

April 19, 2002

Office of the Secretary  
Room 159  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Washington, DC 20580  
E-mail: tsr@ftc.gov

Subject: Telemarketing Sales Rule, 16 CFR Part 310

Dear Sir/Madam:

The Massachusetts Bankers Association (“Association”), which represents more than 230 commercial, savings, co-operative banks and savings and loan associations with over \$400 billion in assets, would like to offer its comments on the above referenced notice of proposed rulemaking.

The Association appreciates the opportunity to comment on the Federal Trade Commission’s (“FTC”) Notice of Proposed Rulemaking (“Proposal”) to amend the FTC’s Telemarketing Sales Rule (“TSR”), 16 CFR Part 310. The TSR prohibits specific deceptive and abusive telemarketing acts or practices, requires disclosure of certain material information, requires express verifiable authorization for certain payment mechanisms, sets recordkeeping requirements, and specifies those transactions that are exempt from the TSR.

Although the TSR does not directly apply to banks, it applies to telemarketing activities performed by third parties (including subsidiaries and affiliates of a bank) acting on behalf of a bank. Therefore, if a bank were to outsource its marketing function, the FTC would indirectly regulate the bank’s telemarketing activities through its third party service provider.

Under the Proposal, the Federal Trade Commission (FTC) proposes to amend the TSR by, among other things, creating a national "do not call" registry. Our comments below focus primarily on this issue.

1. Federal Do-Not-Call Registry

- Pre-Existing Customers

The Proposal would permit the FTC to create and maintain a centralized do-not-call Registry (“DNC Registry”). Companies would be prohibited from calling any individual on the DNC Registry unless the individual has provided “express verifiable authorization” that he or she wishes to receive calls from a specific company. While we would not oppose a centralized DNC Registry, the Proposal makes no exception for companies wishing to telemarket individuals with whom they have pre-existing relationships. As a result, a company would not be permitted to telemarket its own customers if those customers add themselves to the DNC Registry. This

change would hinder banks that wish to offer beneficial or cost saving new products and services to its customers that register on the DNC Registry but neglect to authorize its bank to call.

An unintended consequence of the proposal would be that customers on the DNC Registry may not have the opportunity to take advantage of beneficial programs. For example, during the recent refinance boom, a small community bank wishing to retain its mortgage customers called existing borrowers and offered to refinance the existing mortgage at lower rates. Under the proposal, the bank or its service provider would be required to ensure that it does not call any customers included on the DNC Registry. Many small community banks would find it cost prohibitive and complicated to determine whether their existing customers are on a DNC Registry, particularly if they must examine both state and federal databases. Moreover, banks that telemarket their customers maintain a do-not-call list. Also, under the current Rule, businesses must discontinue calling customers if requested.

If the FTC establishes a centralized calling Registry in the final rule, it should make it clear that companies are not prohibited from contacting individuals with whom they have a pre-existing relationship. In addition, the FTC should make it clear that companies that exist in a corporate family should be permitted to phone consumers that have a pre-existing relationship with at least one member of that corporate family. This change is important in order to preserve the benefits that the financial modernization provisions of the Gramm-Leach-Bliley Act (“GLBA”) were intended to provide.

- Name and/or Telephone Number.

The Proposal states that a consumer would be able to place his or her name “and/or” a telephone number on the DNC Registry. We recommend that the FTC only use telephone numbers. The DNC Registry will not protect consumers from unwanted calls if the Registry includes solely the names of consumers since there are likely to be many individuals with the same name. In addition, we believe that a list of consumer names and phone numbers is a resource for criminals seeking to defraud consumers. There are likely to be far fewer mistakes if an individual registers his or her telephone number on the DNC Registry.

- Cost of Implementation

The cost of creating and maintaining a federal list is an important issue for companies and consumers. It is not clear how the Registry will be funded after the two-year “trial” period. In some states, there is a fee associated with the do not call list. Other proposals required consumers to pay annually for their names to remain on the list. We assume that after the two year review, the FTC may follow the example of states maintaining do not call lists and consider imposing user fees. We are concerned about creating additional fees for banks that subscribe to a state database. There are a number of bills pending in Massachusetts regarding telemarketing activities. Some bills would require consumers to pay a modest registration fee and annual renewal fee. Subscribers would pay a fee established by the state regulator.

Given the possibility of multiple do not call lists, a national list would be the least confusing for consumers and companies that must reconcile lists with a national centralized registry on a regular basis. The Association strongly believes that any federal do not call list rule should

preempt state rules. Obviously, a single list is more efficient and less costly for the government, users, and consumers. In any case, the FTC should make every effort to create a uniform standard for state registries and the federal registry. This will help significantly in minimizing costs and improving the system generally. Indeed, there is little benefit to a federal do not call list absent federal preemption or uniformity among the lists.

Furthermore, subscription to multiple databases would be cost prohibitive. Therefore, we oppose federal fees and fees for multiple subscriptions.

## 2. Outbound Calls

Telephone calls initiated by a customer that are not the result of any solicitation by a seller or telemarketer are exempt from the current TSR. The Proposal, however, seeks to modify definition of an “outbound telephone call.” Specifically, the Proposal includes in the definition of outbound telephone call “any telephone call to induce the purchase of goods or services . . . when such telephone call is initiated by a telemarketer [or] *is transferred* to a telemarketer other than the original telemarketer . . . “ A telemarketer is defined as “any person who, in connection with telemarketing, initiates or *receives* telephone calls to or from a customer or donor.” (Italics added for emphasis). Under the revised definitions, customer initiated calls would be covered when a consumer is transferred from one telemarketer to another even though calls initiated by consumers are generally exempt under Section 310.6(d).

The definition of “outbound telephone call” should be clarified to ensure that it does not cover instances where a consumer inquires about a bank’s product and is transferred to a salesperson in order to discuss a product offerings or when the caller is not eligible for the product they called about, but is eligible for another product offered by the bank or its subsidiary. It could also occur if the consumer purchases one product or service and seeks a complementary product or service.

We do not believe that such calls, when initiated by the consumer, should be subject to the do-not call provisions. Applying these provisions to calls transferred to a telemarketer when the customer initiated the call is impractical and inconvenient to consumers. A call initiated by the consumer is very different from one initiated by the telemarketer. These consumers do not expect to be subject to the do not call restrictions when they are seeking information on products and services. In this regard the proposal is appears flawed. Therefore, the FTC should retain the original exemption for calls initiated by the consumer.

## 3. Customer Account Numbers/ Preacquired Account Information

Under the Proposal, the FTC defines express verifiable authorization as the consumer’s billing information (including account number) among other things. The FTC should reference the requirement that the consumer’s account number be used as expressed verifiable authorization. The protections afforded to consumers under the privacy provisions of the Gramm-Leach-Bliley Act (GLBA) already adequately address this issue and it would not be appropriate encourage consumers to provide their account numbers over the telephone.

In addition, the Proposal would prohibit disclosing consumer billing information to any person for use in telemarketing. It would also prohibit receiving consumer billing information

for use in telemarketing, unless the information is provided by the consumer. This issue is already addressed under the GLBA, which provides that a financial institution may not disclose a customer's account number for use in telemarketing, among other types of marketing. The GLBA fully addresses this issue as it pertains to account number information provided by or obtained from financial institutions. The Proposal should not cover this information to the extent it is already covered by the GLBA.

#### 4. Conclusion

The Association does not oppose a national do-not-call Registry. However, the cost of creating and maintaining the Registry is a concern. The Registry should not be so expensive as to be cost prohibitive for users. Again, we reiterate that a national Registry should pre-empt state rules.

Thank you for hearing our views.

Sincerely,

TANYA M. DUNCAN  
Director, Federal Regulatory and Legislative Policy