March 28, 2002

Office of the Secretary
Federal Trade Commission
Room 159
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

Re: **Telemarketing Rulemaking—Comment, FTC File No. R411011**
Proposed Privacy Act System, Do-Not-Call Registry—FTC

Ladies and Gentlemen:

This letter is in response to the Commission's request for public comments regarding its proposal of a national "do-not-call" registry as published in the Federal Register on February 27, 2002.

The American Resort Development Association ("ARDA") is the Washington, D.C. based trade association representing the vacation ownership industry. Established in 1969, ARDA today has over 800 members, ranging from small, privately held firms to publicly traded companies and international corporations. ARDA's diverse membership includes companies with vacation timeshare resorts, private residence clubs, land development, lots sales, second homes and resort communities. However, the majority of ARDA's membership is related to the timeshare industry.

ARDA appreciates this opportunity to comment on the structure of the new do-not-call registry. In response to the Commission's Notice of Proposed Rulemaking, dated January 30, 2002, ARDA has also provided comments addressing the Commission's proposed changes to the TSR. Portions of that response are included herein. Section references are to the proposed TSR.

Summary

Provided the new system includes certain elements, ARDA would not oppose a national do-not-call registry. Accordingly, the new system should meet the following criteria:

1. Preempt state do-not-call lists (either in the TSR or in the implementing law);

2. Provide an exemption for "established business relationships," including other special relationships with customers;

3. Limit the application of "outbound telephone call" in upsell marketing;

4. Provide a minimum five percent error rate for "dead air" calls from predictive dialers;

5. Limit who has the authority to place a number on the list; and

6. Set a limited retention period for do-not-call requests.

Some of these concerns are addressed herein. A more thorough discussion of these and other concerns is contained in ARDA's comments to the TSR, which are being submitted to the Commission along with this letter.

National Do-Not-Call Registry—General Comments

The establishment of a national do-not call registry, while generally supported by our members, is certainly the focus of their greatest concern. While required not only to comply with the federal standards under the Commission's TSR, and the requirements related to company-specific do-not-call lists pursuant to FCC regulations, telemarketers have had to comply with the duplicative, inconsistent, varied, and often more restrictive state regulations. A do-not-call list at the national level, if not implemented correctly, could result in unwarranted economic and compliance burdens for our members.

The majority of ARDA's members rely on telemarketing as a low-cost means of contacting both current and prospective customers. However, the costs of compliance with additional regulations on the national level, unless offset to some extent, will decrease much of the economic benefit of this method without necessarily providing the desired results for those consumers who wish to receive fewer calls or no calls.

ARDA members call both interstate and intrastate. The juxtaposition of the various state laws already causes difficulties in compliance, which has prompted members to seek assistance from outside companies to manage their do-not-call lists, thus incurring additional costs. ARDA recognizes the unique situation that a national do-not-call registry creates and offers some suggestions for integrating a national registry into the current regulatory scheme.

- Preemption.

There are several interesting options with regard to the application of the national list and preemption (or "non-preemption") of state lists. Preferably, the national registry would preempt all state lists and all phone subscribers would be able to submit their request to one national contact point.[1] This would be the path of least resistance for both telephone subscribers and telemarketers. However, given early indications that the national registry may not preempt state lists (and the states presumably would not want to forego the revenue of generating the lists),[2] here is one possible alternative that would allow some preemption but still maintain the viability of the state lists:

> An interstate seller or telemarketer would only be required to "scrub" their database of telephone numbers against the national list and suppress any numbers on the list. The telemarketer would not be required to obtain and scrub against individual state lists. On the other hand, a purely *intra*state telemarketer would only be required to scrub against that state's list. The state lists would be merged into the national list on a set periodic basis. For states without lists at the time the rule establishing the national registry becomes effective, states would be required to defer to their state's portion of the national list and refrain from collecting any telephone numbers at the state level.[3] If a state has a list at the time the federal rule becomes effective, its residents would be required to continue to submit any requests to that state.

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[1] Neither the Telemarketing and Consumer Fraud and Abuse Prevention Act (15 U.S.C. § 6101 et seq., the "TCFAPA") nor the Rule addresses preemption of state Do-Not-Call laws. The only affirmative statement related to preemption is in the TCPA, falling under the auspices of the Federal Communications Commission (FCC). 47 USC s. 227(e)(1); 27 U.S.C. § 154 (defining "Commission" as the FCC). In passing the TCFAPA, Congress found that interstate telemarketing fraud was a problem and, therefore, legislation should be enacted to stem the tide of such fraud. 15 U.S.C. § 6101. This does not mean the states have exclusive authority over intrastate phone calls. In fact, Congress continues to have the authority to regulate both *inter*state and *intra*state telemarketing. See Texas v. American Blastfax, Inc., 121 F. Supp. 2d 1085, 1088 (W.D. Tex. 2000) (holding that "Congress necessarily intended the TCPA to cover both interstate and intrastate communications.") Even if an argument can be made that any one of the federal laws or regulations governing telemarketing specifically does not preempt *more restrictive* state laws, the Commission should consider that simply because a state has a do-not-call list does not mean that the list itself is more restrictive than the proposed national list. Thus, preemption of state lists would not be barred.

[2] The Commission at least recognizes preemption as a possible alternative in seeking comment on the subject. (Notice at 124, Question 6). References to the Commission's Notice of Proposed Rulemaking, January 30, 2002, ("Notice") are to the page numbers in the .pdf format, at www.ftc.gov/bcp/conline/edcams/donotcall/pubs/NDNCR_therule.pdf.

[3] This requirement would be consistent with the mandate in the TCPA. 47 U.S.C. § 227(e)(2). A few states recently have adopted or have legislation pending that directs the federal government to strengthen the TSR. See, e.g., S. Res. 143 (Mich. 2001) ("memorializ[ing] the Congress of the United States to enact legislation to provide a convenient means for consumers to choose not to receive unsolicited telemarketing calls . . .."); A. Res. 100 (N.J., introduced 3/04/2002) (memorializing the FTC to adopt the Notice of Proposed Rulemaking amending the TSR to, among other things, establish a national "do-not-call" registry).

> Alternatively, residents of all states would be required to use only a single nationwide number and any requests would be filtered down to the states, thus preserving any federal standards for the list, e.g., maintenance of names for a certain number of years. Finally, the federal rule would recognize many of the same exemptions the states have allowed, with some consolidation, so that the calling process is minimally disrupted.

The Commission may find support for preempting similar state do-not-call requirements in the Privacy Act of 1974.[4] The Commission proposes to establish a national do-not-call registry to collect information from individuals at the federal level.

In order to meet the necessary requisites of the Privacy Act, the Commission likely would need to impose consistent standards for the collection, maintenance, and dissemination of consumer information.

State laws vary in the types of information collected from consumers, the manner of collection, retention periods, and requirements upon sellers for obtaining and using that information. It would seem that this difference in state requirements would pose a problem for compliance under the Privacy Act by the Commission if it accepts consumer information from the states or disperses that information to the states. ARDA admits that it is not fully aware of all of the implications of the Privacy Act. However, ARDA asks that the Commission consider the effect of inconsistent state laws upon the maintenance and use of the information obtained from individuals in determining whether or not the national do-not-call registry should preempt state requirements.

ARDA's position is not that state law should yield to potentially less restrictive federal regulations, or that federal law should be more restrictive, inviting states to "up the ante" by increasing their current level of requirements. ARDA members, and presumably other companies that rely on telemarketing, support a standard for compliance that is consistent, uniform, and relatively easy to understand and comply with. If the proposed Rule meets these goals, it will save covered entities time and money , while allowing telephone subscribers the ease and security of a simple method for having their privacy wishes implemented. Further, to maximize the likelihood of compliance, revisions to the TSR, particularly in relation to do-not-call issues, should not be unduly complex or trigger inadvertent violations.

Absent uniformity in the collection and maintenance of numbers on a do-not-call registry (as an example of one area of telemarketing regulation), the national list loses some of its effectiveness in curbing unwanted telemarketing calls. Instead, it may allow many subscribers to slip through the web of laws for technical reasons and lead to unintended violations by telemarketers. Consistency, ease of compliance, and uniformity do not equate to preemption at the cost of well-intentioned state restrictions. A complete or partial preemption of state do-not-call laws, either as outlined above or in some other fashion, would, however, provide a viable means of reaching the goals of all concerned.

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[4] 5 U.S.C. § 552a; 16 C.F.R. § 4.13 (2002).

Subscriber information.

The minimum information a caller should provide to the Commission includes: full name, telephone number, and address. ARDA understands the necessity to maintain the privacy of the individual calling. Thus, telemarketers should receive the following information: telephone number, zip code, and date added to registry. The Commission would need to maintain more information on the registrant as questions of compliance arise and in order to judge the effectiveness of the registry.

Additional caller preferences.

The addition of a one-stop opt-in for specific companies, under proposed section 310.4(b)(1)(iii)(B), could create a host of problems for both subscribers and telemarketers. While the ability of a subscriber to have all of their do-not-call preferences logged in one place may seem to make sense from a practical standpoint, how specific opt-ins will be processed appropriately and timely for each company should give the Commission pause. The more appropriate and reasonable method of allowing the consumer to provide a written opt-in directly to the company, which could be any of several formats, would seem to be less of a leap of faith. Accordingly, ARDA would oppose the one-stop format for opt-ins in favor of the written notification method.

Who may place a number in the registry.

Essential to the effectiveness of the do-not-call registry is defining who shall have the ability to place a number on the list. In proposed section 310.4(b)(ii) and (iii), the term "person" should be replaced by a term that more clearly defines the individual who may not only have the right to place a number on the list, but who may seek remedies in case of a violation. ARDA proposes the use of "residential subscriber," meaning "a person who has subscribed to either residential telephone service from a local exchange company or public mobile services or the person's spouse, or the legal guardian of the person or of the person's spouse."[5] This term affords parameters that could be easily interpreted, rather than attempting to establish rights under the Rule by whether a person resides in a particular dwelling (since, more particularly at the national level, the link to the list is by telephone number) or age of the person (since a person 18 and over, for example, in the home may not be the person who subscribes to the telephone service or even makes decisions regarding that service).[6]

[5] See Ill. Senate Bill 1830 (Intro. Feb. 6, 2002). This definition assumes that the Commission also intends to include cellular phone numbers on the list. If that is not the Commission's intent, then that language could be deleted. The proposed Illinois definition also includes "any agent of the subscriber." However, ARDA is concerned this language would invite an onslaught of third-party listing services, e.g., for an upfront fee, a company would place the subscriber's phone number on the national list, state lists, or any other privacy-related opt-out registries, even contacting sellers directly on behalf of the subscriber. Alternatively, the Commission could expressly prohibit these types of businesses. Conversely, ARDA would have no objection to the Commission contracting with a reliable third-party to maintain the national registry.

[6] The Commission could also use "telephone subscriber," the term used under proposed § 310.2(d) for consistency, but with the same definition in the note above.

It would be incumbent upon such a system to insure that only persons who have the right to place a number in the registry are doing so. One method would be to require the subscriber to call from the telephone number they wish to add to the list. This would limit the ability of third-parties to compile lists of subscribers and insure the subscriber is accurately submitting their privacy preference. Further, this method would assist in

maintaining the balance between the ability of consumers to opt-out of receiving telemarketing calls and the ability of telemarketers to call individuals without unnecessarily burdening either party.

It may not be possible to determine with certainly who in a household has placed a telephone number in the registry. In an automated system, the Commission could require the person calling to respond whether he or she is the subscriber, their spouse, or legal guardian. If so, then the caller may continue. If not, then the caller should be informed that only one of these individuals is permitted to place the number on the list. This method is not foolproof. Coupled with the requirement that the caller must call from the number to be placed on the list, however, the selection is likely to be more accurate.

ARDA's suggestion that only the subscriber, the subscriber's spouse, or their legal guardian should be permitted to list a number also would impact liability. If a telemarketer is accused of violating do-not-call restrictions, only the subscriber, their spouse or legal guardian should have standing to pursue such an action, and only if they can demonstrate one of them placed the number on the registry. Otherwise, the potential for costly, disruptive, and even unjustified actions stemming from possible do-not-call violations could be limitless.

Method of collection and dissemination.

ARDA has no preference regarding the method of collection of numbers. The collection medium should be simple to use and permit the subscriber to provide accurate and detailed information. Otherwise, the addition of a national registry is of little benefit either to consumer or telemarketers.

ARDA members prefer a simple method for receiving copies of the registry. The registry should be in a downloadable format, compatible with most current computer systems. The ability to download lists directly from the Internet, through an encrypted system, probably would be the most efficient. If telemarketers periodically must request a CD-ROM with the current list, delays in mailing and misdirection could result in costly delays to telemarketers and hinder the ability of a consumer to receive prompt action on their privacy request. Such a method should be an alternative, however, to account for those telemarketers who may not have Internet capability or when Internet service is unavailable.

Removal of numbers from the registry.

While the primary goal of a do-not-call list is to prevent customers who do not want to receive telemarketing calls from receiving them, a natural consequence is the ability of telemarketers to call individuals who do want to be contacted. Telemarketers may be needlessly prevented from calling some customers because their phone numbers are on a do-not-call list, when they did not place the number on that list. The listed number may be carried over from the previous subscriber. A telephone number that remains on the registry indefinitely is beneficial neither to the telemarketer nor to the customer.

A telephone number should remain in the registry for a set period of time.[7] Near the end of the appointed time period, the subscriber would be required to renew their listing, perhaps for a small fee. This would bring in revenue to offset the cost of maintenance and would effectively cleanse the list of outdated numbers. Thus, if a number were reassigned to a new subscriber, there would at least be a limit on the time the number would be on the list. ARDA supposes that it would be unlikely that phone companies will be required to notify the Commission or any other governmental entity that a subscriber has changed their number and that the number should be removed from the list. This process undoubtedly would impose a costly burden on the phone companies. Further, this process may be unmanageable.

Ideally, however, phone companies would be required to give notice as subscribers to particular phone numbers change. Perhaps the Commission can seek appropriate assistance and coordination from the FCC in promulgating necessary rules, pursuant to the TCPA or otherwise, in this regard, so that the FTC receives this information promptly and provides it to telemarketers. Once the subscriber to that number has changed, the number should be automatically released from the registry.

In determining a reasonable time period a telephone number may remain on the registry before being renewed, the Commission should solicit information from various telephone service providers. The information should include at least the percentage of telephone numbers that are "turned over" annually. If the percentage is 20 percent or more, for example, the Commission should strongly consider limiting the period to no more than 1 year. However, if the turnover is a lower percentage, e.g. 2 percent, then the Commission may find no more than 3 years acceptable. In either case, any numbers on the list more than 3 years would most likely have turned over and the former subscribers, who placed their number on the registry, would likely have added their new phone number to the registry. This would needlessly limit the available customer base for sellers and forever bar telemarketers from contacting some otherwise viable phone numbers.

[7] However, any set retention period should not bar a subscriber from removing their listing at any time. This can be accomplished through the same method, e.g. a toll-free number, as required for initiating the listing.

Accordingly, ARDA asks the Commission to set a retention period within the stated parameters, preferably for a shorter (one year) rather than a longer time.[8] The Commission equally should consider whether an automatic removal from the list upon a change in subscriber is possible.

Conclusion

ARDA appreciates this opportunity to comment on the revisions to the establishment of a national do-not-call registry. ARDA hopes the comments it is providing and the other comments the Commission will receive from the multitude of individuals, interest groups, and businesses will be helpful. However, given the complexity and potential impact of the proposed changes, and the varying opinions from divergently interested groups, ARDA suggests that further study may be necessary. A committee format, similar to the that adopted by the Commission for the analysis of online access and security, may be beneficial. ARDA would be willing to participate in such a committee.

We hope the Commission will consider our positions on the various issues as it considers whether to establish a national do-not-call registry.

Sincerely,

Sandra Yartin DePoy
Director
Federal Relations

[8] The renewal and retention periods vary widely among the states, thus strengthening the argument for a uniform federal standard. Colorado, e.g., requires numbers that are reassigned or disconnected must be removed **at least** annually. Col. Rev. Stat. Ann. § 6-1-905(b)(VII) (2001). California, however, allows a listed number to remain on the state registry for three years. Cal. Bus. & Prof. Code § 17591 (2001).