

March 28, 2002

Mr. Donald S. Clark, Secretary  
Office of the Secretary  
Federal Trade Commission  
Room 159  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

Re: Federal Trade Commission; 16 CFR Part 310,  
Telemarketing Sales Rule: Proposed Rule

Dear Mr. Secretary:

1. Metris Companies Inc. (“Metris”) appreciates the opportunity to comment on the proposed rulemaking to amend the Federal Trade Commission’s Telemarketing Sales Rule (“TSR”). 16 CFR Part 310. Metris has a significant interest in how our customers and our operations would be affected by the changes, supplemental requirements, and added restrictions of the Proposed Rule.

### **INTRODUCTION**

2. Metris is one of the nation’s leading providers of financial products and services. The company issues credit cards through its wholly owned subsidiary, Direct Merchants Credit Card Bank, N.A. (“DMB”), the tenth largest bankcard issuer in the United States. Through its enhancement services division (“ES”), Metris also offers consumers a comprehensive array of value-added products, such as credit protection, insurance, extended service plans, and membership clubs. Metris is publicly traded on the New York Stock Exchange (NYSE:MXT) and has been listed two years in a row as one of Fortune magazine’s 100 fastest growing companies. Metris has grown its business focusing on creditworthy, yet underserved markets. We provide many individuals with their first bankcard, and through ES, we are able to offer these customers travel, home, security and insurance products.

3. Essential to our business model is the use of telemarketers in promoting our ES and credit products. Our success in providing these products to DMB customers has encouraged other credit card lenders to partner with Metris to provide ES products and services to their credit card customers. Through these partnerships, we have provided ES products and services to the customers of seven of the ten largest credit card issuers in the country. We use telemarketing because it is a cost-effective, interactive method of promoting our products and improving customer service. Telemarketing provides our customers a convenient and safe means of purchasing desired services.

4. At Metris, we strive to provide superior customer service and security. Accordingly, we are very concerned about the potential for abusive and deceptive telemarketing practices and we work to ensure customer privacy. Our business model protects customers from deceptive practices in accordance with all applicable laws and regulations. In most instances, we provide protections beyond the statutory and regulatory requirements. While we support the principles articulated in the Notice of Proposed Rulemaking, there are a number of specific provisions in the Proposed Rule that will increase the chance for identity theft and unauthorized charges while impeding customer service and convenience and imposing unwarranted costs on our operations. Our specific concerns are:

1. The restrictions on the use of preacquired account information and the operation of the definition of "billing information" may be inconsistent with the Commission's rules implementing the privacy provisions of Gramm-Leach-Bliley Act ("GLB") 15 U.S.C. §§ 6801-6810. Furthermore, the requirement that a consumer provide account information as part of his or her express verifiable authorization actually increases risk to the customer, disregards the protections our customers (and our partners' customers) enjoy under GLB, and could jeopardize our safe and convenient customer service business model.
2. The establishment of a national "do not call" registry without appropriate exemptions for pre-existing customer relationships and without preemptive authority restricts our ability to maintain a high level of customer service and subjects us to a multiplicity of inconsistent and burdensome state regulations.
3. A rule applying identical disclosure requirements and "do not call" list restrictions for inbound and outbound calls ignores the material policy difference between unsolicited outbound calls and inquiries from existing customers.
4. The Proposed Rule would make the use of predictive dialers cost-prohibitive to telemarketers and their business partners, and severely disadvantage the millions of people employed by the industry as well as the much larger universe of customers who use these services and products sold by telemarketers.

### **BACKGROUND**

5. To better understand our concerns with the Proposed Rule, it is instructive to understand how our operations work. Metris is the parent company of DMB, an OCC-chartered national bank, and of our ES division. Our credit cards are issued by DMB. As a national bank, DMB is governed by the privacy provisions of GLB. ES also falls within the definition of a "financial institution" under GLB. DMB utilizes telemarketing as one method of marketing its credit products to consumers. The above-mentioned specific concerns regarding inbound calls and the predictive dialers are applicable to the telemarketing of DMB's credit products. DMB already complies with all applicable laws and regulations regarding credit offers, including but not

limited to the Truth-in-Lending Act and Regulation Z. Additionally, DMB complies with the TSR when telemarketing credit products.

6. DMB is not permitted to disclose, directly or through an affiliate, an account number of a consumer's credit card account to a nonaffiliated third party for use in marketing. 12 CFR §40.12. GLB permits disclosure of encrypted account numbers to a nonaffiliated third party, provided that the financial institution does not give the third party the means to decode the number or code. 12 CFR §40.12 (c)(1).

7. In our outbound telemarketing business operation, ES receives a customer identification number from its clients along with the names, telephone numbers and addresses of customers who have not opted out of information sharing. The customer ID number that ES receives is a reference number that is not associated with, or in any way derived from, the account number. Thus, in outbound telemarketing, ES never receives a customer's credit card account number.

8. ES then contracts with a telemarketing company to market the ES products to customers over the phone. It is important to note that all calls initiated by ES using reference numbers for billing purposes are made to existing customers of DMB or other partner banks. The telemarketers then call the customers, complying with all the disclosures and restrictions of the TSR. Once the customer agrees to purchase the product or service, the sales representative goes through an express verifiable consent procedure with the customer that is always digitally-recorded and retained for four (4) years. The procedure requires that the customer give an affirmative vocal "yes" to purchasing the product or service and a separate affirmative "yes" to having the product billed to his or her DMB credit card (or the card of the partner institution).<sup>1</sup> In this process, the customer must also confirm his or her understanding of the price of the product and the terms of cancellation and confirm the billing address on the credit card account that is being billed.

9. After sales are made, 100% of them are reviewed by a separate quality-control verifier within the telemarketing company for compliance with Metris' express verifiable authorization procedure. Sales that meet our standards are then sent to ES with the customer's identification number. ES then completes the sale by providing the sales information and identification numbers to DMB or the partner institution. To provide another level of consumer protection, ES listens to and verifies a statistically valid representative sample of the recorded sales calls on an ongoing basis to ensure that the telemarketers we use are following our strict express verifiable authorization procedures. At no point does Metris give the telemarketing companies that ES hires the ability to decode customer identification numbers. Furthermore, the telemarketers that ES uses cannot initiate charges against a customer's account. Only DMB is permitted to actually charge the account once the sale has gone through the verification processes imposed by ES.

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<sup>1</sup> Telemarketing scripts include language such as, "I just want to confirm we will be charging a membership fee of [X] for one year service on your [card brand, card type] account, unless you call to cancel. Is this OK? WAIT FOR RESPONSE. MUST BE A POSITIVE 'YES'."

## DISCUSSION

### **I. The Proposed Changes Regarding the Use of Preacquired Account Information Could be Inconsistent with Existing Law and Could Increase Risk to Consumers**

10. The Proposed Rule, section 310.4(a)(5), would, “prohibit receiving from any person other than the consumer or donor for use in telemarketing any consumer’s or donor’s ‘billing information,’ or disclosing any such ‘billing information’ to any person for use in telemarketing.” 67 Fed. Reg. 4543 (1/30/02). Furthermore, the Proposed Rule requires that “billing information” be recited as part of the process of obtaining a consumer’s express verifiable authorization if the payment instrument does not have the liability limitations and dispute resolution provisions of the Fair Credit Billing Act or Truth-in-Lending Act (or protections that are comparable thereto). “Billing information” is defined in the Proposed Rule as “any data that provides access to a consumer’s or donor’s account, such as credit card, checking, saving, share or similar account, utility bill, mortgage loan account, or debit card.” *Id.* at 4540. The Commission explains that the purpose behind the additional measures under the express verifiable authorization requirement and the restrictions on the sharing of billing information is to address the use of preacquired account information in the telemarketing sales process. The Commission states: “Receiving from any person other than the consumer for use in telemarketing any consumer’s billing information, or disclosing any consumer’s billing information to any person for use in telemarketing constitutes an abusive practice within the meaning of the Telemarketing Act.” *Id.* at 4514. Furthermore, the Commission questions whether any benefits that could accrue from preacquired account telemarketing would be sufficient to outweigh the concerns of the consumer groups.

11. Metris is concerned that an aggressive and broad interpretation of the definition of “billing information” combined with the Commission’s tough stance on the use of preacquired account information could operate to put a halt effectively on the safe, convenient and efficient way that Metris currently markets its products. Metris wants to ensure that the definition of “billing information” is clarified to exclude client identification numbers that are in no way derived from the customers’ account numbers. Essential to the interpretation of the definition is what constitutes “access” for the purposes of financial institution information sharing. The Commission’s section-by-section analysis of 16 CFR 313.12, (the Rule implementing the privacy provisions of GLB), states:

“The Commission believes 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, the 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 Commission has included a clarification in 313.12(c)(1) 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. Consumers will be adequately protected by disclosures of encrypted account numbers that do not enable the recipient to access the consumer's account." 65 Fed. Reg. 33669 (5/24/2000).

12. Thus, the FTC has already recognized that the kind of information that DMB and other clients share with ES (and that ES shares with telemarketers) is not information that gives access to an account. The Proposed Rule, as currently drafted, is not clear as to whether the sharing of encrypted account numbers would be prohibited by the TSR. An aggressively broad interpretation of the definition could require Metris to substantially alter its current operations. Accordingly, the definition of "billing information" in the TSR should be drafted so that it is consistent with the GLB privacy rules in recognizing that sharing of encrypted account numbers is not prohibited as long as the key to decoding the encryption is not given to the recipient.

13. Even with a clarification in the definition of account information, Metris has significant concerns with the Commission's strong stance against the use of preacquired account information and the additional authorization requirements imposed by the Proposed Rule. Throughout this comment, we refer to the individuals that we contact as "customers" rather than "consumers." The reason is that Metris and our bank partners have pre-existing relationships with all of the individuals that ES contacts using the coded reference numbers. We believe this is material in the context of the Proposed Rule. Indeed, many of the concerns that consumer groups express with regard to use of preacquired account information just do not apply to our operations. ES does not "cold-call" potential new customers, nor do we pose a risk of harassing or deceiving the very customers that are essential to our success as a business. We have ES because our customers have demonstrated an interest in the products. The telephone marketing system we employ is designed to safely and efficiently process these transactions. The protections that we provide are in addition to those protections provided by the Gramm-Leach-Bliley Act, the Fair Credit Billing Act and the Truth-in-Lending Act.

14. Consumer groups criticize the use of preacquired account information and claim that it, "presents inherent opportunities for abuse and deception," including the billing of unauthorized charges to the customer's account." *Id.* at 4513. Another criticism is that use of preacquired account information, "avoids the necessity of persuading the consumer to demonstrate her consent by divulging her billing information, [thus] the usual sale dynamic of offer and acceptance is inverted." *Id.*

15. It is our sincere belief any benefits which derive from requiring a consumer to give his or her credit card account information (or other account information) to meet the express verifiable

authorization requirement of the TSR are substantially outweighed by the risks and burdens to consumers. Indeed, we believe the requirement would increase the instances of identity theft and fraud. The Commission's Consumer Alert entitled, "Consumer Credit File Privacy: The Real Deal," (December 2001) states:

"The FTC strongly advises that you not give out personal information on the phone, through the mail or over the Internet unless you know who you're dealing with. Identity thieves may pose as representatives of banks, Internet service providers and even government agencies to get you to reveal your Social Security number, mother's maiden name, financial account numbers and other identifying information. *Legitimate organizations with whom you do business have the information they need and will not ask you for it.*" (Emphasis added.)

16. The Proposed Rule is directly at odds with this recent Commission admonition to consumers. While there may be some merit to the argument that the use of preacquired account information presents inherent opportunities for deceptive practices and unauthorized charges, there is a much greater risk of identity theft, fraud and unauthorized charges when consumers give out their account numbers over the phone.

17. Furthermore, the notion that the traditional offer and acceptance is inverted or subverted without the customer giving a form of payment is not applicable in situations where a telemarketer is required to provide specific verifiable consent, and the telemarketer goes through strict sales verification procedures, such as the procedures employed by Metris. Concerns about "cramming" of customers are addressed by the digital recording of all of our sales and the two levels of review in our system. If there is a question about the authorization given by the consumer in the ES system, the sale is not processed and the account is not charged.

18. The Proposed Rule could also have the effect of causing our customers to decide not to complete transactions as a result of their concerns about identity theft. As the Commission said, "Legitimate organizations with whom you do business have the information they need and will not ask you for it." *Id.* A wise customer may want a product that we are marketing (*e.g.*, credit report alerts), but when asked to give his or her account number to confirm the sale, he or she would have good reason to hesitate or simply walk away from the purchase for security concerns.

19. The Proposed Rule also could make it much more inconvenient for our customers to complete their transactions. Currently, after the service offered is described in detail, our customer next must express his or her intent to purchase the service, and provide detailed billing information (short of the account number). The Proposed Rule could then require the customer to retrieve his or her card and recite the account number and expiration date. Many customers, faced with the inconvenience of having to satisfy this additional requirement, could very well decide, purely on the basis of inconvenience—rather than on the basis of a lack of a true desire to purchase the product—not to complete the purchase. The Proposed Rule might ultimately

decrease charges (not unauthorized charges) and it may result in a reduced level of consent, but not for the reasons noted by the Commission in the Proposed Rule.

20. Another important reason not to require people to provide their account numbers to confirm a purchase is that it increases the likelihood of human error in the transaction. Even with strong verification procedures, there is a risk of incorrectly recited or recorded card numbers or expiration dates which could lead to a failure to correctly process a desired purchase.

21. The approach of the Commission embodied in the Proposed Rule does not effectively balance the risk of the use of preacquired account information and the risk of having customers provide their account numbers over the phone. The risks associated with the latter activity are far greater when a company like Metris has in place appropriate safeguards and is already prohibited by statute from sharing account information.

22. Metris suggests a different approach than that taken in the Proposed Rule. In addition to clarifying the definition of "billing information" to properly exclude encrypted account numbers, the Commission should more explicitly exempt entities currently complying with the sharing restrictions of GLB from the sharing prohibitions of the TSR or craft restrictions that mirror the GLB provisions. The use of account numbers as a requirement of express verifiable authorization of a sale by the consumer should only apply in situations where the telemarketer (or the company on whose behalf he or she is calling) does not have a preexisting customer relationship that is governed by the privacy provisions of GLB. Under this proposal, the customer is given the chance to opt-out of information sharing and telemarketing. Where the customer has chosen not to "opt out," the financial institution would be barred from sharing the account number of the customer. However, the institution may market products and services to the customer and bill the customer's account using a coded reference number once there is a verifiable sale without the inherent risk and inconvenience associated with customers providing account numbers over the phone to complete the sale.

23. The Commission asks for commenters to help determine, "whether the proposed modifications strike the appropriate balance, maximizing consumer protections while avoiding the imposition of unnecessary compliance burdens on the legitimate telemarketing industry." 67 Fed. Reg. 4494 (1/30/02). For the reasons explained above, Metris does not believe that the Proposed Rule as written achieves either stated goal. However, Metris believes that refining the definition of "billing information" and including an exception for GLB governed preexisting relationships would strike the appropriate balance of consumer protections, customer service, and convenience.

## **II. The National Do Not Call List Needs to be Preemptive and Must Have an Appropriate Exception for Pre-existing Customer Relationships**

24. Metris supports the concept of a national "do not call" list, as long as it preempts inconsistent state law, has an exception for preexisting business relationships, and has a reasonable duration for consumers who ask to be placed on the list. The telemarketing industry,

consumer groups, state law enforcement organizations and the Commission should be able to craft an effective centralized solution to the stated concerns. However, neither the system proposed by the Commission nor the disparate multitude of lists being established by the states is the appropriate answer.

25. The Proposed Rule does not recognize the fact that when someone calls to offer a product someone wants, the consumer views it as a benefit. When someone offers something that is of no use or calls during an inconvenient time, the consumer views it as a nuisance. It is for this reason that the existing business relationship exception is so important. We are very careful about the products we offer to our customers. If we turn a customer off by calling him or her, we recognize that we may lose that customer. At that time, he or she may also put themselves on a "do not call" list as a result.

26. The Proposed Rule would establish a centralized national "do not call" list but would not preclude each state from establishing separate "do not call" registries, each with its own rules, proper dates to obtain lists, fees and penalties. At least 25 states have already passed statutes creating "do not call" registries. In every instance, the registries have distinct rules, list publication dates, fees and penalties. The Proposed Rule would impose yet another registry and further complicate the process of determining which consumers have opted out of telemarketing. As written, the Proposed Rule adds little to improve consumer protection and only places unnecessary burdens on the industry.

27. In addition to maintaining our own "do not call" database under the current regulations, we already have to examine multiple state databases with different information and inconsistent formats just to determine whether we can make a call to an individual. The Proposed Rule should not establish another "do not call" list without requiring uniformity for state "do not call" requirements. Although the Commission does not have the authority to preempt the states in this regard, no federal action should be taken in this area until the preemption issue is resolved.

28. The other key problem with the Commission's proposed "do not call" list, as well as some of the states' lists, is that they do not include sufficient exceptions for preexisting relationships with our customers. As explained above, ES only contacts existing customers of DMB and our other partners. We currently maintain a "do not call" registry for those customers that do not want to be contacted by phone pursuant to the current TSR and the privacy provisions of GLB. We are also a member of the Direct Marketers Association ("DMA") and participate in the DMA national "do not call" registry. Thus, before we initiate a call, we must: (1) check that the customer is not on our "do not call" list; (2) check that the person is not on the DMA list; and (3) make sure that we are complying with the applicable state list. A single centralized list with the exceptions that we have proposed would not make this already burdensome process more complicated.

29. Metris uses telemarketing to provide its customers with offers for less costly, more efficient, or otherwise enhanced services. We do this because we want to add value to our customer relationships. The Proposed Rule suggests that the consumer may customize the

limitations on his or her registration. However, it is doubtful that such a complex system would be workable for consumers and businesses alike. Moreover, asking consumers to provide express authorization for marketing from the numerous businesses that they currently have relationships with is unduly burdensome.

30. Again, the Proposed Rule as drafted would not strike the appropriate balance the Commission seeks between establishing consumer protections and not unduly burdening the legitimate telemarketing industry. Restricting our ability to contact our own customers that have decided not to put themselves on our own “do not call” list impedes our ability to remain competitive in the market by increasing our cost of marketing services through less cost-effective means. It also undermines the intent of GLB, which permits a financial institution like Metris to cross-market the various financial products of its corporate family with its customers.

### **III. Treatment of Inbound Calls as Outbound Calls**

31. Metris has significant concerns about the way in which the Proposed Rule intends to modify the definition of an “outbound telephone call” in a manner that creates ambiguity with respect to the current “inbound telephone call” exemption in the TSR. The Proposed Rule suggests that when a call initiated by a consumer is transferred to a telemarketer, the transferred call is considered a separate “outbound telephone call” and not exempt from the requirements and restrictions of the Proposed Rule.

32. Our concerns with this provision of the Proposed Rule again focuses on our relationship with our pre-existing customers. The potential problems relating to outbound calls—i.e. harassment, deceptive practices (e.g. cramming)—simply do not present themselves when one of our customers calls us regarding a service inquiry or a request to purchase a product or service. Obviously, it would be practically impossible (and annoying to customers) for us to consult the national “do-not-call” list while the customer was on the phone. An inbound call is not an outbound call for the very obvious reason that the consumer initiated the call. We have not interrupted anyone’s dinner or family time. We have not contacted anyone who did not want to talk to us in the first place.

33. The Proposed Rule should be clarified so that it does not cover an inbound call from an individual with an established customer relationship, provided that the inbound call was not in response to a solicitation. For example, the Proposed Rule should not cover an inbound customer service inquiry, even if at some point in the call it is appropriate to transfer the customer to another representative to discuss the possible products or services that may be available to the customer to meet his or her needs or service requests. Furthermore, when a call is transferred for the purposes of providing the customer with the ability to purchase a product, the entire sales verification process that we employ for outbound calls is also used for all inbound calls transferred to sales representatives. Thus, we already provide the same stringent protections against deceptive practices and unauthorized charges during the sales process for transferred inbound calls that we provide for outbound calls.

#### **IV. The Use of Predictive Dialers**

34. In the Notice of Proposed Rulemaking, the Commission notes that it will interpret abandoned calls from predictive dialers as violating the TSR since under such circumstances, a call was successfully placed without the telemarketer giving the disclosures required by the TSR. Metris believes that this strict liability approach is inappropriate and overly draconian.

35. The use of predictive dialers increases our efficiency and lowers our costs substantially. It is an essential tool that allows the industry to employ more than three million people throughout this country. The DMA guidelines set a maximum acceptable abandonment rate of five percent (5%). As a member of DMA, Metris requires that the telemarketing companies it hires operate within these guidelines.

36. Metris would welcome the opportunity to work with the Commission, and trade and consumers groups, to examine possible solutions to the problems caused by abandoned calls. The Commission asked for specific comment regarding some suggested approaches. Metris agrees that one way to alleviate some of the consumer concerns is to limit the use of predictive dialers only to those telemarketers that transmit meaningful Caller ID information, including a number that the consumer could use to return the call. Another possible solution is to allow a business to play a tape-recorded message when a call results in a shortage of available telemarketing agents. The use of such a message could be limited to some maximum percentage of calls (e.g., 5%). One of the main problems with this approach, however, is that some states already prohibit the use of tape-recorded messages in telemarketing calls. These laws would have to be changed if this alteration were to succeed.

#### **CONCLUSION**

37. Most responsible businesses in the telemarketing industry have reacted with diligence to meet the requirements of the TSR promulgated in 1997, and to address consumer concerns as they have developed. As a company focused on enhancing our customer relationships, we have gone to great lengths to ensure that we provide our customers with the kinds of products that they want and that we market and sell these products in a safe, cost-effective, and convenient way. For those customers that have opted-out of information sharing under GLB and/or have decided to register on our “do not call” registry, we respect their wishes and we honor their request.

38. We understand that there are those in the telemarketing industry that do not act appropriately and violate the letter and spirit of the TSR. Metris supports the development of new enforcement strategies that minimize the opportunities for these actors to harass and deceive consumers. However, the Proposed Rule as currently drafted attempts to address consumer concerns in a “one-size-fits-all” approach to the industry. While consumers may derive some benefit from various provisions of the Proposed Rule, the provisions that we have concentrated on in this comment would impose increased risk and inconvenience on consumers and significant costs on our operations—operations which are carefully crafted to ensure the utmost

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in customer security and service. Our conservative estimates show that the Proposed Rule as drafted would cost Metris at least \$25 million.

39. Metris asks the Commission to examine closely how the Proposed Rule affects businesses and consumers that operate under models similar to those we have established. The Commission should narrowly tailor the TSR to promote the best practices that Metris and others in the industry have incorporated without promulgating a new TSR that would have dramatic negative effects on legitimate companies. We appreciate the opportunity to comment and look forward to working with Commission.

Sincerely,

RICHARD G. EVANS  
Executive Vice President  
and General Counsel

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