an individual's control over their personal information. Financial information, including the means to conduct financial transactions, is a particularly sensitive form of personal information. Most consumers would not be aware that the transfer of their billing information is currently permissible, and would be appalled to make such a discovery. The proposed change to the rule is a necessary step in protecting consumers from fraud and invasion of privacy.

However, the proposed amendment to the rule prevents only the transfer and receipt of billing information, not its use. The Commission's purpose of preventing this abusive and potentially fraudulent practice would be better served by prohibiting preacquired account telemarketing outright. There may be instances where telemarketers already have access to such information, either from prior transfers or preexisting business relationships. For example, utility companies have access to utility bills, and financial institutions have certain information about accounts and mortgages. The rule therefore does not protect individuals from telemarketers selling add-on products or services when there is an existing business relationship. The Commission notes that there are "no data that identify or quantify specific efficiency gains" from preacquired account telemarketing, and any such alleged efficiency gains would be outweighed by the danger of fraud that the practice imposes on individuals. Individuals retain control of telemarketing calls only when their affirmative disclosure of billing information is required for a transaction. Because the same privacy and consumer rights risks to individuals ensue from telemarketing in this context as in the case of third-party transfers, the Commission should ban all preacquired account telemarketing.

2. What specific, quantifiable benefits to sellers or telemarketers result from preacquired account telemarketing?

The use of preacquired account telemarketing cannot result in substantial benefit to sellers or telemarketers. A consumer who does not want to purchase goods or make donations will not be more inclined to do so merely because the telemarketer already has his or her billing information. Indeed, the reverse may be the case. Any efficiency gains can only be marginal, as all the billing information would have to be verified by the customer before a purchase or donation is made. Finally, even if there are quantifiable benefits to telemarketers, the use of preacquired account telemarketing should be prohibited in the countervailing interests of fraud prevention, consumer protection, and control over sensitive personal information.

3. Has adequate provision been made for the use and verification of novel payment methods?

The Commission's discussion and comments filed on this issue countenance various possibilities for collecting, using and verifying consumers' financial information, especially as new methods of payment are developed for use in telemarketing. For example, it was suggested that recipients of Social Security benefits would be able to make payments using an access card tied to those benefits—in effect, to use a Social Security Number as a credit or debit card. [39]

The Commission's conclusion that express verifiable authorization, either written or oral, is required for the submission of billing information adequately addresses the need to protect customers' financial information. Customers should never be required to disclose extraneous personal information, such as Social Security Numbers, in order to purchase goods.

The standards to be met for oral authorization of a purchase or charge require the customer to disclose further personal information, such as a contact telephone number. [40] This is a sufficient and acceptable safeguard to ensure the security of a transaction, but there must be a guarantee that such additional personal information will not be misused. The prohibition on receiving or disclosing billing information in §310.4(a)(5) should extend to any other personal information disclosed by the consumer or donor in the course of the transaction.

B. §310.4(a)(6): Caller ID Information. It is technically possible and essential to protect indiviudals' rights to place telemarketers under an affirmative obligation

to send accurate caller ID information every time a sales call is initiated.

The Commission proposes to amend the rule so as to prohibit blocking, circumventing, or altering the transmission of the name and telephone number of the calling party for the purposes of caller identification services ("Caller ID"). The commentators believe that a prohibition on blocking or circumventing Caller ID is insufficient and will not protect consumers from unwanted telemarketing because many sales callers are not currently interfering with the transmission of Caller ID. Instead, these telemarketers are deliberately purchasing phone lines that do not send Caller ID information.

It is technologically possible and necessary for the protection of individuals to establish an affirmative obligation to send accurate Caller ID information every time a sales call is initiated. Without Caller ID information, it is difficult for individuals to identify telemarketers and to protect their rights. Telemarketers who do not wish to comply with do-not-call rules can simply disconnect the line when a customer objects or requests information about the telemarketing company. Accordingly, without the ability to identity the sales caller, individuals cannot even make an effective complaint to authorities.

In response to the Commission's question, it appears that the definition of "caller identification services" is "broad enough to capture all devices and services that now or may in the future provide a telephone subscriber with the name and telephone number of the calling party." [41]

1. What costs would this provision impose on sellers? On charitable organizations? On telemarketers? Are these costs outweighed by the benefits the provision would confer on consumers and donors?

As discussed above in section 1D, the telemarketing industry's estimate of the cost of implementing the proposed rule is frequently inflated.

Further, consumers are already bearing the cost of telemarketers' deliberate avoidance of sending Caller ID information. Much of the demand for Caller ID services initially was created by consumers wishing to avoid telemarketers. Consumers now pay for Caller ID services to protect their privacy. Alert to this, many telemarketers choose phone service that does not transmit Caller ID or that blocks or alters their transmission of Caller ID information. This in turn has created a market for "privacy manager" services which intercept calls in which the calling party is not identified. Many consumers now pay for such services. Telemarketing is thus a "cost shifted" form of advertising, as the onus is moved to consumers to protect themselves against unwanted intrusions into their home, while telemarketers and telecommunications companies profit.

As the Commission suggests, the proposed rule would also confer benefits on consumers and donors. The new rule provides a valuable tool for consumers in asserting their privacy. Using Caller ID information, consumers can identify the caller and so decide whether to allow the intrusion into their home. Whether or not they decide to take the call from the telemarketer, they have the means to contact the company at a later time and request to be placed on the do-not-call registry. Caller ID information is also necessary to enforce the provisions of the Rule itself, by identifying the calling party who engages in abusive or deceptive telemarketing practices, or contacts a consumer in breach of the requirements of the national do-not-call registry.

2. What, if any, trends in telecommunications technology might

permit the transmission of full Caller ID information when the caller is using a trunk line or PBX system?

The proposed changes to the rule have been opposed by some telemarketers and telecommunications carriers on the basis that it is not always technologically or economically feasible to transmit Caller ID information. Specifically, they claim that "trunk" connections, or "CT-1" service, which is cost-effective for large volumes of calls, cannot transmit Caller ID information. [42]

First, note that CT1 is only one possible choice for large volume outgoing service. The newer method, widely used because of its superior performance & flexibility, is ISDN Primary Rate Interface (PRI). It, as a matter of course, delivers Caller ID information. Telemarketers may well choose CT1 over PRI just because the service can initiate calls without transmitting Caller ID.

While the originating Local Exchange Carrier (LEC) normally inserts the Caller ID data, a telemarketer's CT1 service may connect directly to an InterExchange Carrier (IXC) such as MCI or Sprint. This subverts the sending of Caller ID information as well.

Both of these are resolvable by FTC action. The FTC could and should require the telemarketers to have their carrier inject valid Caller ID information in the call. The FCC has already ruled that carrying Caller ID is not an undue burden on carriers. [43] Given that, it cannot be an undue burden to inject the Caller ID information into the call.

3. If Caller ID information is transmitted in a telemarketing call, should the information identify the seller (or charitable organization) or should it identify the telemarketer? Is it technologically feasible for the calling party to alter the information displayed by Caller ID so that the seller's name and customer service telephone number or the charitable organization's name and donor service number, are displayed rather than the telemarketer's name and the telephone number from which the call is being placed? If not currently feasible, is such substitution of the seller's or charitable organization's information for that of the telemarketer likely to become feasible in the future?

Caller ID information transmitted should identify the telemarketing company and include a publicly-listed telephone number of the telemarketer's customer service department.

4. Would it be desirable for the Commission to propose a date in the future by which all telemarketers would be required to transmit Caller ID information? If so, what would be a reasonable date by which compliance could be required? If not, why not?

As discussed above, the technology currently exists to require all telemarketers to transmit Caller ID information. Those telemarketers who claim they are incapable of transmitting such information are only incapable because of their choice of technology. It is desirable to require all telemarketers to transmit Caller ID information at this point in time.

5. Does the proposed Rule provide adequate protection against misleading or deceptive information by allowing for alteration to provide beneficial information to consumers, i.e., the actual name of the seller and the seller's customer service number, or the charitable

organization and the charitable organization's donor service number? What would be the costs and benefits if the Rule were simply to prohibit any alteration of Caller ID information that is misleading? Should the proposed Rule make any exception to the prohibition on altering Caller ID information?

The Rule makes a valuable clarification in allowing telemarketers to alter the display of Caller ID information to provide a meaningful return number and the name or customer service department of the telemarketer.

Prohibiting merely "any alteration of Caller ID information that is misleading" may be susceptible to misinterpretation, and thus difficult for consumers to enforce against telemarketers. Information that is "not misleading" is not necessarily "meaningful" or "beneficial." The latter terms provide greater protection to consumers.

The commentators believe that the privacy interests of consumers would best be served by expanding the provision further to impose an affirmative obligation on telemarketers to transmit accurate and/or meaningful Caller ID information. [44]

The Commission has stated its belief that "there is no reason that a legitimate seller, charitable organization, or telemarketer would choose to subvert the display of information sent or transmitted to consumers' Caller ID equipment." [45]

The proposed rule creates an incentive for deceptive and abusive telemarketers to use a telecommunications system that avoids transmitting Caller ID, when clearly both the technology and the imperative exist to provide Caller ID information to consumers.

The provision of accurate and meaningful Caller ID information is in the interest of companies and charitable organizations that use telemarketing. If, as the industry claims, [46] consumers really do want to receive many of the calls that fall under the definition of telemarketing, identifying themselves as the desirable company or organization they are will ensure that consumers do not dismiss the call.

The intention of Caller ID blocking mechanisms was to afford individuals the ability to remain anonymous when the release of Caller ID information could detrimentally affect their privacy or safety. As the Commission recognizes, "no such privacy concerns pertain when sellers or telemarketers are initiating outbound sales solicitation calls." [47]

The number transmitted to the Caller ID information should not be an unanswered or switch line, but provide a connection to a customer service representative who can add the number to a do-not-call list. A return call by a consumer for this purpose should not be treated as an inbound call for the purposes of the exemption from the Rule. Consumers should not be subjected to further telemarketing pitches unless they ask to be transferred to a telemarketer.

C. §310.4(b)(1)(iii): National "Do Not Call" Registry. The FTC should create a national do-not-call list that supports enrollment by mail, phone, and the Internet.

The existing Rule provides that a telemarketer may not call a person who has previously indicated that he or she does not want to receive calls by or on behalf of the seller. [48] The Commission accepted that the existing Rule's company specific do not call provision "is inadequate to prevent unwanted telemarketing calls," [49] and proposes the establishment of a national do-not-call (DNC) registry to be maintained by the Commission.

The FTC should create a national DNC list that supports enrollment by telephone (via a toll free call), mail, and online registration. The availability of Internet enrollment is important. Already, many states are providing Internet enrollment for DNC lists.[50] Internet enrollment is convenient, and it allows the user to verify enrollment via e-mail. Internet enrollment will relieve some of the paperwork burden and call volume to the enrollment number. Additionally, the individual can save or print a confirmation that their line is enrolled in the DNC database along with the date and time it was included.

> *1. 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 cost of implementing a DNC list for telemarketers will be relatively small. Under the current rule, Section 310.4(b)(1)(ii), and the Telephone Consumer Protection Act (TCPA), telemarketers are required to maintain a DNC list to effectively comply with these rules.[51] A national list will only require telemarketers to add new numbers to the lists they currently maintain in response to individual requests and state DNC lists. The FTC could distribute the national list in a digital or electronic format to facilitate the integration of the list into telemarketer's existing databases. No new technical or infrastructure improvements will be necessary for a telemarketer who is, as required, already maintaining a do-not-call list.

More importantly, the issues of costs are not solely a matter for telemarketers. There is a significant cost placed on the consumer who loses the ability to control access to their telephone. Every telemarketing call requires time of the individual; often this is time the individual would rather spend with her family or in pursuit of another activity within the privacy of her home.

In addition, individuals are purchasing services such as caller ID and call screening services in attempt to eliminate telemarketing interruptions.[52] These costs are a direct result of telemarketing activity.

The current federal system only addresses telemarketing calls once they are placed. This permits telemarketers to force the burden and costs of avoiding telemarketing calls on individuals because it is impossible to prevent unwanted telemarketing until a phone call is placed, causing an initial interruption and invasion of personal time. Once the individual receives a phone call, she must utter the magic words "place me on your do-not-call list," and this request is effective against only that one single telemarketer.

The proposed national registry would enable an individual, wishing to stop telemarketing calls, to exercise her right to privacy in the home by placing her name on the list. This benefit to the individual significantly outweighs any small costs telemarketers incur in updating their lists.

Furthermore, telemarketers will offset any costs they incur by having the opportunity to limit their phone calls to individuals who are open to their calls and a possible sale.[53] No longer will telemarketers' time and money be spent calling individuals who have no wish to purchase any type of product through outbound telephone sales. Ultimately, telemarketers will spend a significantly greater amount of their time calling interested parties and "hot" leads. In effect, the FTC is enhancing the efficiency and effectiveness of telemarketing, while protecting individual privacy.

2. 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?

The FTC should limit the use of a national registry to use for compliance with the DNC provision. The FTC should provide a penalty for improper use of the DNC registry.

3. 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?

The list could have value for fraudulent purposes. Using the knowledge that the number is on the list, a caller might specifically target these individuals, using this information to instill a sense of confidence, and gain access to personal information or induce the purchase of unnecessary products. Therefore, it is important that the FTC properly regulates and penalizes improper use of the DNC registry.

4. 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 FTC should permit individuals to place their numbers on the national registry indefinitely. The FTC should remove the numbers once the numbers are reassigned or when an individual requests that the FTC remove her number from the list.

A number of states provide limited periods of listing; [54] however, this system requires periodic individual input and turns the registry into an ongoing opt-out system. [55] Once an individual expresses her desire to have her number listed, the FTC should only require additional input when the individual no longer wishes to be part of the registry or wishes to add their new telephone number and remove their expired number.

The FTC, in conjunction with telephone companies, can effectively "scrub" all reassigned numbers from the registry. Simply removing those numbers listed as expired or reassigned would ensure that the list only includes numbers currently assigned to individuals wishing to be part of the national registry.

5. 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?

The FTC should permit the individual listed as the line subscriber, and other occupants of the subscribed home, to place telephone numbers on the DNC list. Any member of the household should be able to add the number to the registry, not merely the person who subscribes to the line.

The Commission also asked for comments on the proposal that third parties should be permitted to collect and forward requests to be put on the DNC registry. This would be an appropriate role for telecommunications companies and privacy advocates. It would provide an excellent service to individuals to be able to place themselves on the registry as one of the options they exercise when obtaining a new phone service or number. Additionally, other interested parties, such as public interest groups, should be able to conduct opt-out drives. These opt-out drives could be similar to a voter registration drive where the public interest group performs the function of opting-out individuals with their consent.

> *6. 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?*

Few security measures are necessary to ensure that only those persons who wish to register are placed on the DNC registry. It is unlikely that individuals will attempt to register others without consent. Additionally, greater security measures hinder legitimate efforts to register for opt-out programs.

In other contexts, phone companies have thwarted opt-out processes by demanding excessive authentication for opting-out. For instance, the opt-out process for Customer Proprietary Network Information (CPNI) data sharing established by Verizon was confusing, and placed the burden on individuals to navigate a five-step process in order to opt-out. [56]

> *7. 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?*

The FTC should utilize a system encompassing a telephone call made by an automated system to the line subscriber when a number is placed on the national registry. Ultimately, the automated phone call would provide the best insurance that the line subscriber truly wishes to have their number listed on the registry. If the line subscriber receives a call from the system and does not wish to be on the registry, the phone call should provide instructions and a system for removal over the phone.

The need for verification strongly supports the availability of Internet enrollment. Individuals using Internet enrollment would be able to print out a confirmation to prove their registration on the DNC list. Additionally, Internet enrollment would facilitate verification by e-mail.

> *8. 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?*

The Commission noted that the justification for the calling times restriction in the Rule was that it "protects consumers from telemarketing intrusions…when the toll on their privacy from such calls would likely be greatest." [57] However the 8 AM to 9 PM period under §310.4(c) represents only the Commission's judgment on what times of day people most value their privacy. For example, many commentators have suggested that calls during the dinner hour (whenever that may be for them) are most intrusive, [58] and others may be happy to receive calls after 9 PM. By maximizing individual choice about the times telemarketing calls can be made to them, such a provision would increase the individual's autonomy and control over their privacy. The commentators therefore support systems that allow individuals to choose certain days or times to receive telemarketing calls. The provision would also provide efficiency gains to the telemarketing industry, by targeting only those consumers disposed to receive calls at that time.

However, it is most important that the default opt-out option should designate an intent to receive no telemarketing calls. By seeking to register on the DNC list, individuals are expressing their intent to opt-out of all telemarketing intrusions. Any exceptions should be made on an opt-in basis, affirmatively specifying the days and times that telemarketing calls may be received.

> *9. 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?*

A listing could afford registrants the option to restrict calls from those only selling goods or services and not calls soliciting charitable donations.

> *10. 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?"*

As explained above in section 1D, individuals should already assume many of the costs of telemarketing. The FTC should not impose an additional cost on individuals. The FTC should only impose costs on the telemarketers wishing to utilize the registry and profiting from the placement of telephone calls.

> *11. 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?*

The national do-not-call registry should not preempt the state DNC lists. Although some state lists are ineffective due to the number of exempted entities, [59] a number of state lists are very effective and many reach companies that the FTC list will not, namely telecommunication

companies and other businesses outside the FTC's jurisdiction. [60]

State lists not only regulate a larger range of business but also ensure that intrastate telemarketing is subject to DNC provisions.

The FTC should not exempt any telemarketing activity in the form of outbound phone calls from the proposed rule. Some state lists are ineffective because these lists broadly exempt many calls. Adding exemptions eliminates the effectiveness of the registry and permits calls to individuals despite their preference not to receive calls from telemarketers of any type.

As a worst case scenario, some of Kentucky's original DNC law exemptions include: merchants regulated by the Public Service Commission, merchants that have operated for at least 2 years in Kentucky which offer consumer goods, and merchants that are publicly traded corporations. [61]

Kentucky's own DNC website states, "Unfortunately, it is estimated that over 95% of the businesses or non-profit organizations which conduct telemarketing sales are exempt under the act and will not be required to honor the no-call list." [62]

A certain number of Kentucky's exemptions are commonplace in state DNC regulations; nonetheless, Kentucky's original legislation demonstrates the need for better DNC registry options for many individuals. Most importantly, this example of exemptions reveals the gaping hole in protection an exemption can create in the effectiveness of a DNC list. An individual who does not wish to receive telemarketing calls does not distinguish callers based on government regulatory authority; rather, that individual has no desire to receive calls from any telemarketer.

> *12. The Proposed Rule would permit consumers or donors who have placed their names and/or telephone numbers on the central "do-not-call" registry to provide to specific sellers or charitable organizations express verifiable authorization to receive telemarketing calls from those sellers or telemarketers acting on behalf of those sellers or charitable organizations. What are the costs and benefits of providing consumers or donors an option to agree to receiving calls from specific entities? Does the proposed Rule's express verifiable authorization provision for agreeing to receive calls from specific sellers, or telemarketers acting on behalf of those sellers or on behalf of specific charitable organizations, provide sufficient protection to consumers?*

The proposed Rule defines "express verifiable authorization" in §310.2(n), and further elaborates the means sufficient to evidence such authorization, depending on the transaction. That is, express verifiable authorization for the purposes of submitting billing information (§310.3(a)(3)) has different requirements than that for the purposes of company-specific exceptions to the DNC provisions (§310.4(b)(1)(iii)(B)).

The commentators support the requirement that company-specific exceptions to the DNC provisions must be either written or recorded by the telemarketer. However, the commentators believe that the provision as currently written is open to abuse. It is foreseeable that telemarketers will include company-specific DNC exceptions in "fine print" standard form contracts, warranties, terms of use, registrations and similar documents. In this way, the burden would return to individuals to opt-out of telemarketing on a company-specific or even transaction-specific basis, undermining the purpose and effectiveness of the universal DNC provisions. Further, if the exception consent is obscured within a lengthy document, where there

is no reasonable expectation that such a clause exists, individuals may expose themselves to telemarketing calls without realizing it.

The commentators believe that telemarketers should be required to get specific opt-in consent from individuals before they are exempted from the DNC provisions. The FTC should add language to the Rule to require that express verifiable consent be "specific" or "single-purpose." This provision could be satisfied by requiring an individual to check a box or sign a separate line indicating their consent to the DNC exception.

The proposed Rule incorporates a provision requiring the Commission to review the implementation and operation of the national DNC registry within two years of it entering into effect. [63] The commentators support continued examination of the Rule's operation and efficacy in protecting individual privacy.

D. § 310.4(b)(2): The "Do Not Call" Safe Harbor.

The original Rule provided a Safe Harbor from liability for calling people on a company's "do not call" list provided that the seller or telemarketer complied with certain business practices. [64]

As a result of the changes to the "do not call" provisions of the Rule, the Safe Harbor has also been amended. The scope of the Safe Harbor's protection for telemarketers who violate the Rule has been broadened to encompass the newly created rule against denying or interfering with a person's right to be placed on the registry, and all violations of the national DNC provisions. This expansion is a substantial benefit to telemarketers, who gain an exemption from liability under the rule so long as they comply with various business practices.

The commentators recognize the benefits that a Safe Harbor can provide in encouraging compliance with the Rule, and in protecting telemarketers from the direct and indirect costs of enforcement actions. However, to balance the benefits to telemarketers, it is imperative firstly, that the requirements to qualify for the Safe Harbor are sufficiently stringent to protect consumers, and secondly, that there is a mechanism in place to ensure telemarketers comply with their Safe Harbor obligations.

In addressing the first issue the proposed rule adds several criteria to the standards that sellers and telemarketers must meet to qualify for the Safe Harbor: [65]

· A telemarketer must implement processes for preventing calls to people on the Do Not Call registry, and updating from the Registry at least every 30 days.

· A telemarketer must record and maintain any express verifiable authorizations to call individuals registered on the Do Not Call list.

· A telemarketer must monitor and enforce compliance with the company's procedures regarding do not call lists.

The commentators support each of these additional requirements on telemarketers as a precondition to Safe Harbor protection.

In addressing the second issue of monitoring and enforcement of the Safe Harbor, the commentators believe the current provisions of the Rule are insufficient. While the Rule appropriately places the burden of establishing Safe Harbor protection on the telemarketer in an

enforcement action, [66] there is currently no requirement to report or monitor compliance prior to a complaint being made. The commentators recommend that all telemarketers subject to the Rule be required to report on their compliance with the Rule at regular intervals, and make such reports available to the public.

E. § 310.4(c) Calling Time Restrictions.

The commentators support the Commission's view that the general Calling Time Restriction should remain in place. Although individuals registered on the DNC list may alter the range of permissible calling times to best suit their privacy needs, [67] the default position should remain that telemarketing calls outside the hours of 8 AM to 9 PM, to any individual (whether or not registered on the DNC list) is an abusive telemarketing practice and a violation of the Rule.

F. Predictive Dialers. Predictive dialers should only be used if they produce no abandoned calls.

The FTC should require all telemarketers to improve their predictive dialer technology so that there are no "abandoned" calls.

1. Is the fact that, in the Commission's view, telemarketers who abandon calls are violating §310.4(d) sufficient to curtail abuses of this technology? Is there additional language that could be added to the Rule that would more effectively address this problem?

The commentators commend the Commission for its recognition that the use of predictive dialers resulting in abandoned calls constitutes an abusive practice, and fully agrees that "regardless of the increased productivity that predictive dialers provide to the telemarketing industry, the harm to consumers is very real and falls squarely within the areas of abuse that the Telemarketing Act explicitly aimed to address." [68] Abandoned calls impose great costs on the consumer, without a corresponding opportunity to receive marketing benefits or "exercise any sovereignty whatsoever over future such intrusions on her privacy and encroachments on her valuable time." [69]

The Commission also confirmed that abandoned calls violate §310.4(d) by failing to make the required disclosures of identity at the start of the call. [70] Indeed, under the existing Rule, it is upon this basis that any action or complaint against a telemarketer's use of predictive dialers would have to be taken. However, because the Rule makes no reference to predictive dialer technology, the conclusion that abandoned calls constitute an abusive practice is not apparent on the face of the Rule. To avoid confusion in the industry and better protect consumers, it would be preferable to regulate predictive dialers explicitly.

2. Should the Commission mandate a maximum setting for abandoned calls, and, if so, what should that setting be? How could such a limit be policed? What are the benefits and costs to consumers and to industry from such an approach?

The Commission should mandate a maximum setting of zero for abandoned calls. Having recognized that abandoned calls are abusive, the Commission should not allow telemarketers to continue the practice at any level of frequency. Any abandoned calls should be an enforceable violation of the Rule. A zero limit is also significantly easier to enforce, as it does not require the extensive monitoring and recording that a higher permissible rate of abandoned calls would necessitate. Telemarketers could still use predictive dialers to replace manual dialing by live

operators, so long as it did not result in any abandoned calls.

> *3. Would it be feasible to limit the use of predictive dialers to only those telemarketers who are able to transmit Caller ID information, including a meaningful number that the consumer could use to return the call? Would providing consumers with this information alleviate the injury consumers are now sustaining as a result of predictive dialer practices? What would be the costs and burdens to sellers, charitable organizations, and telemarketers of such action?*
>
> *4. Would it be beneficial to businesses and charitable organizations to allow them to play a tape-recorded message when the use of a predictive dialer results in a shortage of telemarketing agents available to take calls? What would be costs and benefits to consumers if such tape-recorded messages were permitted?*

Neither of these suggestions are desirable alternatives to banning abandoned calls. The provision of Caller ID information would not alleviate the injury consumers are now sustaining as a result of abusive abandoned calls, and would shift the cost to consumers to investigate the number provided. Receiving a recorded message is just as intrusive as an abandoned call. Rather than having a "live" telemarketing operator to speak to, the consumer must, at their own expense, telephone the telemarketer to request to be placed on the do not call list. The abusiveness of recorded message telemarketing has already been recognized by a ban on using messages as a general telemarketing practice under the Telephone Consumer Protection Act. These regulatory proposals would not alleviate the injuries, costs and burdens that consumers are now sustaining as a result of the use of predictive dialers.

> *G. The scope of the Telemarketing Sales Rule. The FTC should work with the FCC to expand the scope of the TSR to include common carriers and other entities that are not currently regulated under the TSR.*

The ability of the FTC to regulate telemarketing is limited by the scope of its jurisdiction under the FTC Act. There are certain types of organizations which are not subject to the jurisdiction of the FTC, and are thus not subject to the requirements of the Rule. The types of organizations outside FTC jurisdiction include common carriers, federal financial institutions, and insurance companies, which often engage in telemarketing that may be just as abusive, deceptive, and privacy invasive as that regulated by the FTC.

The FTC should pursue cooperation with the FCC to provide consumers with the same level of protection against telemarketing by these organizations. This could be accomplished by an FCC Rule requiring all organizations subject to FCC jurisdiction to comply with the requirements of the Telemarketing Sales Rule, or an FCC issued rule with similar provisions. Most importantly, those organizations that are presently exempt from FTC jurisdiction should be required to observe the Do Not Call registry and its associated provisions. An alternative means of achieving this goal would be by legislative amendment to the FTC Act, allowing the Commission to regulate all telemarketing directly, irrespective of the type of organization conducting it.

> *H. §310.6: Exemptions.*

The FTC proposes to narrow the scope of the exemptions afforded under §310.6(a)-(c) to more effectively protect individuals from abusive conduct. [71] The type of telemarketing transactions

affected include the sale of pay-per-call services, the sale of franchises, and telephone calls which result in a sale or donation only after a face-to-face sales presentation. It is proposed that the companies engaging in these telemarketing transactions be made to comply with the requirements of §§310.4(a)(1) and (6) and §§310.4(b) and (c): that is, the prohibitions on "threats, intimidation, or the use of profane or obscene language," blocking, circumventing or altering the transmission of Caller ID information, abusive calling patterns, non-compliance with the do not call provisions, or calling in restricted times. It is appropriate to require these companies not to engage in abusive conduct, which, as the Commission noted, has not been less prevalent or harmful because of the nature of the transaction.[72] The right of individuals or other businesses to protect their privacy from such calls requires that these companies also respect the DNC registry, calling time restrictions, and that they transmit Caller ID information.

Sections §310.6(d), (e) and (f) exempt from the Rule "telephone calls initiated by a customer or donor" in various circumstances. The commentators seek clarification that the Commission's amendment of the definition of "outbound telephone call" in §310.2(t), to include calls transferred to telemarketers and multiple purpose telemarketing calls, also governs the scope of the exemptions in §310.6(d), (e) and (f). Because the words "outbound telephone call" do not appear in §310.6(d), (e) and (f), those sections do not explicitly incorporate the spirit of the proposed change to the definition of "outbound telephone call" in §310.2(t). The definitional amendment was made to protect consumers from unregulated telemarketing when they are transferred to a telemarketer other than the one making the initial call, or when a telemarketer solicits sales or donations from more than one organization.[73] The same concerns apply in cases where an individual initiates an exempt call, but is subsequently transferred to a new telemarketer. The definitional amendment should therefore also apply to calls made under the §310.6(d), (e) and (f) exemptions. Thus, a telephone call initiated by the customer or donor without any solicitation would be exempt only for the initial conversation: if that caller is transferred to another telemarketer, the second portion of the call would not be exempt from the Rule, but would be subject to the required disclosures and other prohibitions. This interpretation is necessary to protect consumers from the practice of "up-selling", fraud and from the misuse of their billing and other personal information, and the commentators recommend that the Commission explicitly incorporate this protection in the Rule.

The "general media advertising" exemption in §310.6(e) was the subject of substantial comment in the Commission's NPR.[74] The commentators endorse the comments made in opposition to the exemption, that "the general media exemption is inconsistent with the intent of the Telemarketing Act… [and] there can be little justification for exempting telemarketers from the Rule's coverage simply because they avail themselves of advertising via television, newspaper or the Internet."[75] The exemption is a loophole through which unscrupulous telemarketers may evade regulation. General media advertising may be deceptive, abusive or merely lack the information required to be disclosed under the Rule, thus substantially reducing the level of protection otherwise afforded to consumers by the Rule. There is no requirement that the individual have seen the advertisement, or that the advertisement make the disclosures that would otherwise be required under the Rule. Further, the growing list of ad hoc exceptions to the exemption demonstrates that, contrary to the Commission's contention, such telemarketing is intrinsically likely to expose individuals to fraud and abuse of their personal information. The commentators believe that the Commission should not wait until further scams and fraud against individuals occurs, but should remove the general media exemption

Similarly, the commentators see no justification for maintaining the direct mail exemption to the Rule in §310.6(f). The expanding list of exceptions to the exemption shows that responding to direct mail may also expose individuals to telemarketing fraud and abuse, and provides ample

evidence that the practice should be regulated under the Rule. Even if the exemption is retained, the commentators do not support the proposed extension of the exemption to cover facsimile transmissions and electronic mail, as they are not analogous to direct postal mail, and require different approaches to consumer protection. [76] Unsolicited fax and email transmissions, or "spam," have been recognized as invasions of individual privacy and cost-shifted advertising. Unsolicited faxes are prohibited under the Telephone Consumer Protection Act of 1991 (TCPA), 47 U.S.C. § 227(b)(1)(C). The Commission has recently announced a crack-down on unsolicited commercial email, with Chairman Timothy J. Muris stating that "almost everyone with an e-mail account gets spam. It's intrusive, unwelcome, and annoying." [77] The proposed exemption offers an incentive to engage in these privacy invasive practices in order to evade the provisions of the TSR.

The business-to-business exemption in §310.6(g) should be removed, as it fails to recognize the circumstances of many businesses, and the costs and harms that telemarketing imposes on them. The Commission's presumption that business recipients of telemarketing are "uniquely sophisticated" represents a mistaken understanding of today's workforce, in which small businesses employ 51% of the private sector workforce, and 53% of small businesses are based in the home. [78] For these individuals, there is no distinction between business-to-business telemarketing and encroachments on the privacy of their homes. In many instances, the person answering a telemarketers call to a "business" number could be a child, and certainly need not be engaged in a business, or realize that the telemarketer is treating them as such. Telemarketing calls can cause economic harm to all businesses, in the form of lost productivity and exposure to fraud, and should not continue to escape regulation. The Commission "is cognizant of the increasing emergence of fraudulent telemarketing schemes that target businesses" [79] and has increased the range of transactions excepted from the exemption. The new exceptions to the exemption merely indicate the rising problem of business-to-business telemarketing fraud, which the proposed amendments are inadequate to combat. The commentators believe that the business-to-business exemption should be abolished, and that businesses should be entitled to place their telephone numbers on the DNC registry and be protected from telemarketing calls which invade their privacy, put them in danger of fraudulent conduct, [80] and compromise productivity.

> *I. The FTC should consider the following actions to protect individuals from unwanted telemarketing: active monitoring and spot checks, telemarketer registration, and bonding.*

The telemarketing industry experiences relatively high employee turnover rates. This affects the ability of telemarketing companies to train sales callers on the regulations involved in making telemarketing calls. As a result, many individuals have reported that when they object to a telemarketing call, or ask to be placed on the do-not-call list, the sales caller simply "hangs up." Once a telemarketer hangs up, the individual has no assurance that they were placed on the do-not-call list. Additionally, since many telemarketers choose phone services that do not send caller ID information, individuals cannot even be sure of the actual identity of the telemarketing company. To remedy these problems in the telemarketing industry, the FTC should consider the following actions.

First, the Commission should engage in active monitoring of call centers and other major telemarketers for compliance with the TSR. This active monitoring could take the form of random "spot-checks" where Commission officials can ensure that sales callers are appropriately trained, and that the telemarketing company is complying with the TSR provisions.

Spot-checks can detect new telemarketing techniques that are developed in order to circumvent the TSR. For instance, some telemarketers are now initiating calls to individuals and disconnecting at the second ring, immediately after caller ID information is sent. These telemarketers send calling party name and number, which takes form of a solicitation to encourage the individual to return the call. The caller ID information sent typically will read "FREE PAGERS" and include a contact phone number. This caller ID information is sent to entice the individual to call back, and thus initiate an inbound telemarketing call. This is done to circumvent outbound calling rules. Spot checks and active monitoring of calling centers could detect these new business practices that are intended to circumvent the TSR.

Second, telemarketers should register with the Commission before engaging in sales calling. This registry should include the Caller ID number they will be displaying to all consumers, as well as the business name, and address. The commission should provide a public list of theses numbers on their web site, in a form that can be downloaded. Not only will this facilitate the ability of individuals to make complaints against sales callers, but it would also allow the creation of Privacy Enhancing Technologies that recognize the telemarketers' phone numbers from Caller ID transmission, and automatically block sales calls.

Last, upon registering, telemarketers should be required to post a bond with the Commission. Some states have instituted bond requirements, and this would facilitate the ability of the Commission to pursue violators.

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[1] Telephone Sales Rule, 67 Fed. Reg. 20, 4491 (Jan. 30, 2002)(to be codified at 16 C.F.R. Part 310).
[2] A 2000 USA Weekend poll found that 75% of respondents consider phone calls at home from telemarketers to be an invasion of privacy. Jedediah Purdy, *An Intimate Invasion*, USA Weekend, Jun. 30, 2000, at http://www.usaweekend.com/00_issues/000702/000702privacy.html.
[3] EPIC maintains a comprehensive web page on telemarketing practices at http://www.epic.org/privacy/telemarketing/.
[4] *Fact Sheet 5: Telemarketing Calls*, Privacy Rights Clearinghouse, Jan. 2002, at http://www.privacyrights.org/fs/fs5-tmkt.htm.
[5] EPIC maintains a comprehensive web page on consumer profiling at http://www.epic.org/privacy/profiling/.
[6] 15 U.S.C. § 6101.
[7] 15 U.S.C. § 6102(a)(3)(A).
[8] 467 U.S. 837 (1984).
[9] *Id*. at 842-45.

[10] *Id*. at 843-45.
[11] Respectively, at 20 U.S.C. § 1232 g, 47 U.S.C. § 551, 18 U.S.C. § 2510 et. seq., 18 U.S.C. § 2710, 18 U.S.C. § 2721, and 15 U.S.C. § 6501.
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[17] Michael L. Pinkerton, *Opt-In vs. Opt-out: No Real Contest*, CAL Advisor, Sept. 9, 2001.
[18] 15 U.S.C. § 6801.
[19] Mark Hochhauser, *Lost in the Fine Print: Readability of Financial Privacy Notices*, July 2001, at http://www.privacyrights.org/ar/GLB-Reading.htm.
[20] 15 U.S.C. § 6802 (b)(2).
[21] Respectively at 18 U.S.C. § 2510 et. seq., 12 U.S.C § 3401, 47 USC § 551, 18 USC § 2710, 29 USC § 2009, 47 USC § 227, 18 U.S.C. § 2721, and 15 U.S.C. § 6801.
[22] *See* Vermont Banking Division Regulation B-2001-01: Privacy of Consumer Financial and Health Information, at http://www.bishca.state.vt.us/Regs&Bulls/bnkregs/REG_B2001_01.pdf.
[23] *See The State of Health Privacy: An Uneven Terrain*, Health Privacy Project, at http://www.healthprivacy.org/info-url_nocat2304/info-url_nocat_show.htm?doc_id=35309.
[24] *See* California Senate Bill 168, at http://info.sen.ca.gov/pub/bill/sen/sb_0151-0200/sb_168_bill_20010914_enrolled.html.
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[26] *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932)(Brandeis, J., Dissenting).
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[31] *See* Robert Gellman, *Privacy, Consumers, and Costs: How The Lack of Privacy Costs Consumers and Why Business Studies of Privacy Costs are Biased and Incomplete*, Mar. 26, 2002, at http://www.epic.org/reports/dmfprivacy.html.
[32] Specifically, required disclosures [§310.3(a)(1). §310.4(d) and (e)], misrepresenting information [§310.3(a)(2)], submitting billing information for payment without customer authorization [§310.3(a)(3)], telemarketing certain financial services (credit repair, recovery and advance fee loans) [§310.4(a)(2), (3) and (4)], and record keeping requirements so that compliance can be monitored [§310.5]. Amendments suggested in the Notice of Proposed Rulemaking include making telemarketing for charitable donations subject to the rule (following the requirements of the USA PATRIOT Act), refining the scope of the exemptions under §310.6 (the privacy implications of which are discussed below), and responding to other developments

in technology and telemarketing practices such as the "sweepstakes disclosure."
[33] For example, the Rule currently prohibits telemarketers from: using threats, intimidation or profane or obscene language [§310.4(a)(1)]; causing any telephone to ring, or engaging any person in telephone conversation, repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number [§310.4(b)(1)(i)]; calling earlier than 8am or after 9pm [§310.4(c)]; and calling people who have previously requested not to be called [§310.4(b)(1)(ii) in the original Rule, §310.4(b)(1)(iii)(A) in the proposed Rule].
[34] See the Commission's discussion of the implication of privacy rights in the proliferation of abusive practices prohibited by the Act in the Notice of Proposed Rulemaking, p. 52.
[35] §310.2(c).
[36] Notice of Proposed Rulemaking, p. 61.
[37] Notice of Proposed Rulemaking, p. 122.
[38] Notice of Proposed Rulemaking, pp. 57 - 62.
[39] Notice of Proposed Rulemaking, p. 42.
[40] §310.3(a)(3)(ii)(F).
[41] Notice of Proposed Rulemaking, p. 122.
[42] Notice of Proposed Rulemaking, p. 63.
[43] http://ftp.fcc.gov/Bureaus/Common_Carrier/Notices/1995/fcc95187.html.
[44] Notice of Proposed Rulemaking, p. 127. The Commission indicates in its Questions for Comment that it is countenancing requiring telemarketers to transmit Caller ID information: "Would it be desirable for the Commission to propose a date in the future by which all telemarketers would be required to transmit Caller ID information? If so, what would be a reasonable date by which compliance could be required? If not, why not?"
[45] Notice of Proposed Rulemaking, p. 65.
[46] Notice of Proposed Rulemaking, p. 76: "Industry's second argument [against do not call registries] is that although many consumers may broadly express the view that they would prefer not to receive any telemarketing calls, when it comes down to particulars, their true wishes may be somewhat different."
[47] Notice of Proposed Rulemaking, p. 65.
[48] Notice of Proposed Rulemaking, p. 142.
[49] Notice of Proposed Rulemaking, pp. 73-74.
[50] *See* Alabama do-not-call Registry *at* http://www.psc.state.al.us/nocall/No-Call%20Web%20info1.htm; Colorado Do-Not-Call List, *at* http://www.coloradonocall.org/; Georgia Residential Consumers Application for Registration, *at* https://www.ganocall.com/resident.htm; Indiana Telephone Privacy, *at* http://www.ai.org/attorneygeneral/telephoneprivacy/; Louisiana Do Not Call Program, *at* http://host.ntg.com/donotcall/; Missouri No Call Law, *at* http://www.moago.org/nocalllaw.htm; New York Do Not Call Registry, *at* https://www.nynocall.com/index.html; Oregon No Call List, *at* http://www.ornocall.com/index.htm; Texas No Call List, *at* http://www.texasnocall.com/.
[51] *See* Telephone Consumer Protection Act, 47 U.S.C. § 227.
[52] *See supra* Section 1D.
[53] *See supra* section 1B.
[54] *See e.g.* Fla. Stat., Telephone Solicitation, § 501.059(3)(a), *at* http://www.800helpfla.com/~cs/ch501_059.html (providing one year registration); New York 'Do Not Call' Telemarketing Registry: Consumer Guide, *at* https://www.nynocall.com/guide.html (providing registration for three year period); *but see* Connecticut Telemarketing Solicitation Legislation: Consumer Information, at http://www.state.ct.us/dcp/nocallFAQ.htm#faqcons (providing one time registration with no need for periodic re-registration).
[55] Note that an opt-in system would effectively eliminate this burden at any point and ensure

the greatest amount of consumer control. *See supra* section 1B.
[56] *See* Letter from Marc Rotenberg, Executive Director, Electronic Privacy Information Center, to Ivan Seidenberg, President and co-CEO, Verizon (Feb. 7, 2002), at http://www.epic.org/privacy/cpni/verizonletter.html.
[57] Notice of Proposed Rulemaking, p. 51.
[58] Notice of Proposed Rulemaking, p. 81, n. 276.
[59] *See e.g.* Kentucky No Call, at http://www.law.state.ky.us/cp/nocall.htm.
[60] This problem might be remedied with participation by the FCC in a national do-not-call registry.
[61] *See* Kentucky No Call, at http://www.law.state.ky.us/cp/nocall.htm.
[62] *See* Id.
[63] §310.4(b)(3).
[64] §310.4(b)(2).
[65] The scope of the Safe Harbor itself has also been extended to cover violations related to the newly created national do not call registry.
[66] A telemarketers seeking Safe Harbor protection must "demonstrate that, in the ordinary course of business" it complies with all seven Safe Harbor clauses in §310.4(b)(2).
[67] *See supra* Do Not Call provisions, Question 8.
[68] Notice of Proposed Rulemaking, p. 88.
[69] Notice of Proposed Rulemaking, p. 88.
[70] Notice of Proposed Rulemaking, p. 88.
[71] §310.6(a) exempts the sale of pay-per-call services subject to the Commission's "Trade Regulation Rule Pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992" 16 CFR Part 308; §310.6(b) exempts the sale of franchises subject to the Commission's Rule entitled "Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures" 16 CFR Part 436; §310.6(c) exempts telephone calls in which the sale of goods or services [or charitable solicitation] is not completed and payment or authorization of payment is not required, until after a face-to-face sales presentation by the seller [or charitable organization].
[72] Notice of Proposed Rulemaking, p. 102.
[73] Notice of Proposed Rulemaking, p. 23-25.
[74] Notice of Proposed Rulemaking, p. 104-107.
[75] Notice of Proposed Rulemaking, p. 104-105.
[76] §310.6(f), Notice of Proposed Rulemaking, p. 108.
[77] http://www.ftc.gov/opa/2002/02/eileenspam1.htm.
[78] Small Business Association, at http://www.sba.gov/advo/stats/sbfaq.html.
[79] Notice of Proposed Rulemaking, p. 109.
[80] Notice of Proposed Rulemaking, p. 109, the Commission indicated that small businesses are particularly vulnerable to fraud. Several commentators proposed that calls to small businesses should be covered by the Rule, see pp. 108-110.