

**Before the
FEDERAL TRADE COMMISSION
Washington, D.C. 20580**

In the Matter of)	
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Telemarketing Sales Rule User Fees)	FTC File No. R411001
)	

**Comments of the
Office of Advocacy, U.S. Small Business Administration
on the Notice of Proposed Rulemaking**

The Office of Advocacy of the United States Small Business Administration (Advocacy) submits these Comments to the Federal Trade Commission (FTC or Commission) regarding its *Notice of Proposed Rulemaking (NPRM)*¹ in the above-captioned proceeding. In the *NPRM*, the Commission examines the costs and implications of user fees to access a proposed national do-not-call registry (National Registry).² Advocacy commends the FTC on its regulatory flexibility analysis and supports permitting small telemarketers to access up to five area codes per year without a user charge. However, Advocacy is concerned that the overlapping federal and state do-not-call registries may create undue burdens for small businesses.

1. Advocacy Background

Congress established the Office of Advocacy in 1976 by Pub. L. No. 94-305³ to represent the views and interests of small business within the Federal government. Advocacy's statutory duties include serving as a focal point for the receipt of complaints concerning the government's policies as they affect small business, developing proposals for changes in Federal agencies' policies, and communicating these proposals to the agencies.⁴ Advocacy also has a statutory duty to monitor and report to Congress on the Commission's compliance with the Regulatory

Flexibility Act (RFA).

The RFA was designed to ensure that, while accomplishing their intended purposes, regulations did not unduly inhibit the ability of small entities to compete, innovate, or to comply with the regulation.⁵ The major objectives of the RFA are: (1) to increase agency awareness and understanding of the potential disproportionate impact of regulations on small business; (2) to require that agencies communicate and explain their findings to the public and make these explanations transparent; and (3) to encourage agencies to use flexibility and provide regulatory relief to small entities where feasible and appropriate to its public policy objectives.⁶ The RFA does not seek preferential treatment for small businesses. Rather, it establishes an analytical requirement for determining how public issues can best be resolved without erecting barriers to competition. To this end, the RFA requires the agencies to analyze the economic impact of proposed regulations on different-sized entities, estimate each rule's effectiveness in addressing the agency's purpose for the rule, and consider alternatives that will achieve the rule's objectives while minimizing any disproportionate burden on small entities.⁷

2. Small Business Impact of User Fees to Access a National Do-Not-Call Registry

As required by Federal law⁸ and an Office of Management and Budget directive,⁹ the FTC is considering user fees to recover the costs of operating the proposed national do-not-call registry. If adopted, this *NPRM* would impose user fees on telemarketers to access a national do-not-call registry.¹⁰ These user fees must be sufficient to recover the full cost of the National Registry to the Federal Government.

These fees will have a direct impact on small telemarketers who may be required to access the National Registry. Fortunately, the FTC has recognized this impact and has taken steps to minimize any disproportionate impact on small businesses. Specifically, Advocacy

notes that the FTC is proposing to waive the fee for telemarketers that access the National Registry for five or fewer area codes per year.

3. Number of Small Telemarketing Firms

In the *NPRM*, the Commission states that there is no readily available evidence concerning the number of telemarketers and sellers.¹¹ Advocacy has long relied upon the North American Industry Classification System (NAICS) to determine the number of entities in a particular industry. The NAICS draws upon information from the U.S. Census Bureau to determine revenue and number of employees.

According to the NAICS, there are 2,305 firms identified as “Telemarketing Bureaus”.¹² Of these, 1,279 qualify as small businesses. For this industry, the Small Business Administration’s Office of Size Standards has defined small telemarketing bureaus as one with receipts of \$5 million or less per year.¹³ Of particular note is that 1,127 telecommunications firms have receipts under \$1 million, which makes them particularly small and vulnerable to burdensome costs of Federal regulations.

Advocacy encourages the FTC to use the data referenced above during its consideration of the proposed rule, since they are consistent with the requirements of the RFA and because both Advocacy and the SBA rely upon these numbers. Advocacy has found the NAICS to be indispensable when reviewing the appropriateness of an agency’s regulatory flexibility analysis.

4. Access to the National Registry

In the *NPRM*, the FTC asked a number of questions regarding how to collect these user fees, including (a) whether the fee should be a flat rate or a per area code fee, (b) whether telemarketers should be allowed to access up to five area codes per year free of charge, and (c) whether a buy-up option is advisable.¹⁴

a. Should it be a flat rate or a per area code fee?

Advocacy supports giving telemarketers the option obtaining access to the entire National Registry for a flat fee or through a per area code fee. A fee schedule that permits small businesses to choose a flat fee, if it needs access to a large number of area codes, or a per area code fee, if it needs access to a few, would be less burdensome to small businesses than forcing them to take one option. This flexibility would be beneficial to small businesses.

b. Should telemarketers be allowed to access up to National Registry for up to five area codes per year at no charge?

Advocacy supports the FTC's proposal to allow telemarketers limited access to the National Registry without charge. However, we do not have the information to determine whether five is an appropriate number. Advocacy recommends that the FTC contact small telemarketers and inquire how many area codes they commonly access in a give year during the course of the business. The information gleaned through this outreach effort can be used to support the agency's decision-making and final regulatory flexibility analysis. Advocacy is willing to assist the FTC in facilitating this dialogue.

c. Does a buy-up provision needlessly complicate user fees?

If the FTC provides a choice of flat rate and a per area-code fee, then the ability to purchase access to additional area codes (referred to in the *NPRM* as a buy-up provision) will not needlessly complicate user fees. In fact, a buy-up provision is necessary if the FTC allows telemarketers to obtain access on a per area code basis. As discussed above, flexibility is beneficial for small businesses, and a buy-up provision would give small businesses the flexibility to gain access to the area codes they want without having to pay fees for area codes they do not need.

5. Duplication with States' Do-Not-Call Registries

In the Initial Regulatory Flexibility Analysis of the proposed rule,¹⁵ the FTC states that the user fees for the National Registry do not overlap or conflict with other Federal statutes, rules, or policies. While this is correct, the FTC also points out that many states have do-not-call registries and that the agency is considering the interplay between state and Federal registries. Advocacy is concerned that fees for a National Registry could compound with fees for state registries to create disproportionate burdens for small businesses.

According to the FTC Web page,¹⁶ 15 states have do-not-call registries. These states are: Alabama, Alaska, Arkansas, Connecticut, Florida, Georgia, Idaho, Indiana, Kentucky, Louisiana, Missouri, New York, Oregon, Tennessee, and Texas. If the proposed rule is adopted, telemarketers that do business in those states would have to subscribe to both the National Registry and the applicable state registries for each of these states. The duplication of fees to access these registries may act as a barrier for small telemarketers.

Therefore, Advocacy asks the Commission to consider means of minimizing the impact of overlapping Federal and state do-not-call registries. In particular, Advocacy offers the following proposals:

- ? Automatically add numbers entered into the National Registry to the state registries and vice versa;
- ? Allow telemarketers who are in compliance with a state registry to certify that they are in compliance with the National Registry for area codes in that state; and
- ? Allow payment of fees to the state do-not-call registry to permit access to the area codes from that state in the National Registry.

Conclusion

Advocacy commends the FTC for the effort the agency has made on its regulatory flexibility analysis, and we support permitting small telemarketers to access a limited number of area codes in the National Registry without a user charge. Overlapping federal and state do-not-

call registries may create undue burdens for small telemarketers, and Advocacy encourages the FTC to seek solutions that minimize the impact on small businesses while accomplishing the agency's regulatory goals.

Respectfully submitted,

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¹ *In re* Telemarketing Sales Rule User Fee, *Notice of Proposed Rulemaking*, FTC File No. R411001, 67 Fed. Reg. 37362 (rel. May 29, 2002).

² See generally, *NPRM*.

³ Pub. L. No. 94-305 (codified as amended at 15 U.S.C. §§ 634 a-g, 637).

⁴ 15 U.S.C. § 634(c)(1)-(4).

⁵ 5 U.S.C. § 601(4)-(5).

⁶ See generally, Office of Advocacy, U.S. Small Business Administration, *The Regulatory Flexibility Act: An Implementation Guide for Federal Agencies*, 1998 ("Advocacy 1998 RFA Implementation Guide").

⁷ 5 U.S.C. § 604.

⁸ Independent Offices Appropriations Act, 31 U.S.C. § 9701 (1952).

⁹ Office of Management and Budget Circular No. A-25.

¹⁰ Under the proposed National Registry, consumers could stop calls from all telemarketers within the United States jurisdiction by placing his or her telephone number on a central "do-not-call" registry maintained by the FTC.

¹¹ See generally, *NPRM*.

¹² NAICS Code 561422.

¹³ Table-of-Small-Business-Size-Standards-from-final-rule (visited June 28, 2002) <<http://www.sba.gov/size/Table-of-Small-Business-Size-Standards-from-final-rule.html>>.

¹⁴ See generally, *NPRM*.

¹⁵ *Id.*

¹⁶ The FTC Proposal to Create a National Do-Not-Call Registry (visited June 27, 2002) <<http://www.ftc.gov/bcp/online/pubs/alerts/dncalrt.htm>>.